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Foreword

It is a great pleasure to introduce the eleventh edition of the *University of Liverpool Law Review* in my capacity as Academic Supervisor. Over the years, the Review has established itself as an important platform for student scholarship, offering aspiring legal scholars the opportunity to develop their research, articulate their ideas and contribute to wider academic debates. The continued success of this student-led initiative is a testament to the enthusiasm, intellectual ambition and collaborative spirit of our students.

The contributions to this edition reflect the breadth of interests and perspectives within our student community. They engage critically with pressing legal and societal challenges, exploring questions of social justice alongside the opportunities and complexities arising from technological developments. This collection is particularly rewarding because its authors look beyond established legal frameworks, question existing assumptions, and consider how the law might respond to an evolving society. Such intellectual curiosity and critical engagement are at the heart of legal education and scholarship at the University of Liverpool.

I would like to congratulate all the authors on their achievements and thank them for the time, care and intellectual effort invested in their contributions. My particular appreciation goes to the Editorial Board, whose hard work, professionalism and collective commitment have made this publication possible. The expansion of the Board to involve students from different years and programmes has enriched the editorial process and helped broaden the Review's reach. I am especially pleased that this edition brings together contributions from both LLB and LLM students, reflecting the diversity of academic experiences within our Law School. I am equally grateful to my academic colleagues for their generous support in reviewing submissions and providing constructive feedback throughout the publication process.

I hope this edition inspires its readers to engage with the questions raised by its authors and encourages more students to pursue their own research and contribute to future editions of the *University of Liverpool Law Review*.

Dr Andreas Karapatakis

(Lecturer in Law, University of Liverpool)

Preface

Our journey with the *University of Liverpool Law Review* began in our first year when we answered the call for editors - though we never expected to be chosen. Despite the role typically being reserved for second and third years, Dr Andreas Karapatakis decided to take a chance on us and we couldn't be more grateful for the incredible opportunity. As a result, the Law Review has become a constant throughout our academic career and has become far more meaningful to us than we ever expected. As Co-Editors-in-Chief of the 11th volume, we wanted to reflect upon how this publication builds invaluable skills, whilst also honouring the past and future of the Law Review. We believe that there are values that truly embody this edition: Authenticity, Balance and Growth.

Firstly, in a world where AI content is at the forefront of society, we wanted to celebrate authenticity. Despite algorithms becoming more sophisticated by the day, we believe that it will never be a replacement for human innovation. With this in mind, we would like to acknowledge the wealth of outstanding submissions that we received this year. It has been an inspiration to read through each one and witness the sheer excellence of our student body - though this did make the selection process very hard. Thank you and well done to everyone who submitted an article.

Secondly, balance is a key theme when discussing the law. As we look at the 11th Volume, balance has been a driving force in preserving the legal heritage of one of the UK's oldest law schools as well as contemporary scholarship. Further to this, as a student-led journal, we aim to respect the established principles and frameworks of the law, whilst also critiquing them and outlining the need for reforms. With topical articles on assisted dying, reproductive justice and the impact of new technologies on intellectual property, this publication reflects upon the ever-changing nature of the law itself and outlines that studying the law does not simply mean accepting it for what it is, it also means understanding when the law needs to evolve in order to serve the current demands of society. Thank you to all of our authors who have demonstrated strong academic vigour and tenacity.

Finally, this has been an ambitious year for the *University of Liverpool Law Review,* marked by significant growth across an array of areas. Most notably, this edition is the largest in the Law Review's history, featuring the highest numbers of articles, and for the first time, a dissertation. This growth was achieved through the guidance and coordination of Dr. Andreas

Karapatakis, whose support has been instrumental. In addition, this achievement has required the collective efforts of a larger academic team, who have provided feedback on submissions, alongside an expanded editorial team, who have dedicated themselves to refining and perfecting this volume. We would like to thank you all as the publication of this edition would not have been possible without your contributions and commitment.

With this edition, we aspired to leave a lasting mark and lay a strong foundation for future volumes and editors. Thank you for taking the time to read the Law Review, we hope you enjoy reading this edition as much as we enjoyed the journey behind these pages. It has truly been a privilege.

Tamzin Sharrocks and Aikaterini Stephanou

(Co-Editors-in-Chief, University of Liverpool Law Review, 2025 - 2026)

Rectifying 'Forced Dying' or Normalising Neglect? Interrogating the Risks of Assisted Dying Legislation

Ceri Lois Hughes



Abstract

This article examines the profound legal and ethical paradox at the heart of the assisted dying debate: whether legalisation rectifies the moral injustice of 'forced dying' or introduces a new, systemic injustice for vulnerable populations. The author argues that a purely autonomy-based justification for assisted dying is legally and ethically insufficient, drawing upon Martha Fineman's vulnerability theory. This paper conceptualises vulnerability as a universal human condition and shifts the focus from procedural consent toward institutional responsibility for mitigating structural determinants. By analysing the phenomenon of 'mission creep' and legal developments and reported concerns surrounding Canada's Medical Assistance in Dying (MAiD) regime, the article examines how socio-economic marginalisation and inadequate palliative care can transform assisted dying from a meaningful choice into a response to social neglect. Assisted dying legislation can only achieve moral and legal legitimacy if it is embedded within a justice-oriented framework that proactively addresses structural inequality and ensures robust social support.

Introduction

The diffusion of assisted dying (AD) legislation across liberal democracies has sharpened a dispute about the responsibilities of healthcare at the end of life.[1] Prohibition may compel competent individuals to endure suffering they regard as intolerable, subordinating their evaluative agency to moral commitments they do not share.[2] Yet legalisation risks a different injustice where poverty, disability, inadequate care or social isolation make continued life difficult to sustain. The ethical issue concerns both the authority to choose death and the circumstances in which that choice becomes intelligible.

This tension is intensified by the widening of eligibility beyond the limits initially adopted, commonly described as mission creep.[3] Expansion does not itself establish that safeguards have failed, but it demands scrutiny of whether social provision develops alongside legal entitlement. Unequal access to care may leave some individuals with substantially fewer bearable alternatives than others.[4] Relational critiques similarly question accounts of autonomy that detach decisions from dependency and social context.[5] Where people internalise the belief that their care burdens others, an apparent freedom to die may acquire the character of an obligation.[6]

Martha Fineman's vulnerability theory provides the framework for examining these concerns. It treats vulnerability as a universal human condition and directs attention to the institutions through which resilience is unequally secured.[7] Applied to AD, this perspective requires more

[1] David Clark and others, 'A Moment for Compassion: Emerging Rhetorics in End-of-Life Care' (2017) Social Science & Medicine 177, 11–19; Dominique Flarey, 'Ethics of End-of-Life Care' (1997) 6 Nursing Ethics 424.
[2] Ronald Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (Knopf 1994) 201–217.
[3] An Act to amend the Criminal Code (medical assistance in dying), SC 2021, c 2, s 1(1).
[4] Emily M Ngui and others, 'Mental Disorders, Health Inequalities and Ethics: A Global Perspective' (2010) 22 International Review of Psychiatry 235.
[5] Leslie Bender, 'A Feminist Analysis of Physician-Assisted Dying and Voluntary Active Euthanasia' (1992) 59 Tennessee Law Review 519.
[6] J David Velleman, 'Against the Right to Die' (1992) 17 Journal of Medicine and Philosophy 665.
[7] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law and Feminism 1.

than confirmation of capacity and consent: it demands consideration of the material and relational resources that sustain agency.[8] The article's central claim is that legalisation can remedy the injustice of compelled suffering only within arrangements that make continued life a supported alternative. Colburn's rejection of claims that legalisation worsens palliative care cautions against treating institutional decline as an inevitable consequence of reform.[9] It requires institutions to address remediable deprivation without dismissing the moral testimony of those seeking assistance.

The discussion first examines compassion and the harms of prohibition, then evaluates the limits of formal choice through relational ethics and vulnerability theory. It subsequently considers eligibility expansion, using Canada as its principal example, before identifying the institutional and legislative safeguards required by this account of justice.

Compassion, Harm and the Ethics of Forced Dying

A commitment to preserving life can conflict with compassion when it prolongs suffering that a person regards as incompatible with dignity.[10] Compassion is used here to mean an ethically attentive response to suffering that seeks to relieve it while taking seriously the person's own account of what makes life tolerable. It is not synonymous with preserving biological life at any cost. The medical and legal understanding examined in this section nevertheless treats preserving life and preventing intentional killing as central means of protecting vulnerable patients.[11] While opposition to AD is frequently presented as an expression of societal and professional care, such restraint may conceal a deeper injustice: obliging competent individuals

[8] Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press 2004) 115.
[9] Ben Colburn, 'Palliative Care-Based Arguments against Assisted Dying' (2025) 39 Bioethics 187, 193–194.
[10] David Clark and others, 'A Moment for Compassion: Emerging Rhetorics in End-of-Life Care' (2017) Social Science & Medicine 177, 11–19.
[11] Bernard E Rollin, 'Ethics and Euthanasia' (2006) 19 Journal of Agricultural and Environmental Ethics 525–540; World Medical Association, 'WMA Declaration on Euthanasia and Physician-Assisted Suicide' (adopted October 2019) <https://www.wma.net/policies-post/declaration-on-euthanasia-and-physician-assisted-suicide/> accessed 17 September 2026.

to continue living in circumstances they can no longer reconcile with their own values.[12] From a justice-oriented perspective, refusal is not a morally neutral act of preservation where it actively imposes suffering and distributes its burdens unevenly.

This concern is most clearly articulated within liberal bioethical accounts that characterise "forced dying" as a distinct form of moral injustice. Ronald Dworkin argues that individuals possess legitimate moral authority over the narrative shape and evaluative meaning of their own lives, including their deaths, particularly where continued existence no longer serves values they regard as central to their identity.[13] To deny assistance in dying under such circumstances is not merely to protect biological life, but to subordinate a person's evaluative agency to external moral ideals about the sanctity of life that they may not share.[14] Justice is thereby compromised, not simply because autonomy is overridden, but because individuals are compelled to shoulder existential burdens that others, often healthier or more socially advantaged members of society, are never required to bear.[15]

Importantly, this injustice cannot be reduced to an appeal to personal liberty alone. A justice-based analysis instead asks how prohibitive regimes distribute suffering. Those with access to comprehensive palliative care (an approach that seeks to improve the quality of life of people and families facing life-threatening illness by preventing and relieving physical, psychosocial, and spiritual suffering) may find continued life tolerable,[16] whereas others facing unmanaged pain, functional deterioration, or social isolation may be required to persist in conditions that erode their sense of dignity.[17] When the State insists upon preservation irrespective of lived

[12] Dominique Flarey (n 1).
[13] Ronald Dworkin (n 2) 201–217.
[14] Tom L Beauchamp, 'The Medical Ethics of Physician-Assisted Suicide' (2019) 44 Journal of Medicine and Philosophy 1–15.
[15] Carl Tollef Solberg, 'The Badness of Death and Priorities in Health' (2012) 38 Journal of Medical Ethics 709–714.
[16] World Health Organization, 'Palliative Care' <https://www.who.int/news-room/fact-sheets/detail/palliative-care> accessed 17 September 2026.
[17] Emily M Ngui and others (n 4).

experience, it mandates endurance most heavily for those already disadvantaged by illness, dependency, or inadequate care.[18] Compassion then hardens into harm because it refuses to recognise suffering as the person experiences it.

Critics often resist this line of reasoning by invoking the moral distinction between killing and letting die, suggesting that prohibiting AD merely allows the natural course of illness to unfold rather than constituting an act of harm.[19] For many opponents, this distinction remains ethically significant because it reflects longstanding commitments to the sanctity of life, the doctrine of double effect, and the belief that intentionally causing death is morally different from permitting death to occur naturally. Nevertheless, the distinction becomes ethically fragile in healthcare systems that actively intervene to prolong life while simultaneously withholding the means to bring it to a close.[20] In such circumstances, non-assistance cannot plausibly be characterised as moral passivity. Rather, it represents a deliberate normative choice to sustain suffering in the service of broader moral commitments, particularly respect for the sanctity of life, the principle of non-maleficence, and traditional conceptions of professional medical ethics.[21] Justice therefore demands scrutiny of whose values are being prioritised and at whose expense. Where continued existence itself becomes the site of harm, insisting upon life at all costs risks transforming care into coercion. This concern must nevertheless be considered alongside Velleman's warning that making death an available option can itself impose burdens on those expected to justify continuing to live.[22]

[18] Kate Hurn and Rebecca Badman-King, 'Care as an Alternative to Killing: Re-conceptualising End-of-Life Care' (2019) 184(10) Veterinary Record 1–4.
[19] John Keown, 'Causing Death or Allowing to Die? Developments in the Law' (1997) 23 Journal of Medical Ethics 308.
[20] Lars Øystein Ursin, 'Withholding and Withdrawing Life-Sustaining Treatment: Ethically Equivalent?' (2019) 45 Journal of Medical Ethics 606, 609–612.
[21] Leslie Bender (n 5).
[22] J David Velleman (n 6).

Moreover, framing opposition to AD as inherently protective obscures the moral agency of those who seek it. Treating requests for AD as necessarily pathological or misguided reinforces paternalistic assumptions about what constitutes a life worth living.[23] From a justice-oriented perspective, this is ethically troubling because it signals a failure to consider the moral testimony of those whose experiences of suffering challenge dominant narratives that equate dignity with perseverance, celebrate endurance despite intolerable suffering, or assume that continued biological existence is always preferable to death.[24] When compassion is defined solely through the preservation of life, it risks silencing individuals for whom continued existence represents not a benefit, but a sustained violation of their sense of self.[25]

This argument does not amount to an uncritical endorsement of AD, nor does it deny the ethical risks associated with its legalisation. Rather, it establishes a necessary starting point. Any ethical evaluation that neglects the injustice of compelled suffering remains fundamentally incomplete. Justice requires more than the preservation of life in the abstract; that is, the protection of biological life as an intrinsic moral good without sufficient regard to the quality, dignity, or lived reality of that life. Instead, justice demands sustained attentiveness to how moral and institutional arrangements shape lived experience at the end of life.[26] Without such recognition, the refusal to permit AD risks amounting to an ethically indefensible imposition of harm rather than an expression of care.[27]

The Illusion of Choice in Assisted Dying

The moral force of arguments in favour of AD is most commonly grounded in respect for autonomous choice. Within liberal bioethics, the capacity to make an informed and voluntary

[23] Caroline Variath and others, 'Relational Influences on Experiences with Assisted Dying: A Scoping Review' (2020) 27 Nursing Ethics 1501.
[24] Martha Albertson Fineman (n 7).
[25] Martha Albertson Fineman (n 8) 1–15.
[26] Jennifer Hickey, 'The Foundations of Vulnerability Theory: Feminism, Family, and Fineman' (2023) 41 Law & Inequality 89–101.
[27] Dominique Flarey (n 1).

decision is treated as the primary ethical threshold for permissibility, with justice often presumed to be satisfied once procedural consent is secured.[28] Yet this presumption becomes ethically fragile when choice is exercised under conditions of dependency, social asymmetry, or compromised relational contexts.[29] From a justice-oriented perspective, the central concern is not whether individuals choose AD, but whether the social conditions under which such choices are made render that choice meaningfully free.[30] A choice can only be regarded as meaningfully free where individuals have genuine alternatives, including equitable access to effective palliative care, adequate social and financial support, protection from coercive influences, and sufficient time and opportunity to deliberate free from structural disadvantage. Where these conditions are absent, apparent autonomy may conceal decisions shaped more by circumstance than by genuine self-determination. It is here that the language of autonomy risks obscuring rather than illuminating moral responsibility.[31]

Feminist and relational critiques have long challenged the individualistic conception of agency that underpins autonomy-based ethics, arguing that decisional capacity is never exercised in isolation from the social conditions that shape people's lives.[32] This resonates particularly strongly within end-of-life contexts, where relational influences, including family dynamics, societal expectations, and dependency upon others for care, significantly shape how available options are perceived and evaluated.[33] Where social support is inadequate, the ethical problem is not one of overt coercion but of the subtle internalisation of social norms that frame dependency as undignified and care as burdensome, thereby undermining the idea of

[28] Tom L Beauchamp (n 14).
[29] Sofia Morberg Jämterud, 'Acknowledging Vulnerability in Ethics of Palliative Care: A Feminist Ethics Approach' (2022) 29 Nursing Ethics 952–964.
[30] Martha Albertson Fineman (n 8) 1–15.
[31] Samantha Ashall, *A Feminist Ethic of Care for the Veterinary Profession* (University of York 2018) ch 2, 41–48.
[32] Leslie Bender (n 5) 519–548.
[33] Caroline Variath and others (n 23).

autonomous choice as an isolated act.[34] This devaluation narrative intensifies when individuals internalise broader societal messages concerning dependency, scarcity of healthcare resources, and personal "burdensomeness", particularly where material support is itself insufficient.[35]

One manifestation of this relational pressure is the burden-of-care narrative: the perception, whether explicitly expressed or internally experienced, that an individual has become a financial, emotional, or practical burden upon relatives, caregivers, or the healthcare system. Even without direct pressure, the internalisation of that belief may encourage a person to regard death as the responsible or altruistic response to dependency.[36] In AD decision-making, the concern is therefore not confined to overt coercion; it includes the quieter social conditions that can make continued care feel morally unavailable.

The Canadian debate illustrates the institutional concerns at stake. In a February 2021 communication about Bill C-7, UN experts warned that poverty and inadequate support networks could expose people to pressure to seek Medical Assistance in Dying (MAiD). They also recalled earlier reports of disabled people being offered a choice between institutional care and assisted death.[37] These were reported concerns, not findings establishing that all requests were involuntary or that deprivation was the sole cause. Their significance for this article is narrower: assessing consent should include scrutiny of whether community support and viable alternatives are available, rather than assuming that legal eligibility establishes the adequacy of the circumstances in which a request is made.

[34] Meta Rus and Chris Gastmans, 'Euthanasia and Assisted Suicide: Who Are the Vulnerable?' (2024) 19 Clinical Ethics 18–27.
[35] Sammy Chown, 'Disability Community Feels Ignored in Canada's Assisted Dying Expansion' (2024) BMJ 385 q806.
[36] Sammy Chown (n 35); Caroline Variath and others (n 23).
[37] UN Special Rapporteur on the rights of persons with disabilities, Independent Expert on the enjoyment of all human rights by older persons and Special Rapporteur on extreme poverty and human rights, 'Communication to Canada' (3 February 2021) OL CAN 2/2021, 3–4 <https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=26002> accessed 5 October 2026.

These concerns are particularly acute for individuals already positioned as vulnerable through illness, disability, poverty, or social marginalisation. The conceptual literature consistently emphasises that vulnerability is not synonymous with diminished autonomy but instead reflects a universal and relationally mediated feature of the human condition, the ethical significance of which cannot be captured adequately through narrow liberty-based models.[38] The House of Commons Health and Social Care Committee documented geographical inequalities in palliative care and concerns about the sustainability of hospice funding.[39] Where such inequalities constrain a person's options, the availability of AD may respond to unmet need without resolving it. Clinical ethics scholarship further demonstrates that vulnerability manifests simultaneously across physical, psychological, social, and moral dimensions, none of which can be adequately evaluated through procedural consent alone.[40]

Principlism offers a widely applicable framework organised around autonomy, beneficence, non-maleficence, and justice. Its universal ambition is a strength: the four principles supply a shared ethical vocabulary across diverse clinical settings without requiring agreement on a single comprehensive moral theory. Beauchamp and Childress present them as prima facie obligations that must be specified and balanced rather than applied mechanically. Yet this abstraction can become a weakness in AD when autonomy is operationalised chiefly through decisional capacity and valid consent, while the social conditions producing the decision are treated as external to the ethical assessment. Fineman's vulnerability theory does not discard the four principles; it exposes what a universal framework may miss when unequal access to

[38] Emily M Ngui and others (n 4) 235–242.
[39] House of Commons Health and Social Care Committee, Assisted Dying/Assisted Suicide (Second Report of Session 2023–24, HC 321) paras 266–273 <https://publications.parliament.uk/pa/cm5804/cmselect/cmhealth/321/report.html> accessed 12 October 2026.
[40] Meta Rus and Chris Gastmans (n 34) 21–24.

care, support, and material security determines whether a nominal choice is genuinely available.[41]

Fineman rejects the liberal fiction of the autonomous and self-sufficient subject, conceptualising vulnerability as both universal and differentially distributed through social institutions.[42] Human beings are inevitably dependent upon social structures throughout their lives, yet access to the resources necessary to respond to that vulnerability is distributed unequally. Consequently, vulnerability is not an exceptional characteristic belonging only to particular groups, but a shared condition whose practical consequences depend upon the quality of institutional support available to individuals.

On this account, justice cannot be satisfied merely by respecting formal choice. Instead, it requires proactive institutional responsibility for cultivating the conditions in which agency is genuinely supported.[43] Applied to AD, vulnerability theory fundamentally reframes the ethical inquiry. Rather than asking only whether an individual has chosen freely according to procedural standards, it asks whether society has fulfilled its prior obligation to minimise avoidable suffering, provide equitable healthcare, and ensure meaningful alternatives to assisted death.

Assessing capacity at a single point in time cannot establish whether a request emerged from adequate care or from its absence. The relevant inquiry must also examine the applicant's practical alternatives and the institutional decisions that constrain them. This extends the assessment beyond a balance of individual interests to the distribution of resources on which those interests depend.[44] Relational autonomy reinforces this approach by locating agency

[41] Tom L Beauchamp and James F Childress, *Principles of Biomedical Ethics* (8th edn, OUP 2019) 13–14, 101–149; Martha Albertson Fineman (n 7).
[42] Jennifer Hickey (n 26) 89–101.
[43] Martha Albertson Fineman (n 7).
[44] Carl Tollef Solberg (n 15) 709–714.

within the relationships and social conditions through which decisions are formed.[45] Vulnerability theory gives that insight an institutional focus: responsibility falls also upon those able to remedy the deprivation shaping the request.

This analysis does not require opposition to assisted dying per se. Rather, it insists that the ethical legitimacy of AD depends upon its availability within a healthcare system characterised by robust social support, equitable palliative care, effective disability services, and meaningful alternatives to death.[46] Only where such conditions exist can autonomy operate as a genuine expression of self-determination rather than a response to structural disadvantage. Without these conditions, the rhetoric of choice risks becoming illusory, concealing structural injustice beneath the appearance of procedural autonomy.[47]

The resulting standard evaluates the conditions supporting a decision alongside the decision itself. It provides the basis for examining whether expanding access to AD is accompanied by a corresponding commitment to care.[48]

Mission Creep and the Risk of Self-Defeating Reform

The concern, described here as mission creep, is that widening legal eligibility may expose deficiencies in the support available to people contemplating AD. UN experts raised this concern when scrutinising Canada's proposed expansion beyond reasonably foreseeable death.[49] Expansion should not, however, be equated with deterioration in safeguards. Downie and Schuklenk reject social disadvantage as sufficient grounds for denying assisted dying to otherwise eligible people who retain decision-making capacity.[50] Canadian law also introduced

[45] Carlos Gómez Vírseda, Yves de Maeseneer and Chris Gastmans, 'Relational Autonomy in End-of-Life Care Ethics: A Contextualised Approach' (2020) 21 BMC Medical Ethics 50
[46]Alex Mullock and Jonathan Lewis, 'Assisted Dying, Vulnerability and the Potential Value of Prospective Authorisation' (2023) 31 Medical Law Review 567–589.
[47] Meta Rus and Chris Gastmans (n 34) 24–26.
[48] Sofia Morberg Jämterud (n 29) 959–962.
[49] UN Special Rapporteurs and Independent Expert (n 37) 3–4.
[50] Jocelyn Downie and Udo Schüklenk, 'Social Determinants of Health and Slippery Slopes in Assisted Dying Debates: Lessons from Canada' (2021) 47 Journal of Medical Ethics 662, 664–667.

additional safeguards for applicants whose natural death is not reasonably foreseeable, including discussion of available means of relieving suffering.[51] The question is therefore whether those safeguards operate alongside accessible services, rather than whether widening eligibility is intrinsically unjust.

Canada supplies the article's principal example. Bill C-7 removed reasonably foreseeable natural death as an eligibility requirement in 2021.[52] UN experts had warned that expanding access in circumstances of poverty and inadequate support could increase pressure on disabled people.[53] This concern remains contested: Downie and Schuklenk defend the expansion against objections based on social determinants of health and slippery slopes.[54] The position advanced here does not infer coercion from disability or disadvantage alone. It requires examination of whether an individual's options have been narrowed by remediable institutional failures, while respecting that person's capacity and account of their own suffering.

Two propositions must accordingly remain distinct. Widening eligibility establishes that the law has expanded; demonstrating that this expansion produces injustice requires evidence of how the amended regime operates in practice. The Canadian amendment and the concerns expressed by UN experts demonstrate the importance of that inquiry, but neither alone proves an inevitable progression towards abuse.[55] The analysis that follows addresses the institutional conditions under which the risk could arise.

Access to care is central to this inquiry. The House of Commons Health and Social Care Committee documented geographical inequalities in palliative provision, while Colburn rejects

[51] An Act to amend the Criminal Code (medical assistance in dying) (n 3) s 1(7), inserting Criminal Code, s 241.2(3.1).
[52] An Act to amend the Criminal Code (medical assistance in dying) (n 3) s 1(1).
[53] UN Special Rapporteurs and Independent Expert (n 37) 3–4.
[54] Jocelyn Downie and Udo Schüklenk (n 50) 666–667.
[55] An Act to amend the Criminal Code (medical assistance in dying) (n 3) s 1(1); UN Special Rapporteurs and Independent Expert (n 37) 3–4.

claims that legalising assisted dying causes palliative care to deteriorate.[56] These positions concern different questions. Existing shortcomings in care do not establish that AD caused them, but they remain relevant to the alternatives available to an individual considering it. In an under-resourced system, facilitating death without addressing remediable suffering risks transferring responsibility for institutional failure to the person affected.[57] The concern is not that palliative care removes every reason for requesting AD, but that an assessment of voluntary choice should examine whether practicable alternatives were accessible.

Material deprivation is compounded by relational pressure. Narratives of burden, dependency, and diminished social worth may shape the preferences of older and disabled people without any explicit encouragement to choose death.[58] UN experts and reporting on disability perspectives in Canada have highlighted concerns about inadequate support and the availability of alternatives.[59] These concerns illustrate why vulnerability cannot be inferred from diagnosis alone: it is produced through the interaction between impairment, social messaging, and the institutional resources that make continued life practicable.

Applied to these conditions, Fineman's theory changes the object of inquiry. The question is not whether MAiD applicants belong to a fixed class labelled 'vulnerable', but whether institutions have equipped them with the resilience needed to exercise agency: adequate care, income, housing, disability support, and social connection.[60] A formally competent request may therefore remain ethically compromised where the state has left the conditions making life tolerable beyond the applicant's reach.

[56] House of Commons Health and Social Care Committee (n 39) paras 266–273; Ben Colburn (n 9) 193–194.
[57] Caroline Variath and others (n 23); Dominique Flarey (n 1) 429–433.
[58] Meta Rus and Chris Gastmans (n 34) 22–26.
[59] UN Special Rapporteurs and Independent Expert (n 37) 3–4; Sammy Chown (n 35).
[60] Martha Albertson Fineman (n 7).

Viewed through this lens, mission creep represents more than a gradual expansion of legal eligibility. Rather, it reflects the possibility that institutional responses to vulnerability have become misdirected. Where AD becomes increasingly accessible within healthcare systems characterised by inadequate palliative care, insufficient disability support, social isolation, or economic disadvantage, vulnerability theory exposes what may be described as a moral inversion. Instead of prioritising the social conditions that enable people to continue living with dignity, institutions risk responding to suffering by facilitating death before adequately addressing the structural conditions that produced that suffering in the first place.[61] In practical terms, this moral inversion occurs where investment in care, support, housing, disability services, or palliative provision fails to develop alongside expanding access to assisted dying, creating the perception that society has become more willing to assist individuals to die than to remove the conditions making life intolerable.

Justice, understood through Fineman's framework, therefore cannot be satisfied solely through procedural safeguards or assessments of individual decisional capacity. Rather, it demands sustained institutional responsibility for addressing the structural determinants that shape end-of-life decision making, including equitable access to comprehensive palliative care, disability support, mental healthcare, social security, and protection against isolation and neglect.[62] Only when these conditions are meaningfully secured can AD plausibly operate as one autonomous option among several genuinely available alternatives rather than becoming a response to institutional failure.

The absence of such commitments fundamentally alters the ethical character of AD. Rather than functioning solely as an expression of individual liberty, legalisation risks accommodating the very inequalities that generate vulnerability. In this respect, the ethical legitimacy of AD

[61] Martha Albertson Fineman (n 8) 33–38.
[62] Emily M Ngui and others (n 4) 235–242.

cannot be divorced from the broader social environment in which requests arise. If individuals seek assisted dying because adequate care, treatment, financial security, or social support remain inaccessible, then the law risks legitimising choices produced, at least in part, by avoidable structural injustice.

Expansion detached from adequate support may therefore become ethically self-defeating. A legal framework introduced to alleviate suffering may inadvertently obscure the institutional failures that continue to generate it.[63] Instead of challenging social inequality, it risks adapting to it. Vulnerability theory therefore redirects attention away from the narrow question of whether legal safeguards have been procedurally satisfied and towards the broader justice obligations owed by the state before AD can be regarded as a genuinely ethical option.

Mission creep should therefore be treated neither as an inevitable consequence of legalisation nor as a rhetorical reason to avoid reform. It is a warning that expansion detached from investment in healthcare, disability services, and social protection may undermine the values used to justify AD. A justice-oriented framework must ensure that assisted death does not become a routine response to structural neglect, institutional abandonment, or preventable social suffering.

Looking Forward: The Future of Assisted Dying Law and Policy

Translating this analysis into law requires safeguards that test the quality of available alternatives, not merely decisional capacity at the moment of request. A justice-centred regime should require documented offers of specialist palliative care, disability and mental-health support, independent examination of coercion and unmet social need, and transparent reporting of the circumstances in which AD is requested. These measures should not operate as

[63] Carl Tollef Solberg (n 15) 712–714.

paternalistic vetoes. Their purpose is to distinguish a settled preference for death from a choice narrowed by remediable deprivation.

The institutional duty is wider than case-by-case assessment. In 2024, the House of Commons Health and Social Care Committee concluded that palliative provision in England was uneven and called for universal coverage, better population data, and adequate hospice support. That evidence supports a prior-obligation model: legislatures considering AD should connect reform to measurable duties concerning access, funding, and monitoring, followed by periodic independent review.[64] Only then can autonomy operate as a choice among supported alternatives rather than as formal permission exercised against institutional scarcity.

This model does not promise to eliminate all suffering or all risk. Nor should access to palliative care be used to deny AD categorically, since even excellent care cannot make all suffering tolerable. The point is sequential and justificatory: before the State treats an assisted death as autonomous, it must be able to show that avoidable failures in care, income, housing, or disability support did not create the conditions in which death became the least burdensome option.

Conclusion

A central ethical question posed by AD is whether the state may facilitate death before it has discharged its duties to make continued life with dignity a realistic option. Prohibition may itself be unjust where it compels a competent person to endure intolerable suffering. Yet autonomy alone cannot legitimate a decision formed through unmet need. Fineman's account exposes AD as an institutional practice whose moral character depends upon the distribution of care, support, and resilience.

[64] House of Commons Health and Social Care Committee (n 39) paras 249–279.

The decisive question is therefore not simply whether the law permits death, but what the State has done to make life with dignity possible. A justice-centred regime must couple any route to AD with enforceable access to care and support, safeguards attentive to structural pressure, and continuing scrutiny of eligibility expansion. Without those conditions, legalisation risks converting abandonment into consent. With them, AD may remain an exceptional response to intolerable suffering rather than an ordinary answer to inequality.

Who gets to cut? A Reproductive Justice Critique on the Law of Genital Cutting

Hannah Porter



Abstract

This essay examines whether the Reproductive Justice (RJ) framework requires the law to address gender disparities, structural racism and colonial legacies in the regulation of genital cutting practices (GCP). It situates contemporary legal responses within the differing treatment of genital cutting in Western and non-Western contexts, highlighting the criminalisation of Female Genital Mutilation alongside the continued legality of male circumcision, cosmetic genital surgery, and certain intersex procedures.

Drawing on the RJ framework, which understands bodily autonomy through the lens of structural inequality rather than individual choice alone, the essay evaluates whether existing legal distinctions can be justified. It first considers gendered inconsistences in the protection of bodily integrity before examining how racialised narratives and colonial histories shape legal responses to non-Western practices. The essay then explores tensions within RJ concerning harm, medicalisation, and autonomy, arguing that although RJ exposes important shortcomings in existing law, it cannot fully displace legitimate state intervention where serious harm is involved. It concludes that RJ supports neither blanket criminalisation nor complete legality. Instead, it points towards a more coherent and context-sensitive framework that applies principles of bodily integrity consistently, while remaining attractive to structural inequality, cultural context, and the lasting influence of colonial governance.

Introduction

Legal responses to genital cutting practices (GCP) are characterised by striking inconsistencies. In many Western jurisdictions, practices labelled as Female Genital Mutilation (FGM) are subject to strict prohibition, while other forms of genital cutting, such as male circumcision, cosmetic genital surgery, and intersex procedures, remain lawful and socially accepted.[65] These distinctions are often justified through harm prevention, child protection, and medical necessity.[66] However, such rationales risk masking the gendered, racialised, and historical assumptions that underpin legal regulation.

This essay evaluates the regulation of GCP through a reproductive justice lens, focusing on how the law responds to forms of gendered, racial, and colonial inequality. It argues that RJ exposes how current legal approaches reproduce gendered double standards and racialised constructions of bodily legitimacy, particularly in relation to non-Western practices. However, RJ does not demand uniform legal treatment of all genital practices. Rather, RJ advocates for a more context-sensitive approach that balances respect for cultural identity and autonomy, with legitimate concerns for serious and irreversible harm.[67]

This essay proceeds in four parts. First, it outlines the RJ framework. Secondly, it examines gender hierarchies in legal regulation. Thirdly, it analyses how structural racism and colonial legacies shape bodily norms. Finally, it considers the limits of RJ in relation to harm and proposes possible directions for legal reform.

The Reproductive Justice Framework

The RJ framework arose from dissatisfaction with the limitations of mainstream reproductive rights debates, which traditionally framed reproductive freedom in terms of individual choice, privacy, and

[65] Female Genital Mutilation Act 2003; *Re B and G (Children) (No 2)* [2015] EWFC 3.

[66] David Fraser, 'The First Cut Is (Not) The Deepest: Deconstructing "Female Genital Mutilation" and the Criminalization of the Other' [1995] 18(1) Dalhousie Law Journal 331; Zara Spencer, 'The Criminalisation Of Female Genital Mutilation In Queensland' [2002] 9(3) Murdoch University Electronic Journal of Law (3(iii)(31), 4(i)(35)).

[67] FGM Act (n1); *Re and B* (n1).

access to healthcare. As articulated by Ross and Solinger[68], this rights-based model failed to account for structural conditions that shape individual's capacity to exercise meaningful autonomy. RJ was developed by 'feminists of colour' who recognised that, alone, formal legal rights were insufficient in achieving the genuine reproductive autonomy sought after by marginalised communities. Instead, RJ requires attention to the social, political, and economic conditions that shape individuals' capacity to exercise meaningful choice, reframing reproductive freedom as a justice-orientated framework rather than a purely rights-based one.[69]

Central to RJ is the recognition that reproductive decision-making does not always allow for genuine autonomy. Choices relating to reproduction are often shaped, and at times constrained, by legal regulation, social 'norms', and power imbalances. As highlighted in *We Are Pregnant with Freedom*[70], women of colour have historically been subject to extensive state control over their reproductive capacities, most notably through practices such as sterilisation. For example, in the United States, the Relf sisters[71] who were both sterilised at a young age without meaningful consent, became emblematic of the systematic targeting of Black girls and women in the late 1900's, under the guise of public health and social welfare. This history underscores the RJ's insistence that reproductive autonomy must be understood within its broader social and political context, rather than assumed as an individualised choice.

RJ is commonly articulated through three core principles: the right not to have a child, the right to have a child, and the right to parent children in 'safe and healthy environments'.[72] However, Ross and Solinger emphasise that RJ also encompasses sexual autonomy, bodily integrity, and freedom from

[68] Loretta J. Ross and Rickie Solinger, *Reproductive Justice: An Introduction* (Chapter Title: A Reproductive Justice History), University of California Press (2017).

[69] Ibid 10.

[70] Stacie Selmon McCormick, '*We Are Pregnant with Freedom: Black Feminist Storytelling for Reproductive Justice*' (University of California Press 2025) 50-51.

[71] Mary Crossley, *'Reproducing Dignity: Race, Disability, and Reproductive Controls*' [2020] 54(195) University California Davis Law Review 213-214, Linda Villarosa, 'The Long Shadow of Eugenics in America' (*The New York Times Magazine*, 8 June 2022) <https://www.nytimes.com/2022/06/08/magazine/eugenics-movement-america.html> accessed 02 January 2026.

[72] Fraser (n2).

coercive state intervention.[73] This broader understanding makes RJ particularly well suited to interrogating GCP, which sit at the intersection of culture, sexuality, medicine, and the law. RJ offers a framework that is able to engage with the complexities of genital cutting in ways that purely medical or Human Rights-based frameworks cannot, as it values bodily autonomy whilst critically examining whether social and legal conditions allow that autonomy to be meaningfully exercised.

Gender Disparities and Legal Hierarchies

RJ reveals that legal regulation of GCP often reflects and reinforces gendered hierarchies rather than equally protecting bodily integrity. In many Western jurisdictions, Female Genital Cutting (FGC) is subject to absolute criminal prohibition, while male circumcision remains lawful and, in some contexts, actively promoted.[74] Although this distinction is often justified through concerns about harm prevention, closer analysis reveals a more complex and uneven allocation of protection and autonomy.

Legal frameworks such as the Female Genital Mutilation Act 2003[75] depict girls as uniquely vulnerable and in need of protection from genital alteration, while boys are treated as legitimate recipients of culturally or medically sanctioned genital alterations.[76] Davis states that, 'these two practices, dramatically separated in the public imagination, actually have significant areas of overlap'.[77] This is supported by Earp, who examines how certain forms of FGM are 'demonstrably less harmful than the most prevalent forms of male circumcision', yet only the former attracts criminal liability.[78] Judicial acknowledgement of this inconsistency can be seen in *Re B and G (Children) (No 2)*[79], where the court

[73] Ross and Solinger (n4).

[74] Brian D Earp, *'Female genital mutilation and male circumcision: toward an autonomy-based ethical framework'* [2015] 5(1) Medicolegal and Bioethics 89-104.

[75] FGM Act 2003 (n1).

[76] Ibid; *Re B* (n1).

[77] Dena S Davis, *'Male and Female Genital Alteration: A Collision Course with the Law?*' [2001] 11(2) Health Matrix 488.

[78] Crossley (n7).

[79] *Re B* (n1).

refers to the 'law's[80] seemingly very different approaches to FGM and male circumcision' as 'puzzling', but ultimately justifies them on the basis of religious and medical rationales. Furthermore, Möller's discussion on this disparity also acknowledges the physical similarity between certain types of FGC and male circumcision but also rests on the basis that there is no religious or medical benefit to justify FGM, and that the differential treatment between the two practices is not solely based on harm.[81]

The hierarchy at issue is not simply one in which men benefit and women are disadvantaged. Rather, it operates paternalistically in a way which privileges Western norms of femininity, sexuality, and protection. Girls are 'protected' through criminalisation, but at the cost of being denied decisional autonomy even in adulthood.[82] This framing of women as victims arguably overlooks the reality that women are mostly the ones who are maintaining this practice, and in some communities the reality is that 'more men oppose to the practice then do women'.[83] Yet, still, women who consent to certain genital practices are not recognised as autonomous legal subjects, reinforcing these narratives of victimhood and incapacity. By contrast, boys are afforded less legal protection from bodily harm, but greater cultural legitimacy as male circumcision is framed as religiously significant, medically beneficial, or socially neutral.[84] As quoted in UNICEF Innocenti Digest, 'in the case of girls and women, the phenomenon is a manifestation of deep-rooted gender inequality that assigns them an inferior position in society… This is not the case for male circumcision'.[85]

[80] Children Act 1989, Section 31.

[81] Kai Moller, *Male and Female Genital Cutting: Between the Best Interest of the Child and Genital Mutilation*, Oxford Journal of Legal Studies, Vol. 40, No. 3 (2020), pp. 508–532.

[82] Layli Miller Bashir, 'Female genital mutilation in the United States: An examination of criminal and asylum law' [1995] 4(415) American University Journal of Gender & the Law 428-454.

[83] Naomi Onsongo, *Female Genital Cutting (FGC): Who Defines Whose Culture as Unethical?*, International Journal of Feminist Approaches to Bioethics, Vol 10, No. 2 (Fall 2017), pp. 114.

[84] Robert Darby and J. Steven Svoboda, *'A Rose by Any Other Name? Rethinking the Similarities and Differences between Male and Female Genital Cutting'* [2007] 21(3) Medical Anthropology Quarterly 310-312.

[85] UNICEF Innocenti Digest, *Changing a Harmful Social Convention: Female Genital Mutilation/Cutting* (2005).<https://www.cawtarclearinghouse.org/storage/AttachementGender/Changing%20a%20harmful%20social%20convention-female%20genital%20mutilation-cut.pdf> accessed 25 December 2025.

From an RJ perspective, this uneven allocation of protection and autonomy constitutes a form of gendered inequality. RJ challenges legal frameworks by insisting that bodily autonomy must be assessed within broader social and legal contexts.[86] In the context of GCP, RJ reveals that female bodies are more heavily surveyed, pathologised, and morally regulated than male bodies. This reflects wider gendered assumptions about female sexuality as something requiring control or correction, rather than autonomy.

However, RJ also requires recognition of important distinctions between practices. Not all forms of genital cutting are equivalent in severity, risk, or long-term impact. The World Health Organisation's (WHO) classifications of FGM[87] demonstrates that certain types of FGC are associated with severe health complications and psychological distress. Where harm is so severe, RJ would not require identical legal treatment of male and female genital cutting but instead demands that the differentiation be justified transparently and coherently. Therefore, RJ requires the law to confront these gender inequalities, while also recognising the limits and acknowledging that concern for serious harm may justify differentiated legal responses in some cases.

Structural Racism, Colonial Legacies, and Bodily Norms

Beyond gender disparity, RJ requires the law to confront the structural racism and colonial legacies that also shape responses to GCP. Although framed as neutral harm prevention, the criminalisation of FGC is embedded within racialised assumptions about African sexuality and culture. These assumptions continue to influence contemporary legal responses, reproducing colonial modes of governance under the guise of protection.[88]

Although Tamale does not explicitly examine FGM in *Decolonization and Afro-Feminism*[89], her feminist analysis of colonialism and sexuality provides important insights into the historical foundations

[86] Kimala Price, 'What Is Reproductive Justice?: How Women of Color Activists Are Redefining the Pro-Choice Paradigm Available' [2020] 19(1) Meridians 340–362.

[87] 'Female genital mutilation' (*World Health Organisation* , 31 January 2025) <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation > accessed 27 December 2025

[88] Sylvia Tamale, *Decolonization and Afro-Feminism*, Daraja Press (2020).

[89] Ibid.

of contemporary legal responses to the practice. She argues that colonial regimes imposed Western moral frameworks onto African societies, constructing African practices and bodies as deviant, excessive, or primitive compared to Western norms. Therein restructuring African sexuality in line with colonial expectations and legitimising legal and medical intervention. This historical context is essential for understanding why contemporary legal responses to FGC cannot be viewed as neutral or purely protective.

Applying Tamale's analysis, the criminalisation of FGC can be seen as reflecting an underlying racialised hierarchy of bodily legitimacy.[90] Practices associated with African communities are framed as culturally backwards and harmful, whereas comparable Western practices, such as male circumcision or cosmetic genital surgery, are normalised, medicalised, and justified. From an RJ perspective, this conflicts with the notion that the legal banning of FGC is motivated solely by concern for bodily integrity and instead raises critical questions about who's bodily 'norms' are embedded in law, and whose bodies are positioned as incapable of autonomous decision-making.

Following on from this, it is important to note that this racialised framework affects African women and men in different but interconnected ways. African women are frequently constructed as passive victims in need of rescue, with little attention paid to their agency or the diverse social and cultural meanings attached to GCP within their communities.[91] African men, meanwhile, are portrayed as cultural perpetrators or enforcers of harmful tradition.[92] This reinforces the stereotype of African masculinity being oppressive or regressive. Yet, as Earp demonstrates, this framing collapses when male circumcision aligns with Western medical or religious practices. In African contexts, male circumcision is routinely excluded from the legal scrutiny FGM faces, even where it entails serious risks and harms.[93]

[90] CA (n16).

[91] Hannelore Van Bavel, 'Education, Class, and Female Genital Cutting among the Samburu of Northern Kenya: Challenging the Reproduction of the "Ignorant Pastoralist" Narrative in Anticutting Campaigns' [2022] 28(15-16) Violence Against Women 3742–3761.

[92] Sara Johnsdotter, 'Popular Notions of FGC in Sweden: The Case of Ali Elmi' [2008] 3(2) Finnish Journal of Ethnicity and Migration 74-81.

[93] Earp (n10) 94.

Drawing on evidence from South Africa, Earp notes that traditional Xhosa circumcision practices have resulted in widespread injury and death, with "more than half a million boys … hospitalised" and over 400 fatalities between 2008 and 2014 alone, challenging assumptions that it is inherently benign.

Earp positions this disparity within a broader scholarly critique by DeLaet,[94] who aids the argument that both male and female forms of genital alteration "fall on a wide spectrum" of severity, and their harms substantially overlap. Similarly, as Androus observes, legal and ethical debates distort reality by collapsing a wide range of genital practices into rigid categories.[95] This framing obscures the overlap across practices, leading to simplistic assumptions about victimhood and culpability. As he states, "what's done to some girls is worse than what's done to some boys, and what's done to some boys is worse than what's done to some girls."[96] This selective framing allows for male circumcision to be normalised where it aligns with Western medical or religious norms, while African women's practices are criminalised as uniquely barbaric. The result is a symbolic disciplining of African sexuality that exaggerates women's victimhood and exposes the racialised inconsistencies underpinning contemporary regulatory approaches.

RJ helps to expose these tensions by shifting the focus from isolated practices to the broader structural conditions under which they are governed. Rather than asking only whether FGC is harmful, RJ asks why harm is interpreted differently depending on race, gender, and cultural context. This racialised hierarchy is further exposed by the law's differential treatment of culturally coded genital practices. As Kennedy notes, Western women are permitted to undergo cosmetic genital surgeries that are materially comparable to some forms of FGC, with such procedures legally justified on the basis of therapeutic physiological benefits.[97] By contrast, FGC is subject to absolute prohibition in jurisdiction such as the

[94] Debra L. Delaet, *'Framing Male Circumcision as a Human Rights Issue? Contributions to the Debate Over the Universality of Human Rights'* [2009] 8(4) Journal of Human Rights

[95] https://www.zacharyandrous.com/The%20US%20FGM%20and%20Global%20HR.pdf accessed. 9th Jan 2026.

[96] Ibid.

[97] Aileen Kennedy, *'Mutilation and Beautification: Legal Responses to Genital Surgeries'* [2009] 24(60) Australian Feminist Studies 211-231.

UK, regardless of age, consent, or motivations of the woman involved.[98] As Berer similarly argues, this reflects a troubling legal asymmetry where Western women's mental distress is afforded more recognition and legitimacy than the suffering, autonomy, or cultural identity of African women.[99] From an RJ perspective, this distinction cannot be understood as neutral harm prevention, rather, it reveals how law embeds Western bodily norms as universal while constructing non-Western genital practices as inherently immoral.

Tamale's work does not, however, imply a need to deny the knowledge that certain forms of FGC can cause serious harm, but rather helps argue that responses that universalise African practices and bodies as inherently violent, while ignoring comparable harms elsewhere, should be cautioned.[100] Therefore, ultimately, an RJ-informed critique requires the law to remain attentive to the material realities of harm, while demanding a more reflexive approach that recognises how racialised bodily norms shape the identification of such harms and the regulatory responses that follow.

Medicalisation, Harm, and Reproductive Justice Tensions

In addition to the racialised and gendered inconsistencies exposed by the RJ framework, significant tensions are also revealed when issues of harm, medicalisation, and bodily autonomy are examined. Debates surrounding the medicalisation of FGC often sit uneasily within RJ, as in its attempt to protect sexual autonomy and cultural self-determination, it also risks legitimising practices associated with serious and psychological harm.

Onsongo challenges dominant Western narratives that depict FGC as uniformly 'barbaric', extreme, and medically catastrophic. She argues that such narratives tend to exaggerate the risks of FGC, centring the most severe types of mutilation, and without any regard for cultural meaning.[101] She states that by

[98] FGM Act 2003 (n1).

[99] Marge Berer, *'Labia reduction for non-therapeutic reasons vs female genital mutilation: contradictions in law and practice in Britain'* [2010] 18(35) Reproductive Health Matters 106-110.

[100] Onsongo (n19).

[101] Ibid 105-123.

describing women as ‘mutilated’, Westerners ultimately consider them less feminine, leading to Onsongo’s suggestion that this exaggeration not only fuels moral panic but may also influence the justification of legal interventions that marginalise the very women they claim to protect. She argues that medicalisation of FGC may offer a pragmatic harm-reduction approach.[102] By relocating the practice into regulated medical settings, she contends that there could be a significant reduction in health risks, such as infection, bleeding, and long-term complications. In her opinion, this approach better aligns with the RJ principles than outright criminalisation, as it protects cultural identity and autonomy, while also prioritising women’s safety and bodily wellbeing. She also criticises the success of current anti-FGC movements, highlighting reports that indicate that in the next decade, over 30 million[103] girls and women will undergo FGC. Onsongo therefore argues that allowing medicalisation, instead of criminalisation, would facilitate ‘autonomy and empowerment’ to the ‘pillars of FGC’, making for safer practice and an increase in the ability for these communities to make decisions surrounding GCP ‘without Western coercion’.[104] Medicalisation, in this sense, is framed as a compromise that acknowledges both autonomy and harm.

Similarly, Obiora critiques the absolutist stance of anti-FGC campaigns for creating “bridges and barricades” between Western human rights advocates and practicing communities. She frames the case for the medicalisation and decriminalisation of FGC through an analogy with feminist arguments for the legalisation of abortion.[105] She argues that, just as ‘clandestine abortions account for approximately forty percent of maternal deaths worldwide’, the primary source of harm in most forms of FGC lies not within the procedure itself but the conditions in which its performed. She contrasts this with male circumcision, which is routinely performed by religious circumcisers, yet when applied to women it remains the target of eradication campaigns. Following this, it can be argued that legal prohibition and

[102] Onsongo (n19).

[103] UNICEF 2013, 114.

<file:///Users/hannahporter/Downloads/UNICEF_FGM_report_July_2013%20(1).pdf> accessed 17th January 2026.

[104] Onsongo (n19) 118.

[105] L. Amede Obiora, 'Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign against Female Circumcision' [1997] 47(2) Case Western Reserve Law Review 375.

the extreme moral condemnation of FGC risks forcing these practices 'underground' and increasing resistance and health risks. It would be in the interest of health promotion and harm reduction to medicalise and control certain forms of FGC.

However, these harm-risk reduction approaches are powerfully challenged by scholars such as Gunning, who warn that medicalisation risks legitimising and institutionalising practices that violate bodily integrity.[106] Gunning argues that even when performed in sterile conditions, FGC remains a gendered practice rooted in controlling sexuality. Medicalisation, she suggests, may shift the responsibility from 'traditional circumcisers to modern health care practitioners', without addressing the underlying inequalities that sustain the practice. In turn, this essentially transfers the provision of women's healthcare from a female-dominated practice to a 'more male-dominated and Western model', ultimately having the same control over the practice that scholars like Obiora aim to avoid.

These competing perspectives reveal a fundamental tension within RJ itself. Unlike abortion debates, where RJ advocates have often rejected medicalisation as a tool of control, FGC raises more acute concerns about non-consensual bodily alteration and long-term injury. This complicates the application of RJ principles and demonstrates that autonomy cannot be assessed in isolation from context, power, and vulnerability. Ultimately, RJ does not provide a singular answer to the question of medicalisation but rather demands a more nuanced legal response. It requires the law to move beyond binary frameworks of prohibition versus permission and instead develop regulatory approaches that distinguish between levels of harm, capacity, and coercion.

The Limits of Reproductive Justice: Harm and Legal Reform

While the RJ framework offers a powerful critique of racialised, gendered, and colonial hierarchies within legal responses to GCP, it is not without limits. This section argues that although RJ rightly challenges structural inequality, its resistance to criminalisation encounters difficulty when faced with

[106] Isabelle R. Gunning, 'Uneasy Alliances and Solid Sisterhood: A Response to Professor Obiora's Bridges and Barricades' [1997] 47(2) Case Western Reserve Law Review 445.

practices that involve serious, and sometimes irreversible harm, especially when children are concerned. In such contexts, RJ cannot fully displace the state's legitimate interest in harm prevention.

A key limitation of RJ is arguably its underdevelopment as a legal framework for harm regulation. Unlike traditional human rights approaches, RJ prioritises lived experiences, community context, and structural critique over doctrinal clarity. While this is a compelling challenge to blanket criminalisation, it offers less guidance on how the law should respond where practices demonstrably threaten physical integrity. As Gunning argues, cultural traditions involving coercion or long-term harm cannot be shielded from critique.[107] Therefore, RJ's excessive caution surrounding legal intervention risks undermining the protective role law can play, particularly for children or vulnerable members of society who may lack decisional capacity.

Moreover, this concern is sharpened by medical and human rights literature that consistently identifies certain types of FGC, particularly WHO Types II and III[108], as carrying substantial health risks, including severe pain, obstetric complications and numerous psychological problems. In these contexts, arguments grounded solely in cultural autonomy or anti-colonial critique become harder to defend. In *Beyond Control*[109] Sheldon critiques reproductive governance, arguing that legal notions of autonomy often ignore the social, medical, and power-influenced contexts in which reproductive decisions are made. Applied to GCP, this suggests that RJ cannot rely on autonomy alone where consent is compromised, constrained or impossible.

Additionally, West's critique of constitutionalised reproductive rights further illustrates the limits of autonomy-based frameworks. In *From Choice to Reproductive Justice*[110], she argues that dominant legal models of reproductive rights, especially those grounded in privacy and non-interference, construct

[107] Isabelle R. Gunning (n42).

[108] Onsongo (n19).

[109] Sally Sheldon, *Beyond Control: Medical Power and Abortion Law* (Pluto Press 1997).

[110] Robin West, *'From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights'* [2008] 118(1) The Yale Law Journal 1394-1432.

autonomy as a negative right. She feels state action is merely restrained, rather than requiring meaningful reproductive freedom to be secured through material and social conditions. While this aligns with RJ's insistence that autonomy must be substantive, rather than formal, it also exposes a potential tension within RJ itself when autonomy is invoked without sufficient regard to harm and vulnerability. In the context of genital cutting, West's analysis cautions against legal frameworks that permit or prohibit practices on the basis of abstract autonomy alone, as such approaches risk the very injustices RJ seeks to challenge.

Nevertheless, recognising these limits does not necessitate a return to punitive or carceral legal models. As mentioned previously, scholars such as Obiora caution against criminalisation, emphasising the risk of driving practices underground and thus increasing the potential for harm.[111] RJ continues to offer valuable guidance for law reform by cautioning against over-reliance on criminal law and highlighting the harms produced by stigma, control, and racialised enforcement.

Ultimately, the limits of RJ do not undermine its relevance but instead clarify its scope. Although it cannot justify inaction where serious harm is evident, RJ requires the law to confront structural inequality and colonial legacies within the regulation of GCP. A reformed legal approach grounded in consistent principles of bodily integrity, such as that proposed by Dustin and Earp,[112] would align with important aspects of the RJ framework. By prohibiting non-therapeutic genital modification of children (both male and female) while permitting informed, voluntary choices by consenting adults, this model would avoid the gendered and racialised double standards that currently exist in the legal responses to GCP. However, RJ requires attention to the structural conditions under which choices are made, and reform must go further than consent alone. By acknowledging this, RJ supports a cautious, non-punitive legal framework that protects children from irreversible harm while resisting both cultural stigmatisation and coercive state control over marginalised communities.

[111] Obiora (n41).

[112] Earp (n10) 19-20.

Conclusion

This essay has argued that the RJ framework requires the law to confront the gender disparities, structural racism, and colonial legacies embedded in the regulation of GCP. However, this requirement is neither simplistic nor absolute. RJ is valuable in exposing how current legal approaches produce hierarchies of bodily legitimacy: female bodies in particular are subject to unfair control, criminalisation, scrutiny and moral judgement, while comparable male practices are legitimised. These inconsistencies cannot be justified solely by way of harm-prevention, but instead reflect deeper assumptions about gender, sexuality, and autonomy.

However, it is made clear that there are limitations to RJ. It does not mandate the blanket decriminalisation of these practices, especially where they involve serious harm to women and children. Rather, it demands that harm prevention be pursued without replicating racialised stigma or colonial governance.

Ultimately, RJ calls for a legal framework that is principled, consistent, and reflexive. One that protects bodily integrity while recognising how autonomy is shaped by power, history, and inequality. In doing so, RJ does not weaken the law's response to genital cutting; it demands that it become more just.

Algorithmic Discrimination: How algorithms expose the limits of the ICCPR's anti-discrimination framework

Joseph Higgitt

Abstract

In recent decades, algorithms have become an unavoidable part of society. They are used to filter job applications, target police resources and identify terror threats. Whilst they undoubtedly carry great benefit, algorithms also raise serious human rights concerns, as improper use can lead to certain groups being disproportionately overlooked by employers, or minorities being over-policed by anti-terror authorities and police.

The International Covenant on Civil and Political Rights (ICCPR) nominally prohibits discrimination. However, algorithmic discrimination continues to challenge the ICCPR's anti-discrimination rules as, unlike other forms of discrimination, it often lacks the 'recognisability' essential to engaging ICCPR rights. This essay argues that the nature and use of algorithms give rise to three types of 'opacity' that make their decision-making process incomprehensible to most people, meaning that any potentially discriminatory decisions they make are unrecognisable and thus difficult to contest and rectify. This essay concludes by suggesting that a procedural 'right to explanation' that operationalises existing ICCPR rights may be necessary to prevent algorithmic discrimination.

Introduction

The emergence of new technologies has exposed the limits of the ICCPR and other similar rights frameworks.[113] State and private actors increasingly use algorithms in 'high stakes' situations, such as policing and recruitment, where outcomes have been proven to be discriminatory.[114] Although the

[113] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ('ICCPR').
[114] Cynthia Rudin, 'Stop Explaining Black Box Machine Learning Models for High Stakes Decisions and Use Interpretable Models Instead' (2019) 1 Nature Machine Intelligence 206, 206.

ICCPR clearly prohibits discrimination, it still struggles to address algorithmic discrimination. This is because it is difficult to recognise algorithmic discrimination due to how incomprehensible algorithms are to the average person. This article will explore three ways in which 'algorithmic opacity' can manifest; namely incidental, deliberate and emergent opacity.

This 'algorithmic opacity' poses a problem for the ICCPR, as recognising that discrimination has occurred is necessary for initiating anti-discrimination procedures and holding relevant parties to account. As such, a procedural 'right to explanation,' that operationalises existing non-discrimination frameworks, is needed.

Discrimination Within Algorithms

Algorithmic decision-making has become ever more common in the modern world, including in 'high stakes' situations, where errors can cause tangible affects to individuals, such as whether a candidate receives an employment offer or whether a prisoner is offered parole. Algorithms often replicate human discriminatory behaviour due to the use of biased data. For example, Amazon used a machine-learning algorithm to review job applications by observing the patterns of successful resumes from previous years.[115] However, the company had a history of disproportionately selecting male candidates, so the algorithm learned to deprioritise resumes that contained the word 'women' (e.g. 'women's college' or 'women's chess club captain'), leading to fewer women being selected for clearly discriminatory reasons.[116]

Similar problems occur within algorithms that governments use. Court systems in the U.S. use the COMPAS program (Correctional Offender Management Profiling for Alternative Sanctions) to determine whether a criminal is likely to reoffend should they be granted parole.[117] The program

[115] Jeffrey Dastin, 'Amazon scraps secret AI recruiting tool that showed bias against women' (*Reuters*, 11 October 2018) <https://www.reuters.com/article/world/insight-amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK0AG/> accessed 28 June 2026.
[116] Dastin (n 3).
[117] Rudin (n 2), 209.

considers factors including the length of the offender's sentence.[118] A ProPublica investigation found that the program was far more likely to produce false positives for black offenders, leading to their parole being denied more often.[119] Even if COMPAS was not directly using race to determine recidivism, variables such as sentence length act as a proxy for race, since black offenders tend to receive harsher sentences than white offenders.[120] The ProPublica investigation exposed how algorithms can produce discriminatory results, making them a concern for human rights frameworks; a point supported by the current UN Special Rapporteur on racial discrimination, who has reported that AI algorithms have a 'huge capacity… to perpetuate and deepen systemic racial discrimination.'[121]

The Right to Non-Discrimination

Article 26 of the ICCPR provides individuals with a right to non-discrimination based on enumerated characteristics and places an obligation on states to guarantee 'effective protection' against discrimination.[122] This right is autonomous, meaning it does not require the invocation of any other ICCPR rights to take effect. The United Nations Human Rights Council (UNHRC) specifies that discrimination includes acts with either the purpose (direct discrimination) or effect (indirect discrimination) of impairing the rights of individuals based on the enumerated characteristics.[123] Article 2(3) of the ICCPR requires states to provide 'effective remedy' in instances where violations of ICCPR rights occur and to properly enforce those remedies.[124]

Articles 2(3) and 26 mandate that states have both a negative and positive duty to prevent and remedy discrimination, which includes discrimination committed by private actors. The UNHRC accepts this

[118] Rudin (n 2), 209.
[119] Jeff Larson and others, 'How We Analyzed the COMPAS Recidivism Algorithm' (*ProPublica*, 23 May 2016) <https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm> accessed 28 June 2026.
[120] Stephen Demuth and Darrell Steffensmeier, 'Ethnicity Effects on Sentence Outcomes in Large Urban Courts: Comparisons among White, Black, and Hispanic Defendants' (2004) 85 Social Science Quarterly 994, 1008.
[121] United Nations General Assembly (UNGA), 'Contemporary forms of racism, racial discrimination, xenophobia and related intolerance' (3 June 2024) UN Doc A/HRC/56/68, para 6.
[122] ICCPR, Article 26.
[123] UN Human Rights Committee (UNHRC), 'CCPR General Comment No. 18: Non-discrimination' (10 November 1989) UN Doc A/45/40 (Annex VI), paras 6-7.
[124] ICCPR, Article 2(3).

understanding, explicitly interpreting Article 26 to include a duty on states to prevent 'acts committed by private persons or entities that would impair the enjoyment of Covenant rights,' including 'in fields affecting basic aspects of ordinary life such as work or housing.'[125] This framework prohibits most discrimination, including the algorithmic discrimination previously discussed, which has the effect of discrimination irrespective of intent.

Assumption of Recognisability

Although Article 26 of the ICCPR imposes these clear positive obligations on states to prevent discrimination, an act of discrimination must first be recognised as such for states to engage the anti-discrimination procedures mandated by Article 26. This is what this paper shall refer to as an 'assumption of recognisability.' It often falls on the victims of discrimination to recognise that they have been discriminated against, and it is usually their responsibility to initiate the proceedings that could lead to the issue being resolved. This is implicit within the ICCPR's Optional Protocol, which refers to the 'individual' who is complaining to the UN Human Rights Committee about violations of their ICCPR rights.[126] Alternatively, states may proactively initiate anti-discrimination procedures as part of their duty to provide 'effective protection,' but this still relies on the state recognising the potential for discrimination to take remedial action. Simply, if no one recognises that discrimination has occurred, then it cannot be combatted, meaning individuals become incapable of accessing the effective remedies prescribed by Article 2(3).

How Algorithmic Opacity Impedes Rights

Algorithmic discrimination is often not recognisable due to the opacity of algorithmic decision-making. This opacity can mainly be categorised into incidental opacity, deliberate opacity and emergent opacity. Though it is noted that this paper is not the first to categorise opacity, and there are other

[125] UNHRC, 'General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant' (26 May 2004) CCPR/C/21/Rev.1/Add.13, para 8.
[126] Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ('OPICCPR').

categories of opacity that this paper does not cover.[127] However, this author has selected these three categories of opacity because they are the most relevant to how algorithms can interfere with rights frameworks like the ICCPR.

The following sections will analyse how these types of opacity create an uneven epistemic playing field between those who employ algorithms and those who are subject to its decisions, placing victims at a disadvantage in recognising algorithmic discrimination. This epistemic gap creates a barrier between individuals and the effective remedies demanded by ICCPR Articles 2(3) and 26, suggesting that algorithmic discrimination is not effectively covered by the ICCPR.

Incidental Opacity

Firstly, this article will explore 'incidental opacity,' which is caused by an individual's technical and statistical illiteracy, leading to their ability to recognise algorithmic discrimination being impeded. To understand algorithmic decision-making and recognise discrimination, one must have at least a basic level of such literacy. Recognising discrimination does not require an individual to fully comprehend algorithms and statistics, but some understanding does allow them to identify whether harm created by algorithms is systematic and how algorithms base that harm on protected characteristics.

Some basic statistical literacy is essential in understanding how capable algorithms are in using data, on top of the general limits of data in making equitable decisions.[128] Some technical literacy is also crucial; algorithms are built out of code and easy explanations of how a particular algorithm functions are often not available, especially for machine-learning algorithms which are more complex than

[127] Jenna Burrell, 'How the Machine "Thinks": Understanding Opacity in Machine Learning Algorithms' (2016) 3 Big Data & Society 1, 1.

[128] Fernando Marmolejo-Ramos and others, 'Factors Influencing Trust in Algorithmic Decision-Making: An Indirect Scenario-Based Experiment' (2025) 7 Frontiers in Artificial Intelligence 1, 4-5.

traditional algorithms.[129] At present, the design of algorithms is a 'highly specialised skill' that is beyond the reach of the layperson.[130] The general population's statistical literacy is also limited.[131]

Furthermore, statistical and technical literacy correlate strongly with social factors, such as gender, age and education level.[132] This is concerning as those less likely to be statistically and technically literate, such as women and the non-university educated (who have significantly higher rates of poverty), are more vulnerable to discrimination and have fewer resources to combat it.[133]

This poses a problem for a state's ICCPR obligations as they are required to take positive action to ensure individuals have 'accessible and effective remedies' to rights violations.[134] The technical and statistical knowledge barrier to recognising algorithmic discrimination presents a clear example of remedies being inaccessible. As such, states must work to resolve this. For example, states could provide education that allows individuals to understand algorithms. However, this is unfeasible for an immediate solution and is far more resource-intensive than the issue requires (though Article 13(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) does impose a duty on states to provide education that strengthens 'respect for human rights,' which may apply in this case).[135] Alternatively, states could require explanations for algorithmic decisions in a way that is intelligible to most people, including those with limited technical and statistical knowledge. This constitutes part of the 'right to explanation' that I will explore later.

Deliberate Opacity

[129] Burrell (n 15), 4.
[130] Burrell (n 15), 4.
[131] Office for Statistics Regulation, 'Statistical Literacy: Research' (Office for Statistics Regulation, 9 February 2023) <https://osr.statisticsauthority.gov.uk/publication/statistical-literacy-research/pages/4/> accessed 9 January 2026, para 3.
[132] Office for Statistical Regulation (n 19), para 3; Maximillian Eder and Helle Sjøvaag, 'Artificial Intelligence and the Dawn of an Algorithmic Divide' (2024) 9 Frontiers in Communication 1, 7.
[133] Joseph Rowntree Foundation, 'UK Poverty 2025: The essential guide to understanding poverty in the UK' (Joseph Rowntree Foundation 2025) 140.
[134] UNHRC, 'General Comment No.31' (n 13), para 8.
[135] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 ('ICESCR'), para 13(1).

Secondly, 'deliberate opacity,' is caused by the purposeful obfuscation of how an algorithm functions by those who employ them. Both states and corporations value secrecy in their algorithms. There are valid reasons why this should be the case; we would not want terrorists to be able to evade detection because they know what factors national security are looking for, and corporations may have a legitimate desire to shield trade secrets from competitors to maintain a market advantage.[136] The proprietary nature of algorithms, such as COMPAS, has already been used as a defence for protecting their code in courts, to prevent competitors from replicating their algorithm.[137] However, there are also less palatable reasons for algorithmic secrecy; states and corporations may wish to use algorithms to intrusively collect data to predict behaviour.

In either case, such secrecy makes it difficult for individuals to recognise when discrimination is taking place and when they should engage their ICCPR rights. Take the terrorism example – whilst it is true that it would be undesirable for a terrorist to know what factors a 'terrorist-detection algorithm' is using, it is also undesirable for the public not to know what those factors are. How can the public be sure that the algorithm is not using race as a factor, leading to counterterrorist agencies policing and intruding upon the lives of racial minorities? If this were happening, it would certainly constitute an Article 26 violation, as ICCPR Article 4(1) prohibits discriminatory measures. States cannot use 'national security' to justify these measures – even in national emergencies. Yet it is impossible to contest the algorithm when 'national secrets' protect it; this is a violation of the 'effective remedies' Article 2(3) guarantees.

Corporate algorithmic opacity can also take a different shape, related to the emergent opacity mentioned earlier, but in a deliberate form. Rudin explains that corporations sometimes purposefully choose the algorithmic opacity seen in black box machine learning (ML) models over more transparent alternatives. This is because there is currently a greater profit motive in complex black box models,

[136] Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (Harvard University Press 2015), 2-4
[137] *State v Loomis*, 2016 WI 68, 371 Wis. 2d 235, 881 N.W.2d 749, [66].

which are proprietary, than in simple transparent algorithms.[138] Multiple jurisdictions across the U.S. use COMPAS and pay hundreds of thousands in yearly licencing fees; the State of Michigan alone paid over $2 million from 2016-2019.[139] Despite these large fees, COMPAS performs equally to a free, open-source code (CORELS) that only considers four variables for recidivism.[140] According to a 2018 study, COMPAS performs similarly to humans with no experience in criminal justice, and has comparable levels of discriminatory outcomes.[141] However, these two alternatives are not nearly as profitable for corporations, so they instead push for expensive black box models.

Deliberate opacity raises clear ICCPR concerns about a state's obligation to provide an 'effective remedy' for discrimination and to regulate the behaviour of private actors. It also raises concerns about existing power structures; secrecy perpetuates inequality in who can access their rights by allowing powerful actors, such as states and corporations, to relinquish their responsibility to remedy discrimination. This undermines the purpose of ICCPR rights entirely, whose purpose is to guarantee protections from these powerful actors.

Emergent Opacity

Thirdly, there is 'emergent opacity.' This is opacity caused by the innate incomprehensibility of algorithms built on machine learning (ML) models. Such algorithms have become 'black boxes' of information, with some having 'internal states… of millions of interdependent values,' becoming impossible for any human to understand why it has made any decision.[142] This contributes to the non-recognisability of algorithmic discrimination, as there is no way to know if a machine learning algorithm has made a decision based on discriminatory factors.

[138] Rudin (n 2), 209-210.
[139] Michigan Department of Technology, Management and Budget, Contract 7700014 (11 September 2024), 55, 127.
[140] Rudin (n 2), 209.
[141] Julia Dressel and Hany Farid, 'The Accuracy, Fairness, and Limits of Predicting Recidivism' (2018) 4 Science Advances 1, 3.
[142] Brent Mittelstadt, Chris Russell and Sandra Wachter, 'Explaining Explanations in AI' [2019] Proceedings of the Conference on Fairness, Accountability, and Transparency 279.

For example, take the candidate-selection algorithm from earlier; a traditional rule-based algorithm (where a designer selects variables) would be easy to track how it came to any decision by looking at the variables it has used. Thus, if the algorithm had used any directly (such as gender) or indirectly (such as postcode) discriminatory factors, it would be easy to recognise, contest and remedy. But if it were an ML algorithm, a human could not trace a decision back to any individual causal factors, only complex interactions between internal representations of variables that the algorithm derives from its training data. This makes it difficult to determine if a decision was discriminatory.

There are indirect methods of interpreting the decision-making process algorithms built on ML models, but these are flawed. 'Explainable' ML models apply a second model to the original 'black box,' replicating most of its behaviour but in a human-intelligible format.[143] There are several criticisms leviable against explainable models, particularly the unfaithful replication of data.

Explainable models cannot entirely replicate the data of the original black box (or the original model would be redundant) and so interpretation errors are possible.[144] Even low inaccuracy rates are unacceptable for use in 'high-stake' situations – even small errors could, for example, lead to bail/parole being denied to a protected class of people.[145] The ProPublica analysis of COMPAS shows how explainable models can fail. ProPublica used an explainable model on COMPAS to determine what factors it uses to produce results, determining race is an important factor.[146] However, it is possible that ProPublica's model unfaithfully replicated COMPAS' data, deriving race from proxy variables that correlate.[147]

It is not that any individual accusation of discrimination produced by an explainable model is or is not true, as explainability errors do not negate the possibility of discrimination. Instead, there is no way of verifying that potential truth in a way that satisfies the threshold for reliability required of high-stake,

[143] Rudin (n 2), 206-207.
[144] Rudin (n 2), 207-208.
[145] Rudin (n 2), 206, 207.
[146] Larson (n 7).
[147] Rudin (n 2), 208.

rights-sensitive situations. Inherently interpretable models are mostly preferable to explainable models, and until a change to such models occurs, emergent opacity will remain a problem for discrimination recognisability.[148]

Emergent opacity puts strain on ICCPR rights in a way that is unique to this type of opacity. Claims of Article 26 breaches rely on proving that differential treatment is based on prohibited grounds such as protected characteristics, but emergent opacity obscures the causal chain back to such grounds, and even explainable models cannot reliably eliminate this obscurity. Any claims of discrimination by ML algorithms then struggle to meet the standard legal burdens of proof. This differs from the other two forms of opacity, in which the causal chain between discriminatory factors and outcomes is clearly identifiable, at least to the operators of the algorithms, or someone with sufficient technical wherewithal.

The limits of this technology's explainability do not absolve states of their Article 26 duties. A UN report on AI systems affirmed states' duty to combat algorithmic discrimination by improving access to remedies.[149] Since access to remedies cannot exist without discrimination being recognisable, states therefore also have a duty to make sure discrimination within ML algorithms is recognisable. This falls within the States' Article 2(3) positive obligations to provide effective remedies, including regulating private actors who use ML algorithms.[150] This may mean regulating algorithms used in high-stakes decisions to ensure they are transparent, or, if this proves unfeasible, ceasing their use until a transparent solution can be found.

A Right to Explanation

The ICCPR establishes both positive and negative obligations, as affirmed by the UNHRC; Article 2(3) requires states to take measures that give effect to their obligation to investigate allegations of rights

[148] Rudin (n 2), 211-214.
[149] UNGA, 'Human Rights and International Solidarity' (17 July 2024) UN Doc A/79/170, para 17.
[150] UNHRC, 'General Comment No. 31' (n 13), para 8.

violations.[151] This is the issue in algorithmic discrimination cases as the epistemic gap created by algorithmic opacity obfuscates when states should be engaging their obligation to investigate violations, rendering these obligations ineffective. However, the ICCPR currently lacks a framework that outlines what measures states should be taking to bridge the epistemic chasm. A right to explanation would rectify some of these problems. This right derives from the non-discrimination and effective remedies clauses of the ICCPR, and is not strictly a 'new right,' though the ICCPR does not currently explicitly outline it.

This section explores how a 'right to explanation,' as a positive obligation on state actors (grounded in ICCPR Article 2.3), could combat the issues presented by algorithmic discrimination. This 'right' would not be a standalone right, but auxiliary to the ICCPR's existing non-discrimination framework. It would not eliminate bias, but it would shift some of the burdens created by the epistemic gap inherent to algorithms away from individuals and towards state and private actors.

While several definitions exist, for the purpose of this paper, a 'right to explanation' is a procedural right requiring states to ensure those subject to algorithmic decision-making receive sufficiently intelligible information about how an algorithm reached a decision, to allow meaningful contestation and access to remedy in cases of Article 26 breaches. It is not a right to full transparency and will not provide access to source code or proprietary models as national security or market competition can provide legitimate grounds for states or corporations to want to keep their algorithms secret from the public. However, explanations must be as detailed as needed to satisfy legal thresholds for proof in discrimination cases. A right to explanation would make algorithmic decisions more intelligible to those who lack the technical and algorithmic literacy necessary to recognise cases of discrimination against them. It would also eliminate some arbitrary deliberate opacity of algorithms.

However, it would not eliminate all discriminatory outcomes – these are more often the result of biased data and the structural inequalities it contains; it would only lift the veil that often hides the

[151] UNHRC, 'General Comment No. 31' (n 13), para 15.

discrimination occurring, allowing remedial mechanisms to be engaged. Importantly for this paper, a right to explanation would not solve many of the issues with emergent opacity. A right to explanation requires states and corporations to provide intelligible reasons for why an algorithm has made a decision, but black box ML algorithms are incapable of producing such reasons; even well-designed explainable ML models are not fully reliable and lack methods of verifying their results, suggesting ML algorithms are not compatible with non-discrimination frameworks.

A full right to explanation also may not always be feasible, especially in information-sensitive domains, such as counterterrorism. In these instances, a right to explanation may need to be weighed proportionally – independent auditors for sensitive algorithms could be a satisfactory alternative when full explanation could be dangerous. A right to explanation does not fully solve the problems algorithms pose to existing rights frameworks, but it is necessary to restore the recognisability of discrimination in algorithms, which existing frameworks have thus far failed to do.

A right to explanation is not a substantive right; it is a procedural measure designed to support the effective enforcement of other procedural and substantive ICCPR rights, such as Article 2(3) and 26 respectively. In this sense, it is not a 'new' right to prevent discrimination, as no normative gap exists in the ICCPR that allows any sort of discrimination.

Conclusion

The purpose of this paper was to discover whether new technologies expose the limits of existing human rights frameworks, necessitating new rights. This paper used algorithms as an example of a technology that could expose the limits of rights frameworks, specifically the ICCPR's non-discrimination protections in Article 26 and its demand for effective remedies in Article 2(3). It concluded that algorithms do, in fact, expose the limits of the non-discrimination protections by undermining ICCPR's reliance on victims being able to recognise and contest discrimination. Furthermore, this paper found that a right to explanation would help to address some of the issues

presented by algorithms by operationalising pre-existing ICCPR obligations rather than creating new rights.

There is much ground this paper did not cover – other emerging technologies, such as mass surveillance and neurotechnology, similarly expose deficiencies in rights frameworks, suggesting that these frameworks must operationally adapt across a range of areas. Ultimately, this analysis suggests that focus should be on supplementing and clarifying existing obligations rather than creating a new generation of rights.

FIFA's Principle of Contractual Stability Re-Examined: An Analysis Through the Lens of FIFA v BZ (2024)

Aoife Bradley

Abstract

This dissertation examines the impact of FIFA's principle of contractual stability on player mobility and employment in professional football. The research centres on the landmark judgment of the Court of Justice of the European Union in *FIFA v BZ* (2024) which exposed the asymmetrical and punitive operation of Article 17 of FIFA's Regulations on the Status and Transfer of Players (RSTP). The Court held that the measures were incompatible with Article 45 of the Treaty on the Functioning of the European Union.

Through adopting a doctrinal and critical methodology, this dissertation analyses the emergence and operation of contractual stability within the RSTP. It demonstrates that the cumulative effect of these rules extends beyond legitimate contractual regulations and operate as a systematic restraint on labour mobility, that privileges club interests.

Existing scholarship defends contractual stability as necessary for the regularity of competitions. However, it remains focused on elite European football and consequently underplays both the asymmetrical burdens imposed on players and the intensified harm experienced in lower leagues and economically weaker football markets. This research addresses that gap by situating contractual stability within football's historical pattern of player control and the current global labour market. It draws on empirical evidence from FIFPro's Global Employment Report 2016 and examines the role of FIFA's private legal order in embedding and enforcing these effects.

The dissertation concludes that contractual stability requires reorientation towards reciprocity and transparency.

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Abbreviations

CAS	Court of Arbitration for Sport
CJEU	Court of Justice of the European Union
DRC	Dispute Resolution Chamber
EU	European Union
FIFA	*Fédération Internationale de Football Association*
FIFPro	*Fédération Internationale des Associations de Footballeurs Professionnels*
RSTP	Regulations on the Status and Transfer of Players
TFEU	Treaty on the Functioning of the European Union

Introduction

Professional football operates within a highly regulated employment market governed by a private transnational authority, the *Fédération Internationale de Football Association* (FIFA). FIFA regulates the international transfer system, which governs how players as employees move between employers, football clubs, worldwide.[152] Players, unlike standard workers, cannot freely move between employers by simply providing notice as they are bound by Chapter IV, "Maintenance of Contractual Stability" of FIFA's Regulations on the Status and Transfer of Players (RSTP).[153] FIFA present the principle of contractual stability as the cornerstone of this system, a neutral mechanism designed to ensure contractual certainty between players and clubs for the maintenance of team composition and the integrity of competitions.[154] For illustration, FIFA's Circular Letter 769 states that contractual stability "is of paramount importance in football, from the perspective of clubs, players and the public."[155]

This dissertation asks: How does FIFA's principle of contractual stability impact player mobility and their employment, through the lens of the Court of Justice of the European Union's (CJEU) ruling in *FIFA v BZ* (*Diarra*) (2024)?

The impacts of FIFA's contractual stability rules were exposed by the CJEU in *Diarra* (2024).[156] Following the premature termination of his contract, Lassana Diarra, a French footballer, was subjected

[152] Raffaele Poli and others, 'Football Mobilities: A Global Player Transfer Market' in Joseph Maguire, Katie Liston and Mark Falcous (eds) *Handbook on Sport and Migration* (Edward Elgar 2024) 22; FIFA, 'Global Transfer Report 2024' (FIFA, January 2025) 5.

[153] Fédération Internationale de Football Association (FIFA), 'Regulations on the Status and Transfer of Players' (FIFA 2022) (RSTP 2022).

[154] FIFA, 'Commentary on the Regulations on the Status and Transfer of Players' (FIFA 2023), 122 (FIFA RSTP Commentary); Paul A Czarnota, 'FIFA Transfer Rules and Unilateral Termination Without "Just Cause" 2(1) Berkeley Journal of Entertainment & Sports Law 1, 7.

[155] FIFA, 'Circular Letter No 769: Revised Regulations for the Status and Transfer of Players' (23 August 2001) 10 < https://digitalhub.fifa.com/m/52905820e6b2bd01/original/dml3hvtpgzmjkbn5hixd-pdf.pdf> accessed 10 October 2025.

[156] Case-650/22 *Fédération Internationale de Football Association (FIFA) v BZ* EU:C:2024:824 (*FIFA v BZ*).

to substantial financial liability and sanctions under the RSTP. Cumulatively, this excluded him from the labour market.[157] FIFA have consistently maintained that such consequences are inherent to contractual stability. However, the CJEU held that these rules are incompatible with Article 45 of the Treaty on the Functioning of the European Union (TFEU), which guarantees EU workers the right to free movement between Member States.

This dissertation uses *Diarra* as an analytical focal point to examine the operation of contractual stability within football's regulations. It demonstrates that the case exposes broader issues in FIFA's contractual stability framework, raising questions about whether contractual stability really operates reciprocally between contracting parties, or rather functions to systematically privilege club interests over labour mobility and player autonomy.

This research matters because the effects of contractual stability reflect a recurring historical pattern within football's governance, in which regulations disproportionately restrict player mobility and access to employment. Moreover, the impact of these rules extends beyond European Union (EU) law and elite European football. FIFA's rules apply uniformly across vastly unequal labour markets, meaning that the burden imposed by contractual stability is often felt most acutely by players in lower leagues and economically weaker jurisdictions.

This dissertation proceeds in four chapters. Chapter One situates contractual stability within the historical development of football's labour market. Chapter Two examines the entrenchment of contractual stability in the RSTP and the CJEU's intervention in *Diarra* (2024). Chapter Three demonstrates that FIFA's principle of contractual stability does not withstand critical scrutiny. Chapter Four explores the global implications of this model, with focus on FIFA's private legal order and the role of EU law in football.

[157] Subhrajit Chanda and Animesh A Bordoloi, 'Breaking Boundaries: The Diarra Case and Its Ripple Effects on FIFA Regulations and Player Transfers' (2024) 5(1) Journal of Sports Law, Policy and Governance 1.

Chapter 1: Contractual Stability Within the Historical Development of Football

FIFA's principle of contractual stability is neither a neutral nor a novel development. The principle reflects a modern reformulation of a historical pattern in which football's governance has restricted player mobility and their rights to protect club interests, with meaningful reform only occurring through external legal intervention.

1.1 Early Restrictions on Player Mobility

The origins of contractual stability can be traced to the earliest forms of football regulation, where mechanisms governing player movement were designed primarily to preserve club control rather than protect contractual relationships. Following the professionalisation of football in England in 1885, the Football Association and the Football League introduced the transfer-and-retain system to regulate player movement.[158] Under this system, clubs retained extensive control over player mobility by preserving a player's registration after the expiry of their contract. As a result, players were unable to register for another club unless their existing club agreed to release or transfer their registration, despite the absence of any continuing contractual obligations.[159]

The restrictive nature of this system was exposed in *Eastham v Newcastle United* (1963).[160] Following the expiration of his contract, Newcastle United retained Eastham's registration under the transfer-and-retain system.[161] Although Eastham was no longer contractually bound to Newcastle, the club's retention of his registration meant that he remained tied to them for registration purposes. Any club wishing to employ him as a professional footballer was required to negotiate a transfer and pay a fee to

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[158] David McArdle, *From Boot Money to Bosman: Football, Society and The Law* (Cavendish 2000) 18-21.

[159] Peter J Sloane, 'The Labour Market in Professional Football' (1969) 7(2) British Journal of Industrial Relations 181,184; Mark O'Neill, 'The History of the Football Transfer System' (*Sport and the Law: Mark's Musings,* 19 July 2024)< https://www.sportlawmusings.com/post/the-history-of-the-football-transfer-system>accessed 12 October 2025.

[160] *Eastham v Newcastle United Football Club* [1964] Ch 413.

[161] Michael P Furmston, 'Retain and Transfer System Offside' (1964) 27(2) The Modern Law Review 210, 211.

Newcastle, even though Eastham's contractual obligations had ended. As a result, he was effectively prevented from freely joining another club and securing alternative employment within professional football. Eastham therefore challenged the legality of the transfer-and-retain system before the English Chancery Division. This represented the first judicial intervention in which football's private regulations were subject to external legal scrutiny.

Wilberforce J. held that the retain system constituted an unreasonable restraint on trade.[162] In his reasoning, he explicitly recognised the asymmetry of power within the system, observing that it operated as an "employers' system" in which "employers were vastly more organised than employees."[163] This early judicial recognition highlights that restrictions on player mobility have been embedded within football's regulatory framework since the professionalisation of the game, serving club interests rather than neutrally governing the employment relationship between player and club. Further, *Eastham* marks the beginning of a recurring pattern in which reform within football's internal affairs only occurs when players invoke external legal fora to challenge the onerous rules governing player mobility.

The early transfer-and-retain system established the imbalance that persists in the modern RSTP where player mobility continues to be unduly restricted, albeit reframed under the rhetoric of contractual stability.[164] As football governance became internationalised through FIFA, these restrictions were entrenched within its regulatory framework and reconfigured to operate through contractual enforcement and sanctions for breach rather than registration control, but they continue to produce the same practical effect of limiting player mobility.

[162] ibid, 439.

[163] Ibid, 438.

[164] Siyabonga P Hadebe, 'Dismantling Lex Sportiva: How the Diarra Doctrine and a Class Action Are Affirming Footballers' Labour Rights' (Proceedings of the Rijeka Doctoral Conference, Faculty of Law, University of Rijeka, 2025) 3 (Conference Paper) < https://ssrn.com/abstract=5917002> accessed 2 January 2026.

1.2 The Establishment of FIFA

FIFA controls player movement globally through a hierarchical system.[165] At the apex, FIFA formulates binding regulations governing player registration, transfer and contractual relations.[166] Confederations, national associations and clubs must comply and implement these rules to partake in organised football.[167] Therefore, players, as structurally disadvantaged participants in the system, can only pursue a professional career in football if they submit to FIFA's monopoly. The multi-billion-dollar nature of the football industry has granted FIFA the power to exercise regulatory authority that significantly constrains players' freedom of movement.[168]

FIFA was originally established in 1904 to coordinate international football matches.[169] However, by 1953,[170] FIFA codified the first set of rules governing cross-border player movement, exporting the logic of restricting player movement internationally.[171] National systems varied but the unifying principle remained consistent: clubs retained disproportionate control over player mobility through post-contract compensatory fees.[172] The centralisation of regulatory autonomy in FIFA and its adverse implications on footballers as workers prompted intervention from EU law.

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[165] Richard Bush and Andrew Smith, 'Institutions' in Nick De Marco KC (eds) *Football and the Law* (Bloomsbury Professional 2022) 15-16.

[166] FIFA RSTP (n 2) art 1.

[167] FIFA, 'FIFA Statues: Regulations Governing the Application of the Statues; Standing Order of the Congress' (May 2024) art 11(2), art 22(3)(a) (FIFA Statute).

[168] Erdenedalai Batmunkh, 'Role of Football in International Business and Economy' (2021) 1 Management Science and Business Decisions 39.

[169] Tom Bason, Paul Salisbury and Simon Gerard, 'FIFA' in Simon Chadwick and others (eds) *Routledge Handbook of Football Business and Management* (Routledge 2018) 423.

[170] Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* EU:C:1995:293, [1995] ECR- I-04921, Opinion of AG Lenz, para 20.

[171] Michael P Furmston, 'Retain and Transfer System Offside' (1964) 27(2) The Modern Law Review 210, 211.

[172] Borja García, 'He was not Alone: Bosman in Context' in Antoine Duval and Ben Van Rompuy (eds) *The Legacy of Bosman: Revisiting the Relationship between EU Law and Sport* (Springer 2016) 16.

1.3 European Union Law in Football

FIFA's free reigning autonomy within football exists only within the limits imposed by European Union law. [173] European football occupies the economic and commercial epicentre of the global game with many of the world's most commercially significant clubs, leagues, players and competitions based in Europe. This creates a strong incentive for FIFA to tailor its rules to the realities of European football, as its regulations must remain capable of governing the part of the football industry in which much of the global game's financial activity is concentrated. Consequently, FIFA cannot realistically develop and enforce its rules without accounting for the EU legal framework in which European football operates.

Sports law, therefore, emerges from the interaction between internally generated sporting rules and their external juridification by EU internal market law.[174] Article 45 of the TFEU guarantees the free movement of workers within the Union and prohibits unjustified restrictions on mobility.[175] Importantly, professional footballers fall within the scope of this protection as workers, meaning that sporting regulations cannot be considered immune from EU law simply because they are created by private sporting bodies. Where football regulations restrict a player's ability to move between clubs, they may constitute an obstacle to free movement requiring legal justification. This establishes a tension between football's self-regulation and EU market principles.

The CJEU first confirmed in *Walrave and Koch* (1974) that professional sporting activity falls within the scope of EU law as it constitutes economic activity when performed for remuneration. Professional footballers are therefore 'workers' under Article 45 and are entitled to the protections against restrictions on their movement.[176] It was reinforced in *Meca-Medina* (2006), that "the mere fact that rules are

[173] Floris de Witte and Jan Zglinski, 'The Idea of Europe in Football' (2022) 1 European Law Open 286, 298.
[174] Richard Parrish, 'The Birth of European Union Sports Law' (2003) 2(2) Entertainment and Sports Law Journal 20, 21-23.
[175] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/49, art 45.

[176] ibid.

purely sporting in nature does not have the effect of removing them from the scope of the Treaty."[177] Therefore, FIFA cannot rely on the illusory phenomenon of the 'sporting exception' to resist the oversight of EU law; its rules must be proportional.[178]

The CJEU first exposed FIFA's restrictive transfer system in *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* (1995) (*Bosman*).[179] Bosman was prevented from pursuing employment with another club due to the imposition of post-contract transfer fees.[180] The CJEU held that this constituted an unjustifiable restriction on the free movement of workers, insofar as it impeded players' ability to take up employment in another Member State.[181]

The judgment, therefore, curtailed one manifestation of the control, but did not eliminate the underlying objective and thus prompted the reconfiguration of regulations to pursue stability through contractual means. This shift provides the backdrop for the emergence of the principle of contractual stability and the resulting barriers to Diarra's free movement in *FIFA v BZ* (2024).

1.4 Post-*Bosman* Landscape

Following *Bosman*, post-contract transfer fees could no longer be used to control player mobility.[182] This strengthened players' bargaining power by removing clubs' residual control over access to future employment and facilitated increased cross-border mobility. For clubs, however, the judgment destabilised the economic logic that underpinned player retention. Where previously value could be

[177] Case-519/04 *David Meca-Medina and Igor Majcen vs Commission* EU:C:2006:492 [2006] ECR I-6991 para 27.

[178] Robert Siekmann, 'The Specificity of Sport: Sporting Exceptions in EU Law' (2012) 49 Zb Radova 697, 724.

[179] Antoine Duval, 'The FIFA Regulations on the Status and Transfer of Players: Transnational Law-Making in the Shadow of Bosman' in Antoine Duval and Ben Van Rompuy (eds) *The Legacy of Bosman: Revisiting the Relationship between EU law and Sport* (Springer 2016) 85.

[180] Stephen Weatherill, *Principles and Practice in EU Sports Law* (OUP 2017) 142-143.

[181] Case-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* EU:C:1995:463 [1995] I-04921, para 114.

[182] Stephen Weatherill, *Principles and Practice in EU Sports Law* (n 29) 308-309.

secured through post-contract compensation, clubs now faced the risk of losing players without financial return.

In response, contractual practices across Europe adapted rapidly. Clubs relied on longer fixed-term contracts and incorporated unilateral extension clauses to prolong their control over players' registrations.[183] These adaptations functioned to preserve clubs' economic leverage notwithstanding the formal expansion of player mobility rights.

It is within this post-*Bosman* environment that FIFA formulated the principle of contractual stability. Although presented as a safeguard for contractual certainty and the stable organisation of competitions, the practical function of this doctrine was to restore some of the control that clubs had lost under *Bosman*. Contractual stability is therefore not a novel principle, but a continuation of the entrenched system of football's governing bodies (FGBs) restricting player mobility for the benefit of clubs, reshaped in response to external legal restraint.

This historical continuity provides the basis for Chapter 2's analysis of how contractual stability operates through the RSTP, demonstrating why the system exposed in *Diarra* is not an aberration, but the latest manifestation of FGBs restricting player mobility.

Chapter 2: Contractual Stability and FIFA v BZ

Building on the historical foundations, this chapter examines how FIFA's principle of contractual stability emerged and is operationalised through the RSTP.

2.1 History of the RSTP

Post-*Bosman*, clubs reactively urged FIFA to establish a uniform set of regulations that would restore their financial security in the transfer market.[184] FIFA and UEFA commenced negotiations with the

[183] ibid 309-310; Stefano Bastianon and Michele Colucci, 'The Evolution of FIFA Transfer Football Regulations: Challenges, Opportunites and Innovative Approaches in the Wake of the Diarra Judgment' (2024) 20 Rivista Di Diritto Ed Economia Dello Sport 1, 4.

[184] Espen Auberg, 'History of FIFA Transfer Regulations' (*EA Sports Law*, 17 March 2024)< https://www.easportslaw.com/news/history-of-fifa-transfer-regulations-rstp>accessed 28 October 2025.

European Commission to agree on rules that would comply with EU law and curb increased player mobility.[185] Negotiations culminated in a political agreement in 2001.[186] The resulting agreement did not represent an equal compromise so much as a retreat by the Commission and a settlement secured largely on FIFA's terms, illustrating another example of FIFA using its institutional power to resist external legal constraint.[187] The agreement permitted financial compensation and sporting sanctions to be employed where contracts were terminated without just cause.[188]

Importantly, the Commission's endorsement was non-binding; thus, even at this point, it was unclear whether these new rules genuinely complied with EU law.[189] The EU tolerated certain deterrent mechanisms in principle, but it did not endorse the disproportionate way FIFA subsequently implemented them. In particular, the agreement did not envisage the extension of joint and several liability for new clubs, nor the systematic refusal to issue International Transfer Certificates during contractual disputes. FIFA nevertheless incorporated both features into the RSTP, extending the reach of contractual stability beyond what had been politically accepted by the EU. [190]

Opposition from the *Fédération Internationale des Associations de Footballeurs Professionnels* (FIFPro) underscored the discontent with this proposed system. The global players' union criticised the agreement for restricting players' ability to terminate contracts and for treating footballers differently from other EU workers.[191] This highlights that FIFA's contractual stability rules have been viewed as harmful from the outset by those whom it affects most: players. FIFPro ultimately capitulated to the

[185] Richard Parrish, *Sports Law and Policy in the European Union* (MUP 2003) 138.

[186] European Commission, 'Outcomes of the Discussions Between the Commission and FIFA/ UEFA on FIFA Regulations on International Football Transfers' IP/01/314 (Press Release, 5 March 2001).

[187] Borja Garcia, 'The 2001 Informal Agreement on the International Transfer System' (2019) Sports Law and Policy Centre 1, 5.

[188] European Commission (n 35).

[189] Borja Garcia (n 36) 5-6.

[190] Ibid.

[191] Richard Parrish (n 34) 145,148; James G Irving, 'Red Card: The Battle over European Football's Transfer System' (2002) 56 U Miami L Rev 667, 715.

settlement.[192] This acquiescence reflects the limited influence of player representation within football which has allowed FIFA to shape rules that marginalise players' interests.

The resulting RSTP 2001 institutionalised contractual stability as the organising principle of the international transfer system.[193] Understanding how this principle is operationalised within the RSTP is essential before assessing its legal effects in *Diarra*.

2.2. Contractual Stability Under the RSTP

The rules governing contractual stability can be found in Chapter IV of FIFA's RSTP.[194] These provisions govern the termination of employment contracts, the consequences of unilateral termination and the conditions under which players may register with new clubs.

Article 13 establishes the foundational rule that a contract between a player and a club may only be terminated by mutual agreement. This reflects the broader contractual principle of *pacta sunt servanda*, whereby parties are generally bound by the agreements they have entered into. Articles 14 provides a narrow exception to this principle and provides that a contract may be terminated by one party if there is "just cause". This exception is not defined nor elaborated upon and thus most unilaterally terminated contracts will be considered to be "without just cause". Article 17 regulates the consequences of unilateral contract termination without just cause.

If a player terminates their contract and thus is in breach, Article 17(1) provides that they are liable to pay compensation, which is calculable with regard to, "the law of the country concerned, the specificity of the sport and any other objective criteria". This provision imposes financial consequences for premature termination. Article 17(2) provides that when that player seeks to join a new club, that is a

[192] European Commission. 'Commission Closes Investigations into FIFA Regulations on International Football Transfers' IP/02/824 (Press Release, 5 June 2002).

[193] Omar Onargo, 'Maintenance of Contractual Stability Between Professional Football Players and Clubs – The FIFA Regulations on the Status and Transfer of Players and the Relevant Case Law of the Dispute Resolution Chamber' in Michele Colucci (ed) *Contractual Stability and Termination in Football* (European Sports Law and Policy Bulletin (2) 2025) 36.

[194] FIFA RSTP (n 2).

new employer, the new club will be held jointly and severally liable for the payment of the compensation. In addition to this, Article 17(4) imposes a rebuttable presumption that the new club induced the player to breach their contract and as a result a sporting sanction is imposed on the club which prohibits them from registering new players for two registration periods (that is two transfer windows).

The regime goes further as the RSTP also governs the administrative conditions for players to transfer to clubs in different countries through the International Transfer Certificates (ITCs) system. The general rule is that pursuant to Article 9(1) and Article 8.1 of Annexe 3, a player can only register with a new association once their ITC has been issued by their former association. However, during a contractual dispute concerning unilateral termination, Article 8.2(7) of Annexe 3 prohibits the issuance of an ITC. Therefore, if a player terminates their contract the rules also prevent them from registering with a new club until the dispute is resolved.

Although framed as neutral provisions which apply to both a breaching player or club, the provisions are not equal. Specifically, Article 17(2), 17 (4) and the witholding of an ITC are only capable of sanctioning a player. Therefore, the cumulative effect of these provisions on players not only impedes their right to free movement but also disproportionately harms players in contrast to clubs, as exposed by the CJEU in *Diarra*.

2.3 FIFA *v BZ (Diarra)*: Exposure of Contractual Stability in Practice

The dispute in *FIFA v BZ* (2024) provides the starkest illustration of how contractual stability operates in practice to disproportionately harm player mobility.

In 2013, BZ (Diarra), a French professional player, entered a 4-year contract with Lokomotiv Moscow. One year into the contract, the club unilaterally terminated, alleging it was on the grounds of the player's

conduct.[195] The club's allegation of 'just cause' termination triggered the application of the RSTP rules and Diarra was automatically assumed to have terminated 'without just cause'. [196] In proceedings before FIFA's Dispute Resolution Chamber (DRC), Lokomotiv sought compensation under Article 17(1) RSTP, claiming that the termination was attributable to the player.[197] The DRC accepted this and ordered Diarra to pay €10.5 million in compensation. This was subsequently upheld by the Court of Arbitration for Sport (CAS).[198]

Following this, Diarra was precluded from accepting a conditional offer from Sporting Charleroi, owing to the club's reluctance to incur joint and several liability for the compensation and the administrative inability to register him without an ITC. [199] Cumulatively, the rules excluded him from the labour market for 15 months.[200]

Diarra subsequently initiated proceedings against FIFA and the Belgian FA before the Belgian courts seeking damages for loss of income, arguing that FIFA's rules violated EU law.[201] The Belgian Court of Appeal referred the question to the CJEU.[202]

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[195] Ornella Desirée Bellia, 'CAS 2015/A/ 4094, Lassana Diarra v FC Lokomotiv Moscow, Award of 27 May 2016' in Antoine Duval and Antonio Rigozzi (eds) *Yearbook of International Sports Arbitration 2016* (Springer 2018) 318-319; *FIFA v BZ* (n 5) para 22.

[196] Mark James, 'The Diarra Case' (2024) 24 The International Sports Law Journal 205.

[197] Ornella Desirée Bellia (n 43) 319.

[198] ibid 320.

[199] *FIFA v BZ* (n 5) para 25-26.

[200] Frank Hendrickx, 'Transfers in Professional Football and *Diarra* Case' (2025) 11 International Labour Rights Case Law 249, 250.

[201] Sînziana Ianc and Aurélien Hömann, 'Certain FIFA Transfer Rules Contrary to EU Law: Case C-650/22 *FIFA v BZ'* 16(5) Journal of European Competition Law & Practice 364; Jasper Wauters and Nikolas Hertel, 'ECJ Decision in the Diarra Case: Some of FIFA's Players Transfer Rules are Incompatible with EU Law' (*White & Case*, 10 October 2024)> https://www.whitecase.com/insight-alert/ecj-decision-diarra-case-some-fifas-players-transfer-rules-are-incompatible-eu-law< accessed 10 November 2025.

[202] Treaty on the Functioning of the European Union (n 23) art 267.

2.4 The CJEU's Rejection of Contractual Stability

The Court approached the case in three stages: it first identified whether the rules amounted to a restriction on free movement under Article 45 TFEU, then examined FIFA's claimed justifications, and finally assessed whether the measures were proportionate to the objective of ensuring the regularity of competitions.

(i) Restriction on Free Movement

The CJEU first held that the combined operations of the RSTP articles amounted to a restriction on the free movement of workers under Article 45 TFEU.[203] The rules were found to deter players from terminating contracts and to dissuade prospective clubs from employing them, thereby directly impeding players' ability to access employment in another Member State.[204]

(ii) FIFA's Claimed Legitimate Objectives

Having established a restriction, the Court examined FIFA's justifications. FIFA relied on three purported legitimate objectives: (i) maintaining contractual stability, (ii) ensuring the regularity of competitions, and (iii) remarkably, protecting players.[205]

The Court accepted, in principle, that sporting bodies may pursue objectives related to the organisation and regularity of competitions, consistent with its reasoning in *Superleague* (2023).[206]

However, it rejected FIFA's attempt to elevate contractual stability into an autonomous justification capable of legitimising restrictions on player mobility.[207] Fundamentally, the Court reframed contractual

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[203] *FIFA v BZ* (n 5) para 94; Case-680/21 *UL and SA Royal Antwerp Football Club v Union royale belge des sociétés de football association ASBL* EU:C:2023:1010.
[204] ibid paras 91-93.

[205] ibid para 98.

[206] ibid 100-101; Case-333/21 *European Superleague Company, SL v Fédération internationale de football association (FIFA) and Union of European Football Associations (UEFA*) EU:C:2023:1011, para 143.

[207] ibid para 102.

stability as a subsidiary consideration that may only operate insofar as it genuinely serves stable team composition for competitions. [208]

The Court further dismissed FIFA's attempt to justify these rules as necessary to protect players. It blatantly observed that player protection is not within FIFA's objectives and that the rules, in effect, do not serve that purpose. [209]

(iii) Proportionality and the Court's Rejection of the Rules

The Court then assessed whether the contested rules were proportionate to the accepted objective of ensuring the regularity of competitions, concluding they were not and some "went far beyond what was necessary".[210]

It scrutinised the compensation model under Article 17(1) for its reliance on indeterminate criteria and the resulting excessive financial liability, recognising the intent to redress clubs' financial interests to the detriment of players.[211]

Secondly, Article 17(2) was criticised for imposing automatic joint and several liability on new clubs without any assessment of their actual conduct, undermining proportionality and legal certainty.[212]

Thirdy, Article 17(4) was held to be manifestly disproportionate due to its automatic presumption of inducement and inflexible sporting sanctions, imposed without regard for the circumstances of each case.[213]

[208] Ibid para 102.

[209] Ibid Para 99.

[210] ibid para 104

[211] ibid paras 105-107

[212] ibid para 108.

[213] ibid paras109-110

Finally, Article 8.2(7) of Annex 3 was found to "manifestly infringe on the principle of proportionality" because the non-issuance of an ITC operates as an absolute barrier to employment, irrespective of fault or context.[214]

2.5 Analysis

The Court also demonstrated a sympathetic approach towards players. It acknowledged the vulnerability of professional footballers, emphasising the short duration of their careers and the potentially severe consequences of exclusion from the market.[215] In doing so, it employed notably emphatic terminology, such as "significant", "potentially very high" and "major".[216]

The Court's analysis therefore exposed fundamental tensions within FIFA's contractual stability model, which although presented as a neutral mechanism, operates in ways that detrimentally affects player mobility. The CJEU was confined to assessing the compatibility of the RSTP with EU law, but its reasoning reveals broader issues and effects of contractual stability that warrant further critical examination. These issues are addressed in Chapter 3.

Chapter 3: FIFA's Objective Does Not Stand Up to Scrutiny

Building on the CJEU's judicial critique in *Diarra,* this chapter examines FIFA's reliance on contractual stability as a justification for restricting player mobility. It demonstrates that contractual stability is conceptually indeterminate, asymmetrically applied and incapable of operating in a proportionate or reciprocal manner, producing effects that impede players' mobility and access to employment.

3.1 The Indeterminacy of Contractual Stability

Despite FIFA's repeated reliance on contractual stability, neither the RSTP nor its commentary provide any definition of the concept. Its contents, scope and limits are entirely unspecified. As a result,

[214] ibid para 112

[215] ibid para 104

[216] ibid.

contractual stability cannot operate as a legal standard capable of constraining FIFA's regulatory discretion or guiding the interpretation of the rules by the DRC or CAS. This has enabled FIFA, for over two decades, to justify far-reaching restrictions on players by reference to an undefined principle, undermining fundamental requirements of legal certainty and transparency, that are expected of a body exercising regulatory authority over employment relations.[217]

I purport that, in the context of employment regulation and in the absence of any authoritative definition, contractual stability can only coherently be understood as a reciprocal relationship between employer and employee, in which both parties enjoy equal certainty as to their rights and consequences of lawful termination.[218] Crucially, stability cannot be equated with contractual rigidity. [219] A system that operates asymmetrically by effectively trapping one party does not promote true stability as it undermines freedom of contract, a foundational principle of contract law.[220]

The analysis that follows demonstrates that, FIFA's rules do not uphold contractual stability as a reciprocal principle but instead deploy it to prioritise club interests while disproportionately affecting player mobility.

3.2 An Asymmetrical System

In principle, post-*Bosman,* players can move freely when their contract expires. However, in practice, many players never reach that point. Players' careers are inherently short, averaging less than 20 years,[221] with most players retiring in their early thirties.[222] As contracts may last up to 5 years,[223]

[217] Sahiba Gill and others, 'Whose Game? FIFA, Corruption and the Challenge of Global Governance' (2019) 30(3) The European Journal of International Law 1041, 1045.
[218] Hanoch Dagan and Michael Heller, 'Freedom of Contracts' (2013) Columbia Law and Economics Working Paper No. 458, 18 <https://ssrn.com/abstract=2325254> accessed 12 November 2025.
[219] Onargo (n 41) 33.

[220] Larry A DiMatteo, *Principles of Contract Law and Theor*y (Edward Elgar 2023) 58.

[221] António S Ribeiro and Francisco Lima, 'Football Players' Career and Wage Profiles' (2019) 51 Applied Economics 76, 81.

[222] No Ezequiel Rey and others, 'No Sport for Old Players: A Longitudinal Study of Aging Effects on Match Performance' (2022) 25 Journal of Science and Medicine in Sport 535.

[223] FIFA RSTP (n 2) art 18(2).

players are therefore bound to their employer for a significant portion of their career. During this period, clubs also retain a structural advantage and can transfer the player to secure a fee before the contract expires or rely on unilateral extension options. Players, already have little control over their mobility and the contractual stability rules only intensify this.[224]

FIFA's contractual stability rules operate within this in an asymmetrical manner, imposing greater burdens on players in temporal effect and severity of consequences. Clubs face limited deterrence and minimal impacts when they terminate contracts unilaterally.[225] Players, however, are subject to the punitive effects of contractual stability at all stages: they constrain their autonomy during the contract operating as a form of entrapment and impose disproportionate consequences following termination.[226]

This asymmetry is reinforced in practice. When clubs are subject to the effects of contractual stability rules the impacts are negligible. For example, in 2010, Chelsea FC were sanctioned under Article 17(2) and (4) RSTP for the presumed inducement of Gaël Kakuta.[227] In reality, the club avoided any real consequence: the sanction was overturned by the CAS and the compensation payment was resolved through a negotiated settlement.[228] By contrast, when players are subject to the rules, the rules impose substantial financial liability that can be personally ruinous and carry sanctions capable of ending

[224] FIFPRO, 'The Lassana Diarra Judgement Explained: What Does It Mean for Footballers?' (*FIFPRO*, 22 May 2025) < https://www.fifpro.org/en/articles/2025/05/the-lassana-diarra-judgement-explained-what-does-it-mean-for-footballers> accessed 28 October 2025.

[225] Wil van Megen, 'Contractual Stability from a Player's Perspective' in Michele Colucci (ed) *Contractual Stability and Termination in Football* (European Sports Law and Policy Bulletin (2) 2025) 118.

[226] Houben Robby, 'FIFA Transfer System Rules in Front of the Court' (*Verfassungsblog.de*, 18 March 2024) 3 > https://verfassungsblog.de/transfer-system-rules/< accessed 1 January 2026.

[227] Jamie Horner, 'Gael Kakuta, Chelsea Football Club, the Transfer Embargo and Implications' (*LawInSport)* >https://www.lawinsport.com/component/content/article?id=92:gael-kakuta-chelsea-football-club-the-transfer-embargo-and-the-implications&catid=21 <accessed 2 December 2025; Owen Gibson, 'Chelsea Banned by FIFA From Signing Players Till 2011 Over Gaël Kakuta' (*The Guardian*, 3 September 2009) > https://www.theguardian.com/football/2009/sep/03/chelsea-fifa-transfer-ban-gael-kakuta< accessed 3 December 2025.

[228] Owen Gibson, 'Chelsea Transfer Ban Lifted by Court of Arbitration for Sport' (*The Guardian*, 4 February 2010) >https://www.theguardian.com/football/2010/feb/04/chelsea-transfer-ban-lifted-gael-kakuta< accessed 3 December 2025.

careers. *Diarra* makes these effects visible, but most players remain invisible, lacking the financial, legal and reputational resources required to challenge FIFA's rules.[229] Empirical data reinforces this imbalance as approximately 95% of employment-related disputes before FIFA concern breaches by clubs.[230]

This undermines FIFA's claim that contractual stability operates to protect both clubs and players.

3.2.1. Asymmetry in Termination Standards

The narrow exception that permits termination without consequence under Article 14 does not operate reciprocally between clubs and players. FIFA provides no definition of 'just cause' thus the threshold is determined on a discretionary analysis by FIFA's own arbitrating bodies.[231] This indeterminacy generates legal uncertainty for players and deters termination even in untenable employment relationships, given the risk that an unsuccessful claim will trigger the severe consequences attached to termination without just cause under Article 17.

By contrast, clubs benefit from the flexibility of an undefined standard. This is illustrated by *Diarra*. Lokomotiv relied on ordinary disciplinary allegations such as Diarra's absence from training sessions and a team dinner to establish 'just cause'. Diarra adduced substantial counterevidence indicating a mutual intention to facilitate his transfer, supported by his exclusion from pre-season training in Spain. He also produced medical evidence from two doctors confirming depression, claimed allegations of coercive medical oversight and evidence of the club's failure to pay his wages.[232] Notwithstanding this, the DRC and the CAS both upheld that Lokomotiv had just cause.

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[229] Chuenchanok Siriwat, 'Breaking the Contract: Exploring the Fallout of Unilateral Termination in Professional Football – Insights from FIFA Dispute resolution Chamber Cases involving Thai League Clubs' (2024) 18 Asian Sport Management Review 85, 89.

[230] FIFPRO (n 72).

[231] FIFA RSTP Commentary (n 3) 128-129.

[232] Ornella Desirée Bellia (n 43) 319, 324.

This showcases that clubs face a comparatively lower threshold for establishing just cause, while players must overcome an ambiguous evidentiary standard to rebut the claim.

Moreover, the structure of Article 14 produces an inversion of responsibility: once a club successfully invokes just cause, the player is exposed to the punitive consequences of Article 17 despite not having initiated the termination. [233] Therefore, Article 14 fails to account for the individual circumstances of the employment relationship and operates to transfer the risk of termination almost entirely onto the player.

3.3 Contractual Stability as a Barrier to Player Mobility and Employment

3.3.1 Compensation Criteria

FIFA and CAS consistently maintain that compensation under Article 17(1) is necessary to deter premature termination.[234] At an abstract level, the imposition of financial consequences for breach is a familiar feature of contract law and, in principle, promotes compliance.[235] However, the method for calculating compensation is incompatible with this logic. First, it applies to clubs and players in materially different ways, undermining the reciprocity required for genuine contractual stability.[236] Second, its effects extend beyond deterrence and actively suppress players' rights to free movement and access to employment.

When clubs unilaterally terminate, the amount owed is limited to the residual value of the contract, a quantifiable amount that can be anticipated and managed in advance.[237] This significantly weakens any deterrent effect and means that clubs effectively retain freedom to choose to terminate.[238]

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[233] FIFA RSTP Commentary (n 3) 128.

[234] CAS 2008/A/ 1519 *FC Shakhtar Donetsk v. Matuzalem Francelino da Silva & Real Zaragoza SAD & FIFA* (19 May 2009) para 34 (CAS 2008/A/1519 Matuzalem).

[235] R Samantha Cotton, 'Remedies for Breach of Contract' [1999] Practical Law UK Articles 1.

[236] Dachi Peradze, 'Critique of Player Inducement Liability in the FIFA Regulatory Framework' (Master's Thesis, New Vision University 2025) 31 < https://ssrn.com/abstract=5923964>accessed 8 January 2026.

[237] Stefano Bastianon and Michele Colucci (n 32) 27.

[238] Will ven Megen (n 73) 121.

By contrast, the compensation model is fundamentally different and more severe when applied to players for three main reasons.

Firstly, compensation is calculated with reference to the "positive interest" principle, as introduced in the *Matuzalem* (2008) case.[239] This intends to put clubs in the financial position it would have occupied had the contract been fully performed. This disproportionately holds players personally liable for the club's investment risks.[240] Figures such as the amortised transfer fee are included despite bearing no causal relation to the player's actual conduct or breach.[241] Financial liability that bears no reasonable relationship to the harm caused ceases to function as enforcement and instead operates as coercion.[242]

Secondly, the criteria confer an unrestrained discretion on the DRC and CAS when calculating. In particular, the requirement to give "due consideration" to the "law of the country concerned" has virtually never been incorporated in calculations.[243] Liability is instead calculated primarily with reference to FIFA's own regulations and subsidiarily, Swiss law.[244] This is a position acknowledged by FIFA itself, which seeks to justify it on the basis that it ensures "traceable jurisprudence".[245] However, consistency achieved through the exclusion of external legal standards does not ensure legal certainty for players who are deprived of the protections ordinarily afforded under national employment laws. In

[239] CAS 2008/A/1519 *Matuzalem* (n 82) 40-42.

[240] Richard Parrish, 'Contractual Stability: The Case Law of the Court of Arbitration' in Michele Colucci (ed) *Contractual Stability and Termination in Football* (European Sports Law and Policy Bulletin (2) 2025) 83.

[241] FIFA v BZ (n 5) para 107; Paul A Czarnota (n 5) 38.

[242] Practical Law, 'Punitive Damages' (Glossary, Item 6-501-5593) > https://uk.practicallaw.thomsonreuters.com/6-501-5593?transitionType=Default&contextData=(sc.Default)&firstPage=true< accessed 23 December 2025.

[243] FIFA RSTP Commentary (n 3) 178.

[244] FIFA RSTP Commentary (n 3) 178; Omar Onargo, 'Compensation Under Article 17 of FIFA Regulations on the Status and Transfer of Players' in Bjorn Hessert, Chui Ling Goh and Jack Anderson (eds*) Elgar Concise Encyclopaedia of Sports Law* (Edward Elgar 2025) 70.

[245] FIFA RSTP Commentary (n 3) 178.

this context, the formal inclusion of this criterion is difficult to justify, as its persistent non-application suggests that it functions to obscure the asymmetrical operation of contractual stability.

Thirdly, reference to the "specificity of the sport" increases the unpredictability in calculations. It is undefined in the RSTP and applied through highly subjective assessments by DRC and CAS panels. In *Matuzalem,* reliance on this criterion resulted in additional €600,000 being added to the award, notwithstanding the absence of clear justification.[246] This is exacerbated by the limited publication of DRC decisions, which prevents scrutiny of how and when this criterion is applied and undermines any claim to consistency.

3.3.2 De Facto Bans to Mobility

Beyond compensation, contractual stability produces *de facto* bans on players' access to future employment. Under Article 17(2), the the joint and several liability provision effectively reinstates the pre-*Bosman* system as it requires the new club to pay the former club compensation for a player who is, in fact, out of contract.[247] When combined with the automatic presumption of inducement, this shifts the financial and sporting risk onto prospective employers, utilising economic deterrence to prevent player mobility as no rational employer will assume such exposure.

This exclusionary effect is compounded by the mandatory withholding of the ITC which operates as an absolute barrier to player mobility. Therefore, it goes beyond penalising the player or discouraging prospective clubs: it suspends a player's career *sine die.*[248]

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[246] CAS 2008/A/1519 Matuzalem (n 82) 132; Stephen Sampson and Peter Limbert, 'Matuzalem – The CAS Increase FIFA DRC Award on FIFA Article 17 Case' (*LawInSport*) > https://www.lawinsport.com/component/content/article?id=143:matuzalem-the-cas-increases-fifa-drc-award-on-fifa-article-17-case< accessed 27 December 2025.

[247] Stefano Bastianon and Michele Colucci (n 32) 32.

[248] Josep F Vandellós, 'Refusal to Delivery the ITC in International Transfers of football Players and Free Movement of Workers within the EU' (*LawInSport,* 27 August 2014) > https://www.lawinsport.com/topics/item/refusal-to-delivery-the-itc-in-international-transfers-of-football-players-and-free-movement-of-workers-within-the-eu-entry-b<a https://www.lawinsport.com/topics/item/refusal-to-delivery-the-itc-in-international-transfers-of-football-players-and-free-movement-of-workers-within-the-eu-entry-b< accessed 16 December 2025.

Crucially, the combined operation of these provisions' functions *ex ante* rather than *ex post*. Clubs are deterred from offering players employment before liability has even been established. This distinguishes contractual stability from conventional employment enforcement which operates only after liability has been determined.

This chapter has demonstrated that FIFA's reliance on contractual stability cannot withstand legal scrutiny. As Valloni and Pachman observe, there is no justification for a system in which a player may "become a slave to his former club for the rest of his life".[249] The analysis must now turn to why this matters globally.

Chapter 4: Contractual Stability in Practice and Global Consequences

As demonstrated, FIFA's principle of contractual stability is not a neutral tool. It is therefore necessary to situate its operation within the realities of the global football labour market. This chapter examines how contractual stability entrenches inequality through FIFA's private legal order and considers the significance of judicial intervention by the CJEU.

4.1. Contextualising Football's Global Labour Market

The consequences of FIFA's rules extend beyond a handful of high-profile disputes. FIFA's rules apply across 211 member associations on 6 continents, encompassing labour markets with vastly different levels of economic development and working conditions.[250] Contractual stability therefore operates within an uneven global market, producing effects that are often invisible.

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[249] Lucien Valloni and Thilo Pachmann, 'Landmark *Matuzalem* Ruling Has Major Consequences for FIFA Regulations' (*Pachmann Law,* 10 May 2012) 2.

>https://pachmann.law/wpcontent/uploads/2022/02/THP_Landmark_iMatuzalemi_ruling_has_major_consequences_for_FIFA_regulations.pdf< accessed 27 November 2025.

[250] FIFA, 'Professional Football Report 2023: Men's Football' (FIFA, 2023) 104 > https://digitalhub.fifa.com/m/2a5dc95026d9cf8a/original/FIFA-Professional-Football-Report-2023.pdf< accessed 10 October 2025; BBC News, 'Abuse and Poor Pay – The Reality of African Footballers' (*BBC News,* 29 November 2016) > https://www.bbc.co.uk/news/world-africa-38129536=< accessed 4 December 2025.

4.1.1 The Reality of Non-Elite Players

Transfer law discourse is commonly framed around elite players, yet 97.9% of the global football workforce do not play in the top European leagues nor earn comparable wages.[251] As former Secretary General of FIFPro, Theo van Seggelen encapsulates, "not every footballer has three different cars in three different colours".[252] In fact, the lived reality of most professional players is far removed from this stereotype. For many players, employment conditions are characterised by instability, which cannot be reconciled with FIFA's disproportionate enforcement of contractual stability.

FIFPro's Global Employment Report (2016) reveals that 45% of players globally earn less than $1000 per month, with 41% of players experiencing delayed wages.[253] Instability extends beyond remuneration to coercive employment practices. Over 6% of players report being forced to train alone, a tactic used by clubs to pressure players into accepting contract renewals or unwanted transfers.[254] In some jurisdictions, contractual protections are virtually non-existent: in Congo, 89.1% of players lack a written contract.[255] Player mobility is further constrained by entrenched power imbalances. Across global leagues, 29% of players report being forced to join clubs against their will.[256] These conditions illustrate that for many players structural insecurity is imposed by the club and directly rebuts FIFA's claim that Article 17 is necessary to prevent instability caused by opportunistic player behaviour. As

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[251] FIFPRO, '2016 FIFPRO Global Employment Report: Working Conditions in Professional Football' 2, 6 > https://media.fifpro.org/media/4eslemz2/working-conditions-in-professional-football.pdf<accessed 18 October 2025; Raffaele Poli and others, 'Team Demographics in 48 Leagues Worldwide' (*CIES Football Observatory Monthly Report 89*, November 2023) >https://football-observatory.com/MonthlyReport89#:~:text=Superliga%20(DEN),26.2%20players//< accessed 18 October 2025.

[252] As cited by: Nick Ames, 'Low Wages, Threats, Late Payment – The Life of Football's Non-Elite Players' (*The Guardian,* 28 November 2016) > https://www.theguardian.com/football/2016/nov/28/fifpro-low-salaries-withheld-payments-threats-footballers< accessed 18 October 2025.

[253] FIFPRO (n 99) 6-9 FIFPRO, 'UTA Arad: Players Reveal Contract Abuses and Unpaid Salaries at Romanian Liga 1 Club' (*FIFPRO,* 10 September 2025) > https://www.fifpro.org/en/articles/2025/09/uta-arad-players-reveal-contract-abuses-and-unpaid-salaries-at-romanian-liga-1-club< 20 October 2025.

[254] FIFPRO (n 99) 22.

[255] FIFPRO (n 99) 28-29.

[256] FIFPRO (n 99) 14.

Roger Blanpain states, such conditions approach forms of "modern slavery" underscoring the imbalance that the rules sustain.[257]

This vulnerability is intensified by the short nature of footballers' careers. Periods of enforced inactivity, such as the season-long exclusion experienced by Diarra, may irreversibly undermine a player's earning capacity, physical condition and future employability.[258] This risk is amplified in the lower leagues by the prevalence of short-term, low-wage contracts that require frequent renewal.[259] Players in these markets remain dependent on continuously securing subsequent engagements to sustain their career. Therefore, mobility is not a discretionary privilege but a necessity for survival.[260]

Based on this empirical evidence, FIFA's RSTP rules do not remedy labour market instability but exacerbate it. The magnitude and indeterminacy of the financial and sporting consequences attached to termination can operate to potentially either trap players in abusive employment or ruin their careers. This dynamic entrenches broader global inequalities, as players in wealthier leagues have the resources to mitigate these risks while those in the lower leagues remain trapped in a cycle of vulnerability.

4.2 FIFA's Private Legal Order & Player Harm

The effects of contractual stability must also be considered in the context in which it is enforced. FIFA operates a closed legal system in which it simultaneously acts as rule-maker, adjudicator and enforcer.[261] This concentration of power amplifies the harmful impacts identified in Chapter 3 and insulates them from scrutiny.

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[257] As cited by: Simon Gardiner and Roger Welch, 'Bosman-There and Back Again: The Legitimacy of Playing Quotes Under European Union Sports Law' (2011) 17(6) European Law Journal 1, 7.

[258] Martin Roderick, 'A Very Precarious Profession: Uncertainty in the Working Lives of Professional Footballers' (2006) 20(2) Work Employment and Society 245, 260-61.

[259] Ibid, 260-261; Ikechukwu Ejekwumadu, "Yet They Didn't Sign Me': The Production of Precarity in Amateur and Semi-Professional Football in Nigeria' (2024) 22(2) European Journal for Society 104, 114 - 115.

[260] António S Ribeiro and Francisco Lima (n 69) 76.

[261] Branislav Hock and Suren Gomtsian, 'Private Order Building: The State in the Roles of Civil Society and the Case of FIFA' (2018) 17 The International Sports Law Journal 186, 194.

Employment disputes are channelled through FIFA's internal DRC, pursuant to Article 22(1)(a) RSTP. Although players formally retain the right to bring a claim before domestic courts, a concession secured only through EU pressure, the right is of limited practical value.[262] The requirement for an exclusive jurisdiction clause in the individual employment contract makes recourse to domestic courts largely theoretical. Most players are unlikely to possess either the legal knowledge or the necessary legal representation to negotiate and prospectively include such a clause in their contracts. Thus, FIFA's internal system remains the unavoidable forum for resolving disputes.

Appeals from the DRC lie only to the CAS,[263] recognised under Articles 49 and 50 of the FIFA Statute. Although formally an independent body, it reproduces the same restrictive effects insofar as, under Article R68 of the CAS Code and Article 49(2) of the FIFA Statute, it must apply FIFA's regulations in disputes. This excludes the extent to which CAS can meaningfully scrutinise the legality of FIFA's rules. CAS, therefore, operate as an extension of the private system, not an external restraint. This is evidenced by the fact that CAS only annuls approximately 5% of the DRC's decisions.[264]

The closed system amplifies player harm in two principal ways. First, it embeds contractual stability as the overriding objective within the dispute-resolution process itself. The DRC and CAS treat high compensation and sporting sanctions as legitimate tools of deterrence, rather than outcomes requiring justification.[265] This orientation is evident in their consistent expansive and disproportionate interpretations of Article 17, which elevates contractual stability above competing legal considerations such as EU free movement principles.[266] Therefore, players are required to litigate within a system that is pre-committed to enforcement, limiting the possibility of a genuinely balanced assessment of their mobility and employment rights.

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[262] FIFA RSTP Commentary (n 3) 443, 446-447.

[263] Article 34 RSTP

[264] Frans de Weger, *The Jurisprudence of the FIFA Dispute Resolution Chamber* (2nd edn, Springer 2016) (Author's Note) xx.

[265] CAS 2008/A/1519 *Matuzalem* (n 82) para 34.

[266] Suren Gomtsian and others, 'Between the Green Pitch and the Red Tape: The Private Legal Order of FIFA' (2018) 43 Yale Journal of International Law 85,113.

Secondly, this is reinforced by the opacity of FIFA's adjudicatory practices. Decisions of the DRC, including its ruling in *Diarra*, are either unpublished, removed or released only in abbreviated form, making it impossible to scrutinise the legal methodology or identify consistency. [267] The lack of transparency has allowed arbitrary and club-centred interpretations of contractual stability to consolidate unchecked.

FIFA's private legal order, therefore, entrenches the disproportionate effects of contractual stability. This explains both the persistence of player harm and the necessity of EU judicial intervention to expose the incompatibility with free movement principles.

4.3 The Importance and Limits of the EU in Football

EU intervention is significant as it imposes external legal limits on FIFA's autonomy, where internal mechanisms are structurally incapable of doing so.[268] This is vital to address systemic injustices within the transfer system and compel reform for player mobility within the EU. In *Diarra* (2024) the CJEU asserted definitive authority over FIFA's insular regime, thus ensuring that the potent private regulator complies with accountability and proportionality.[269] For illustration, contractual stability was stripped of its status as a self-standing justification and its rules were subjected to proportionality review. This prevented FIFA from relying on an indeterminate objective to justify restrictions on player mobility and exposed the asymmetrical impact of the rules on players relative to clubs.[270] The *Bosman* judgment further illustrates the CJEU's capacity to compel meaningful reform. Lassana Diarra and Jean-Marc Bosman have been widely commended for using their resources to pursue reforms that strengthen the

[267] Frans de Weger (n 112) 105.
[268] Floris de Witte (n 21) 298.

[269] Siyabonga P Hadebe, 'Dismantling Lex Sportiva' (n 12) 15.

[270] FIFPRO, 'What the Lassana Diarra Ruling Means – And What Happens Next' (*FIFPRO,* 9 June 2025) > https://www.fifpro.org/en/articles/2025/06/what-the-lassana-diarra-ruling-means-and-what-happens-next< accessed 3 January 2026.

protection of players' employment rights worldwide. [271] As FIFPro have emphasised, the reforms following *Diarra* must strike a more equitable balance between "legitimate club interests and protecting players' individual rights and freedom of movement."[272]

However, the EU's capacity to check FIFA remains limited. EU intervention is reactive, depending upon individual players initiating complex and costly litigation before national courts and ultimately the CJEU.[273] Many players do not possess the means to do so, therefore EU law can only protect players when brought to its attention, which explains how FIFA's contractual stability system was able to operate with limited scrutiny for over two decades.

Moreover, the territorial scope of EU law is confined to Member States. Therefore, when intervention does occur, it risks producing a Eurocentric reform trajectory in which reforms only address European labour market concerns without resolving broader global inequalities. Therefore, EU intervention functions as a partial constraint on FIFA's autonomy rather than a full solution to the harms generated by contractual stability.

By contrast, a more comprehensive form of intervention would require a genuinely international framework capable of regulating FIFA's rules beyond the territorial limits of the European Union. Such a mechanism could take the form of a multilateral agreement between states, national football associations, and players' unions, establishing minimum standards for contractual fairness and freedom of movement applicable across jurisdictions. Unlike EU law, which is confined to the internal market, such an intervention would address the global nature of professional football by ensuring that regulatory constraints on player mobility are subject to consistent scrutiny regardless of where disputes arise. However, the feasibility of such a system remains limited given FIFA's status as a global entity, its

[271] FIFPRO, 'FIFPRO Statement: Decision of European Court of Justice' (*FIFPRO,* 4 October 2024) > https://www.fifpro.org/en/articles/2024/10/fifpro-statement-decision-of-european-court-of-justice>accessed 24 November 2025.

[272] Ibid.

[273] Borja Garcia, 'The Influence of the EU on the Governance of Football' in Hallgeir Gammelsæter and Benoit Senaux (eds) The Organisation and Governance of Top Football Across Europe (Routledge 2011) 32-33.

entrenched autonomy and the absence of a single global legal authority capable of enforcing uniform labour standards in sport.

Conclusion

This dissertation has demonstrated that FIFA's principle of contractual stability, as examined through *FIFA v BZ* (2024), operates in a manner that disproportionately and asymmetrically restricts player mobility and access to employment. At the core, FIFA's principle does not operate as genuine stability as true contractual stability requires reciprocity, legal certainty and a balanced allocation of risk between employer and employee. Conversely, the principle secures stability primarily for clubs while exposing players to indeterminate and potentially career ending consequences. For a club, the loss of or inability to acquire an individual player represents one transaction within a broader financial and sporting structure. For the individual player, however, a single employment contract may represent a substantial proportion of their career earning potential. Restrictions on that player's ability to move between clubs can therefore impose consequences that are disproportionately greater than those experienced by the club. The regulatory framework consequently places the heavier burden on the party with the narrower capacity to absorb it.

The analysis has showcased that contractual stability represents a continuation of football's historical approach to regulating player mobility. From the transfer-and-retain system examined in *Eastham* to the post-contract transfer restrictions invalidated in *Bosman*, football governance has repeatedly sought to preserve club control over player movement. *Diarra* therefore represents not an isolated failure of FIFA's regulation, but the latest judicial exposure of a longstanding tension between football's regulatory autonomy and players' employment rights. The CJEU's judgment was significant because it rejected the assumption that contractual stability could operate as an autonomous justification for restrictions on free

movement. The Court's analysis demonstrated that the cumulative operation of compensation liability, joint and several liability, the presumption of inducement and ITC restrictions extended beyond legitimate deterrence and created substantial barriers to players accessing employment. In doing so, *Diarra* exposed the imbalance within a system which claims to protect both contracting parties but, in practice, places the greatest risks upon players.

The harms produced by this model are not confined to European law or elite European football. As FIFA's regulations apply across a globally unequal labour market, their consequences are felt most acutely by players operating in economically vulnerable environments, where mobility is often an essential for career survival rather than merely a matter of preference. A regulatory model that threatens exclusion from employment or financially ruinous liability risks reinforcing existing inequalities rather than promoting genuine contractual security.

Furthermore, FIFA's private legal order amplifies these concerns by concentrating regulatory, adjudicatory and enforcement authority within a closed system Although EU law plays a vital corrective role, its intervention is reactive and territorially limited. As a result, it can constrain FIFA's autonomy only partially and intermittently.

Ultimately, genuine contractual stability requires more than preserving the enforceability of agreements; it requires a fair allocation of rights, obligations and risks between clubs and players. The significance of *Diarra* therefore extends beyond the immediate incompatibility of FIFA's rules with Article 45 TFEU: it exposes the need to reconsider how contractual stability is conceptualised within football governance. Future research should examine whether FIFA's revised RSTP framework genuinely addresses the imbalance identified in this dissertation or merely reconstructs contractual stability through alternative mechanisms. It should also consider how these rules operate beyond elite European football, particularly in less economically developed labour markets where players possess fewer resources to challenge

regulatory restrictions. Without stronger player representation, particularly through FIFPRO, and sustained external scrutiny, contractual stability risks remaining a mechanism through which historical restrictions on player mobility are likely to be reproduced in new regulatory forms.[274]

[274] Stefano Bastianon and Michele Colucci (n 32) 47.

Human Rights as a Source of Climate Harm: Rethinking Justice in the Anthropocene

Holly Perrins

Abstract

This thesis contends that human rights in their current individualistic and myopic nature reproduce the structural harms underlying climate injustice. Through privileging the protection of autonomous interests, human rights frameworks conceal the significance of ecological interdependency, whereby humans rely on their environmental surroundings to flourish. This individualistic approach also renders collective climate harms as difficult to address. Human rights frameworks are predominantly designed to accommodate individualised harms, consequently overlooking the collective nature of climate harm. Additionally, the claims of future generations are marginalised due to the shortsightedness of human rights foundations. The prioritisation of present living interests obscures the impacts of current environmental degradation on the future population's quality of life, limiting their ability to enjoy the necessary environmental conditions for human growth.

This paper evaluates whether the current notion of human rights is adequately equipped to confront climate injustice without replicating the very harms it seeks to overcome. Nevertheless, renouncing human rights entirely would be unwarranted, given their potential to provide a universal foundation for pursuing social justice. Instead, this author argues that a transformative reinterpretation of rights through an eco-centric approach could be part of a just response. Identifying the environment as subject to its own rights can simultaneously advance climate justice for humanity by protecting the ecosystems that we rely on to survive.

Introduction

Dominant interpretations of human rights, particularly via the protection of property rights, may have indirectly crafted the route of climate change by legitimising economic structures that are harmful to

the environment. While human rights are frequently cited as both threatened by climate change,[275] and essential to achieving climate justice,[276] a growing body of scholarship has come to question the uncritical adoption of a rights-based approach. For example, Usha Natarajan observes that as society has evolved economically, human rights have reflected this paradigm by providing a legal framework that legitimises the infinite collection of wealth.[277] The right to life and health has been surrendered to give precedence to the right to property,[278] and the fuelling of capitalism. Natarajan's reasoning is convincing as it frames the vicious cycle of the Anthropocene,[279] as a cycle that is powered by rights frameworks. Humans are conditioned through property law to prioritise relentless capital accumulation and commodified self-interest. Thus, rights described as encouraging human dignity and prosperity have simultaneously hindered flourishing over the long term by degrading the environment.

By prioritising wealth accumulation over ecological well-being, the legal architecture of human rights has itself become a vector of climate harm. This paper suggests that the groundwork of human rights generates harmful colonial and liberal assumptions, focusing on three main issues. Firstly, there are complex causality issues when attributing responsibility for climate harms. Next, the inconsistent thresholds of standing between individual and collective harms creates a blind spot for shared climate injuries. Finally, there is a lack of direct actionability for future generations' rights. These fundamental flaws especially impact marginalised communities, such as women in low-income countries, where

[275] Pooja Yadav, *'How Climate Change is Threatening Human Rights'* (*UN News,* 26 December 2025) <https://news.un.org/en/story/2025/12/1166649> accessed 21st September 2026.

[276] Jorje Viñuales, 'A Human Rights Approach to Extraterritorial Environmental Protection? An Assessment' in Nehal Bhuta (ed), *The Frontiers of Human Rights: Extraterritoriality and its Challenges* (Oxford University Press 2016).

[277] Usha Natarajan, 'Who Do We Think We Are?: Human Rights in a Time of Ecological Change' in Usha Natarajan and Julia Dehm (eds), *Locating Nature: Making and Unmaking International Law* (1st edn, Cambridge University Press 2022).

[278] UNGA, 'Universal Declaration of Human Rights' (10 December 1948) UNGA Res 217 A (III), art 17.

[279] National Geographic Society, *'Anthropocene' (National Geographic,* 19 October 2023) <https://education.nationalgeographic.org/resource/anthropocene/> accessed 2nd January 2026.

their ability to adapt to climate change is further limited due to their existing socio-economic vulnerabilities.[280]

Climate injustice exposes the cultural, social, and economic power imbalances of our world. Although existing human rights attempt to address this crisis, they risk entrenching the very injustices sought to be remedied, by failing to acknowledge the underlying roots of inequality embedded in our system.[281] This article argues that the rights intended to protect human dignity and livelihood may also contribute to their deterioration. Reinterpreting these rights through an eco-centric lens may mitigate such harmful assumptions by moving beyond the anthropocentric nature of human rights frameworks that currently attempt to tackle climate injustice.

Harmful Assumptions in Human Rights

Human rights law is framed by complex causality, Western individualism, and fragile temporality, which renders its potential to remedy climate injustice highly constrained. Causation remains the 'most significant challenge' in human rights frameworks,[282] requiring a chain of causation between the omission of a state and the violation of a specific victim's right.[283] Factual causation in climate cases is difficult to establish due to greenhouse-gas emissions (GHG) having an abundance of contributory causes,[284] making it virtually impossible to precisely attribute responsibility for specific harm to the conduct of a specific state. This is evidenced in the international human rights case of *Billy and others v. Australia,* where despite the United Nations Human Rights Committee's general findings of violations arising from Australia's inadequate adaptation measures, they nevertheless expressed difficulty tracing specific causal links between the contribution of the Australian state and the effects on the enjoyment

[280] UN Women, *'How Gender Inequality and Climate Change are Interconnected'* (*UN Women,* 21 April 2025) <https://www.unwomen.org/en/articles/explainer/how-gender-inequality-and-climate-change-are-interconnected> accessed 21st September 2026.

[281] Karl Marx, *On the Jewish Question,* in Robert C Tucker (ed), *The Marx-Engels Reader* (Norton 1978).

[282] Douglas A Kysar, *'What Climate Change Can Do About Tort Law'* (2011) 41 Environmental Law 29.

[283] Ole W Pederson, *'Climate Change and Human Rights: Amicable or Arrested Development?'* (2010) 1 Journal of Human Rights and the Environment 236.

[284] Alice Venn, *'Rendering International Human Rights Law Fit for Purpose on Climate Change'* (2023) 23 Human Rights Law Review 1.

of the claimants' rights.[285] Such reluctance to establish a causal chain by arguably the world's most preeminent human rights authority reveals a deeper set of flawed assumptions. Constructing climate change as too complex of a phenomenon to attribute responsibility for, risks frustrating the safeguarding purposes of human rights.

However, the view that responsibility cannot be readily attributed to climate-related harm is not without challenge. The recent advancement of climate attribution science has enabled quantification of contributions to both sudden and slow-onset harms, as well as the ability to attribute impacts to individual emitters.[286] Some human rights courts have signalled an openness to imposing normative legal standards of causation that lower the factual burden in contexts where more general declaratory relief is sought.[287] Nonetheless, it is questionable whether legal standards that lower the factual burden would be applied in contexts where demands for compensation may be at issue, and how willing the courts would be in these cases to depart from causation standards that are close to factual. This statistical evidence is approached by the courts with a degree of wariness,[288] disclosing the reproduction of structural harms through individualistic rationales.

Such individualistic attitudes stem from a framework embedded in the production of climate change. The origin of human rights law's competitive self-advancement has determined its struggle to envisage collective, interdependent harms caused by climate change.[289] Ultimately, claims involving collective rights and victim status are treated as exceptional because the human rights system is habituated to individualised harm.

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[285] *Daniel Billy and others v Australia,* Communication No. 3624/2019 (22 September 2022) UNHRC, 'Views: Communication No 3624/2019' UN Doc CCPR/C/135/D/3624/2019.

[286] Rupert F Stuart-Smith and others, *'Filling the Evidentiary Gap in Climate Litigation' (*2021) 11 Nature Climate Change 651.

[287] Andre Nollkaemper, *'Causation Puzzles in International Climate Litigation' (*2024) 33(1) Italian Yearbook of International Law 25.

[288] Mark Wilde, *'Causation and Climate Change Litigation: 'Bridge Too Far?''* (2021) 8 Austrian Law Journal 268.

[289] Azadeh Chalabi, *'A Right to Environment-Based Approach as a New Route for Climate Litigation'* (2025) 43 Nordic Journal of Human Rights 241.

Environmental rights are understood by Azadeh Chalabi as a form of collective rights because they protect shared environmental qualities, such as polluted water or contaminated air, that are essential to a community's long-term welfare.[290] Nonetheless, collective rights can lack firm binding as many States contest their universality,[291] revealing a blind spot where individuals are unprotected from their interdependent losses. For example, in the European human rights case *KlimaSeniorinnen*,[292] the individual women over the age of 70 were not held as victims of violations under Articles 2,[293] and 8,[294] of the European Convention of Human Rights because they failed to display that they were personally affected by the failures of Swiss authorities.[295] This case was still partially victorious since the association itself was given standing as a clearly defined group facing specific climate-related risks. The European system applied a high threshold for the individual women, but a lower threshold to the non-governmental organisation (NGO) that ultimately represented these same women and the collective interest of older women more broadly. This could be seen as a form of legal gymnastics to get around the absence of explicitly collective group rights in the climate context where the court does not wish to deny any remedy, overall leading to decision making that is procedurally difficult to comprehend.

Similarly, in the domestic context of the Netherlands, the NGO *Urgenda* also received standing for 'acting on behalf of the current generation of Dutch nationals,'[296] and the action succeeded in directing the State to reduce emissions by at least 25%.[297] At first instance, the court accepted *Urgenda's* standing, however the court notably limited the groups on whose behalf the organisation could act, excluding

[290] Azadeh Chalabi, *'A New Theoretical Model of the Right to Environment and Its Practical Advantages'* (2023) 23 Human Rights Law Review 1.

[291] Andrea Schapper, *'Climate Justice and Human Rights'* (2018) 32 International Relations 275.

[292] *Verein KlimaSeniorinnen Schweiz v Switzerland* (2024) 79 EHRR 1.

[293] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) art 2.

[294] ECHR art 8.

[295] *KlimaSeniorinnen* (n 18).

[296] Jacqueline Peel and Hari M Osofsky, *'A Rights Turn in Climate Change Litigation'* (2017) 7 Transnational Environmental Law 37.

[297] *Urgenda Foundation v Netherlands* (Supreme Court of the Netherlands, 20 December 2019) ECLI:NL:HR:2019:2007.

non-Dutch citizens.[298] This revealed a doctrinally cautious approach, aimed at avoiding any precedent for transboundary climate representation. On balance, this exception does not undermine the broader point that many climate cases struggle to accommodate collective harms, demonstrated by the inconsistent thresholds of standing applied to individual and collective claimants. Human rights are ill-equipped to comprehend systemic injustices whilst operating within individualist assumptions. This limitation is further intensified when regarded alongside temporal hindrance.

Temporal myopia is a continuing limitation of human rights because their framework operates in a retrospective manner, where prioritisation of immediate harms makes it difficult to protect against foreseeable climate harms that materialise gradually or in a distant future.[299] Climate impacts are predominantly prospective; by around 2050, wildfires are predicted to consume two to six times more Western land than present statistics.[300] Evidence by NASA carries significant strength in scientific credibility, yet human rights remain poorly equipped to respond to this proactive outlook, repeating injustice for communities who fear for the future. Sam Adelman considers citizens' rights to health as typically only capable of utilisation after rights violations have transpired.[301] Adelman is persuasive because he unveils the façade of human rights as a moral performance rather than a protective instrument, shielding inaction towards slow-onset events due to lack of imminency.

The imminence requirement stipulates that an individual must be personally and directly affected,[302] from an act or omission of the State, or that such harm has already materialised.[303] This strict threshold operates as a structural barrier, ignoring foreseeable future harms until they are irreversible. Scholars, such as Knox, have proclaimed that climate harms constitute imminent threats because once in progress,

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[298] ibid.

[299] B.T. Warwick, *'Temporalised International Human Rights: Complicated Times'* (2025) 43(4) Netherlands Quarterly of Human Rights 217.

[300] *'The Effects of Climate Change' (NASA Science)* <https://science.nasa.gov/climate-change/effects/> accessed 7th January 2026.

[301] Sam Adelman, *'Human Rights in Pursuit of Climate Justice' (*2021) 38 Wisconsin International Law Journal 171.

[302] UN Office of the High Commissioner for Human Rights, *Fact Sheet No 7/Rev 1: Complaints Procedure* (OHCHR 2003), <https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet7Rev.1en.pdf> accessed 7th January 2026.

[303] Venn (n 10).

they are onerous to forestall.[304] Despite the persuasiveness, human rights have not adopted this analytical lens, highlighting the nuance between different individuals' interpretations of imminency. The case of *Teitiota v New Zealand* reflects the practical degree of struggle required, where risks to a Kiribati national's right to life as a result of rising sea levels was not deemed sufficiently imminent to prevent deportation.[305] Ultimately, handling slow-onset climate harms as too remote to recognise, entrenches injustice further by failing to protect people that are currently vulnerable to climate risks and placing burdens onto future generations.

Conventional human rights frameworks are insufficient in protecting inter-generational interests at risk of climate harm. Courts have typically steered clear of addressing whether future generations have independent free-standing rights and instead acknowledge future generations in the context of intergenerational burden sharing. This lack of direct actionability for future generations' rights makes this area of litigation imprecise. For example, while the German Constitutional Court in *Neubauer v Germany* recognised that inadequate climate policy today could place disproportionate restrictions on the future exercise of fundamental freedoms, it was simultaneously suggested that future generations do not carry any fundamental rights in the present since they are not yet born, treating such generations as legally peripheral.[306] However, as Aoife Nolan argues, such efforts to protect future generations remain complicated due to the absence of a stringent definition, causing legal uncertainty.[307]

A more optimistic reading proposes that protecting future generations would sacrifice improving the welfare of the present generation by obscuring contemporary injustices.[308] Although a compelling argument, climate justice requires declining the thought that one generation's well-being must be sacrificed for another because this explicitly falls short of inclusion in protection, particularly where

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[304] John H Knox, *'Linking Human Rights and Climate Change at the United Nations'* (2009) 33 Harvard Environmental Law Review 477.

[305] UN Human Rights Committee, Teitiota v New Zealand, Views Adopted Under Art 5(4) Of the Optional Protocol, Communication No 2728/2016 (7 January 2020) UN Doc CCPR/C/127/D/2728/2016.

[306] *Neubauer v Germany* 1 BvR 2656/18 (2021).

[307] Aoife Nolan, *Children and Future Generations Rights Before the Courts: The Vexed Question of Definitions (*2024) 13(3) Transnational Environmental Law 522.

[308] Stephen Humphreys, *Against Future Generations* (2022) 33(4) European Journal of International Law 1061.

climate harms disproportionately affect vulnerable populations both now and in the future. My following focal point will connect to these harmful assumptions by providing evidence of their resulting inequitable impacts, specifically on women.

Inequitable Consequences

For the reasons discussed above and as will be explored further below, human rights in their current formulation cannot be part of a just response. At present, human rights-based responses risk magnifying the structural inequalities of society through unfavourable, uncompromising requirements. This critique is particularly clear-cut when scrutinising gendered burdens of climate harm.

Fundamentally, we must first consider the concept of social justice and what this really asks of us. As society is complex, the concept of social justice mirrors this complexity.[309] It operates in parallel with the unsettled issue of what justice demands in an evolving climate, and who endures responsibility. The persistent contestation over what justice entails renders climate justice progress marginal – justice cannot be achieved when the very concept lacks an agreed definition. Nancy Fraser, for example, insists that justice requires a two-dimensional approach of redistribution and recognition to allocate resources to those most vulnerable, whilst acknowledging and respecting the dignity and experiences of marginalised groups.[310] Contrastingly, Henry Shue places human rights as inherently minimalist,[311] aimed not to enable human flourishing, but to facilitate a decent existence with minimal standards for all.[312] Among these competing scholars, plausibly, Fraser's writing is more compelling as it encapsulates the multidimensional nature of climate injustice. Shue's formal equality approach may

[309] Emmaline Soken-Hubert, *'Four Principles of Social Justice' (Human Rights Careers)* <https://www.humanrightscareers.com/issues/four-principles-of-social-justice/> accessed 10th January 2026.

[310] Nancy Fraser, *'Social Justice in the Age of Identity Politics: Redistribution, Recognition, Participation'* (WZB Discussion Paper FS I 98-108, 1998).

[311] Tomas Wedin, *'Samuel Moyn and Marcel Gauchet on the Relationship Between Human Rights, Neoliberalism, and Inequality'* (2023) 41 Nordic Journal of Human Rights 471.

[312] Robert Mark Simpson, *'Minimalism, Determinacy, and Human* Rights' (2021) 34 Canadian Journal of Law and Jurisprudence 149.

secure a basic standard of protection but, fails to grasp the depth of substantive global inequities in a way that prioritises those most vulnerable to climate harm.

Applying equality of condition in the context of women, prevailing rights systems concurrently disadvantage women by reproducing structural inequalities instead of ensuring that women possess equal standard of living and quality of life.[313] For instance, today 47.8 million more women suffer from the impacts of famine compared to men.[314] This reflects the disproportionate burdens of climate harm on women - yet their role in securing food and water is misunderstood and invisible.[315] Primarily in lower income countries, women suffer inequalities and open discrimination in all aspects of life. This includes unequal access to education[316] and persistent pay disparities, with female employees in April 2025 earning a 12.8% lower median hourly wage than that of men.[317] Human rights law inadvertently feeds these inequities into the climate sphere by relying on a gender-neutral standard of equality that overlooks women's structural disadvantages. For instance, the failure of human rights to address discriminatory land-tenure systems reproduces gendered climate injustice through crop loss, food insecurity and displacement, as women in lower income countries are restricted in their rights to inherit or control land.[318]

In addition, gender-based violence illustrates how human rights treats certain harms as temporally out of sync, fabricating the exclusion of women from remedies. International law now confirms that harms

[313] Joanne Hughes and others, '*Equality of Condition? Exploring Minority Ethnic Group Experiences of Education in Northern Ireland'* (2025) 73(6) British Journal of Educational Studies 695.

[314] UN Women (n 6).

[315] UN Women, "Access *to Information is the Basis of Democracy" – Interview with Environmental Journalist Miriam Jemio on World Press Freedom Day' (UN Women,* 1 May 2024) <https://www.unwomen.org/en/news-stories/interview/2024/05/access-to-information-is-the-basis-of-democracy> accessed 10th January 2026.

[316] UNICEF, *'1 In 3 Adolescent Girls from the Poorest Households Has Never Been to School' (UNICEF,* 19 January 2020) <https://www.unicef.org/press-releases/1-3-adolescent-girls-poorest-households-has-never-been-school> accessed 11th January 2026.

[317] House of Commons Library, *Gender Pay Gap Statistics* (Research Briefing, 17 November 2025) <https://commonslibrary.parliament.uk/research-briefings/sn07068> accessed 29th July 2026.

[318] UN, *'Securing Women's Land Rights for Increased Gender Equality, Food Security and Economic Empowerment' (UN Chronicle,* 15 June 2023) <https://www.un.org/en/un-chronicle/securing-women%E2%80%99s-land-rights-increased-gender-equality-food-security-and-economic> accessed 28th June 2026.

within the private sphere are recognised as within States obligations to prevent,[319] with CEDAW recognising gender-based violence as a human rights issue.[320] Yet, human rights fail to address slow and cumulative violence outside the conventional definitions of imminence. This structural gap elaborates Fraser's view that climate justice cannot rest on recognition alone in the hope that acknowledged injustices will plainly diminish – it requires the redistribution of resources, such as access to adaptation funding, to mitigate impoverished women's structural vulnerabilities. Climate disasters have been linked to increased gender-based violence, with the escalation of existing inequalities, economic insecurity and displacement heightening women's exposure to harm. Human rights cannot constitute a just response whilst preventing women's access to justice. Further, excluding slow, recurring harms of gendered violence denies women effective citizenship and preserves illegitimate advantages for men. Such short-sightedness cultivates climate injustice.

Human rights fail to deliver fairness or equality of condition for women in developing countries by supporting wealth inequalities that prevent resources from reaching the most vulnerable. The rights-based approach perpetuates a vicious sequence of 'compound injustice,'[321] where the socio-economic hardship lays the foundation for climate injustice. For example, even in the urban context, a study established that 50% of flats in a Hong Kong neighbourhood exceeded 30°C indoors, leading to dehydration,[322] and that women are therefore more likely to be disproportionately exposed to such health impacts because they are more likely to take on domestic caring responsibilities whilst living on low incomes.[323] This is unsurprising since human rights generate structural economic disparities produced by systemic bias. Arguably, human rights typically focus on formal equality rather than the

[319] Ronagh JA McQuigg, *'Domestic Violence as a Human Rights Issue: Rumor v Italy'* (2015) 26 European Journal of International Law 1009.

[320] UN Committee for the Elimination of All Forms of Discrimination Against Women, 'General Recommendation No 35' (2017) UN Symbol CEDAW/C/GC/35.

[321] Henry Shue, *Climate Justice: Vulnerability and Protection* (Oxford University Press 2014).

[322] Sarah Fuller, *'Configuring Climate Responsibility in the City: Carbon Footprints and Climate Justice in Hong Kong'* (2017) 49 Area 519.

[323] Women's Environmental Network, *'Wen's Take: As Temperatures Rise, So Must Women's Voices' (Women's Environmental Network,* 23 June 2026) <https://www.wen.org.uk/2026/06/23/wens-take-as-temperatures-rise-so-must-womens-voices/> accessed 28th July 2026.

underlying economic structures that produce women's vulnerabilities to begin with. A cyclical state of compound injustice is apparent where women who are already disadvantaged by their gender are additionally underprivileged by climate change due to their poor economic status. A transformative reinterpretation of human rights is urgently required to break this cycle.

Decolonial, Relational and Eco-Centric Transformations

While there are reasons to be critical of the current substance and practice of human rights law, the potential of a newly constituted rights-based response to the climate crisis should not be overlooked. It is possible that justice could be revived by adopting a new worldwide formulation of rights that would require human rights systems globally to acknowledge the ecological interdependence that connects human well-being to environmental standards. The shift from an anthropocentric to an eco-centric approach would recognise the ingrained value of ecosystems whilst viewing humans as inseparable from nature. Ecological fate is apparent – when the environment is protected, humans experience the benefit. The following section evaluates the extent to which a right to environment-based approach (REBA, used simultaneously with a rights-of-nature approach, can overcome the limitation of human rights in climate justice, considering any practical challenges that may limit their effectiveness.

Legitimising REBA would regulate wider structural climate-related issues,[324] including collective, territorial, and temporal aspects. REBA comprises of a three-dimensional model: as an individual right enabling personal claims against localised harm; as a collective right protecting from shared environmental degradation; and as a global right to address planet-wide threats.[325] Chalabi contends that this would constructively address the collaborative gap and broaden protection across all levels of susceptibility, assuring the absence of systemic exclusion from remedies for suffering collective harm.

However, this position is problematic – as in current practice there is inconsistent juridical reasoning of whether the right to environment promotes individual entitlement (as in *Leghari),*[326] or collective

[324] Jolene Lin, *'Climate Change and The Courts'* (2012) 32 Legal Studies 35.

[325] Chalabi (n 15).

[326] *Ashgar Leghari v Federation of Pakistan* (2015) W.P. No 25501/2015 (Lahore High Court Green Bench).

entitlements (as in *Future Generations)*.[327] Ultimately, the human right to a healthy environment (that Chalabi's REBA builds upon) is often interpreted as ambiguous due to its incohesive theoretical framework.[328]Although this counterargument may initially hold potent value, the very 'inconsistency' underscores the need for REBA. Case law variation indirectly shows why such a theoretical model is needed to explain and guide the courts when operating at various levels of environmental safeguarding. This could form part of a just response by engaging with equality of condition.

Chalabi's formulation of REBA could ease the burdens of proving causation or victim status in practice as it explicitly adopts a more relational framework. The current burden of proof falls unfairly on disadvantaged individuals, appearing counterproductive where those who lack the necessary resources to prove a violation are against powerful states. REBA proposes a more accommodating requirement, where it would be sufficient to show the link between individual emitters and potential climate harms,[329] allowing relatedness between direct effect and future harms. Further transformation encompasses a shift of burden onto the government to exonerate itself.[330] As seen in *Tătar v Romania*, the applicant was spared from proving certitude of the risk.[331] This reinterpretation would withdraw procedural barriers that prevent marginalised communities from accessing justice.

Some scholars argue that REBA would fail as a legal standard, let alone produce justice, because its content is too conceptually vague,[332] and redundant when the right to environment can be protected through present civil rights.[333] Imagined in the context of social justice, the apparent inconclusiveness

[327] *Future Generations v Ministry of the Environment and Others* (2018) Case No 11001-22-03-000-2018-00319-01 (Colombian Supreme Court).

[328] Chalabi (n 16).

[329] ibid.

[330] Chuan-Feng Wu, *'Challenges to Protecting the Right to Health Under the Climate Change Regime' (*2021) 23 Health and Human Rights Journal 121.

[331] *Tatar v Romania* App No 67021/01 (ECtHR, January 2009).

[332] Pau De Vilchez and Annalisa Savaresi, *'The Right to A Healthy Environment and Climate Litigation: A Game Changer?'* (2023) 32 Yearbook of International Environmental Law 3.

[333] Marcos Orellana, *'Quality Control of the Right to a Healthy Environment'* in John Knox and Ramin Pejan (eds), *The Human Right to a Health Environment* (Cambridge University Press 2018).

of REBA is a weaker concern when compared with the injustice of harsh evidentiary thresholds that prevents access to justice. Altogether, REBA's collectivism and relationism, as proposed by Chalabi, offer a more equitable approach to climate protection. However, the framework of the human right to environment outlined by Chalabi may fall short without corresponding rights-of-nature, as it remains centred upon human entitlement, leaving nature remaining as the object of rights rather than the subject. This author will now examine the corresponding options for establishing new rights.

Recognising Rights-of-Nature as Standalone Rights

A rights-of-nature approach provides a decolonial framework for a just response to climate change by acknowledging non-Western cultures and knowledge.[334] A rights-of-nature approach would mark a radical departure from environmental protection as a human welfare towards recognition as a rights-holder in its own right. Embedding this right into an international legally binding treaty would reinterpret rights in a mechanism that displaces anthropocentrism with eco-centrism – yet the current system fails to recognise the rights-of-nature as standalone rights and remains silent on their adoption.[335]

Historically, human rights have conceived nature as 'subject to appropriation, reducible to property, and capable of entering the stream of commerce,'[336] a perspective that reproduces structural colonial harms through economic exploitation of nature's resources. Contrastingly, the rights-of-nature approach confirms the environment as 'indivisible and whole,'[337] enabling the environment to flourish as a legal entity without interference from human sovereignty. For instance, the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 granted the Whanganui River legal personhood in New Zealand.[338] This shift to decolonisation could provide a just response if applied universally, by attempting to dismantle

[334] Daniëlla Dam-de Jong and Fabian Amtenbrink (eds), *The Greener International Law* (1st edn, TMC Asser Press 2023).

[335] ibid.

[336] Ileana Porras, *'Appropriating Nature: Commerce, Property, and the Commodification of Nature in the Law of Nations'* (2014) 27 Leiden Journal of International Law 641.

[337] Earth Law Center, *'New Zealand' (Earth Law Center,* 16 August 2016) <https://www.earthlawcenter.org/international-law/2016/8/new-zealand> accessed 8th January 2026.

[338] Toni Collins and Shea Esterling, *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 and the Indigenous Cosmovision* (2019) 20(1) Melbourne Journal of International Law 8.

harmful practices of extractivism and allowing ecosystems to thrive interdependently with humans through Indigenous concepts.

A more sceptical reading warns that a rights-of-nature approach risks generalising culturally specific cosmologies, such as Māori relationality,[339] in methods that romanticise their ideas rather than enforce them in legal orders. Even so, these critiques are pessimistic and strengthen the argument for just transformation – a rights-of-nature approach must reinterpret legal authority away from nature appropriation towards ecological reciprocity. If nature's rights can be established, fairness could be restored through the redistribution of climate protections towards both vulnerable humans and non-humans interdependently. The right to environment and rights of nature should not be understood as competing alternatives, but as addressing different normative deficits in existing climate governance. Consequently, transforming human rights to address ecological interdependence and relationality can be part of a just response, and must be addressed with urgency if we want any chance of producing climate justice.

Conclusion

Ultimately, a transformative reinterpretation of human rights is essential in assembling part of a just response. Without such transformation, human rights remain shackled to archaic individualist and colonial methodologies that are unprepared to address the convolutions of an evolving global crisis. This paper has exhibited how human rights reproduce hierarchical injustice and indirectly manufacture exclusion.

Reflecting on broader implications, transformative reinterpretation would allow human rights to safeguard society rather than discard the only global language capable of remedying such harms. Chalabi's human right to environment-based approach provides part of a promising solution, but only when complimented by rights of nature to secure nature as subject to rights instead of an object for human benefit. Further research could examine how marginalised communities themselves envision

[339] Minea Tănăsescu, '*Rights of Nature, Legal Personality, and Indigenous Philosophies'* (2020) 9(3) Transnational Environmental Law 429.

transforming human rights, illustrating climate justice from the perspective of plaintiffs previously failed by the system.

An institution capable of defending itself: the European Court of Human Rights responding to claims of 'excessive interference' and becoming a more robust institution

Orlando Moore

Abstract

In recent years, Council of Europe member states have increasingly criticised the European Court of Human Rights for 'excessive interference' in their domestic affairs, with the current source of political outrage and public incandescence being domestic immigration, asylum, and deportation policies' conflict with the European Convention on Human Rights. Although the Court's jurisprudence can be criticised for doctrinal inconsistency, overly liberal interpretations of its case law, and contextual insensitivity, current critiques are mainly political. In my view, this is unsurprising, given the inherently political nature of human rights law.

But the Court and the Convention it defends are under sustained pressure on two fronts. Amongst Council of Europe member states, a growing populist backlash against immigrants, asylum seekers, and refugees has seen the Court been portrayed as a 'blocker' of deportations, leading to politicians and Europe calling for the Convention's reform and some going as far to suggest outright withdrawal. Outside the Council, assertive authoritarian states, like Belarus, seek to leverage this anger by manufacturing humanitarian crises at its frontiers with Council member states. If the Court wishes to ensure the Convention's survival, it needs to adapt, even if that means conceding certain points to its detractors to win the overall argument.

1.1. Introduction

In this article, I will suggest a series of reforms to the European Convention on Human Rights[340] (hereinafter ECHR/the Convention) system, in response to a Council of Europe (CoE) member state proposing to leave the ECHR on the grounds of 'excessive interference'. This will be followed by an analysis of how these reforms can safeguard the integrity of the European Court of Human Rights (hereinafter ECtHR/the Court). I will choose to centre the discussion of this essay on the issue of migration, asylum, and deportation, given the current political climate and debate surrounding this issue, with certain Convention states sustaining pushes for reform to the Convention system to facilitate easier deportations, with certain political parties even agitating for the denunciation of, and withdrawal from, the ECHR.[341]

I will divide this discussion into three sections. In the first section, I will discuss the political and doctrinal grounds for Convention states claiming 'excessive interference', primarily focussing on the controversy surrounding the Court's inconsistent deployment of the 'European consensus' doctrine, as well as the quasi-legislative capacity that it can draw from the 'living instrument doctrine'. I will then briefly consider these issues with this essay's central theme, illustrating potentially controversial judgments in the ECtHR's case law, before outlining my proposed reforms in the third section. These reforms will focus on both procedural and substantive issues, such as deportations to third countries and the 'instrumentalisation' of immigration by states hostile to states party to the ECHR, as a tool of hybrid warfare, respectively.[342]

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[340] Convention on the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) ETS No. 005 (ECHR)

[341] Dominic Casciani, 'Would leaving the ECHR really 'stop the boats'?' (*BBC News*, 9 October 2025) <https://www.bbc.co.uk/news/articles/cm283eqje03o> accessed 1 January 2026; Ministry of Justice (United Kingdom), 'Joint Statement to the Conference of Ministers of Justice of the Council of Europe' (GOV.UK, 10 December 2025) para 6, bullet point 5 <https://www.gov.uk/government/news/joint-statement-to-the-conference-of-ministers-of-justice-of-the-council-of-europe> accessed 30 December 2025; HC Deb 29 October 2025, vol 771, div 331, cols 357-8; Presidenza del Consiglio dei Ministri, 'Lettera aperta sulle Convenzioni internazionali' (Governo Italiano, 22 May 2025) <https://www.governo.it/sites/governo.it/files/Lettera_aperta_22052025.pdf> accessed 30 December 2025

[342] MoJ (UK) (n 2); Richard Milne and James Shotter, 'Belarus 'weaponising' illegal migration, Lithuania says' (Financial Times, 15 June 2021) <https://www.ft.com/content/0ad28032-6102-41a0-ad8d-b80460e52867> accessed 30 December 2025

2.1. 'Excessive interference': political and doctrinal concerns

2.1.1. Political concerns

Concerns over the far-reaching nature of the Convention and the Court by Contracting Parties, with respect to the sovereignty of their legal systems, also date back to the Convention's inception. Only Denmark and Ireland accepted both the individual right to petition and the Court's compulsory jurisdiction, when the Convention entered into force in 1953, with the other Contracting Parties opting instead to not adopt the then-optional clause.[343] However, upon the ratification of Protocol No. 11, the right to individual petition was enshrined into the ECHR for all Contracting Parties under art 34, amending the existing text of the ECHR and explicitly prohibiting any interference with this right.[344] Although the UK attempted to ensure that the right to individual petition (art 34) remained optional during Protocol 11's negotiations, these attempts were unsuccessful.[345] This right is qualified by strict admissibility criteria under art 35, which has been amended under Protocols No. 14 and 15 to include (among other provisions) a single-judge formation to examine the admissibility of cases, as well as reduce the admissibility period from six to four months.[346]

Given that forty-six nations are party to the ECHR,[347] each with their own unique legal systems and set of cultural values, it is unsurprising that the ECtHR's rulings may prove controversial. When the Court ruled in *Hirst v. the United Kingdom (No. 2)* and *Greens and MT v. the United Kingdom* that the UK's blanket ban on prisoner voting violated its obligations under art.3 of Protocol No.1 to hold free

[343] Ed Bates, 'The Birth of the European Convention on Human Rights—and the European Court of Human Rights' in Jonas Christoffersen and Mikael Rask Madsen (eds.) *The European Court of Human Rights between Law and Politics* (OUP 2014) 40; Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (CUP 2015) 144-8

[344] Protocol No 11 to the Convention on the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) ETS No. 155 (ECHR) art 34

[345] Alexander Horne and Vaughne Miller, 'Parliamentary Sovereignty and the European Convention on Human Rights' (*House of Commons Library*, 6 November 2014) <https://commonslibrary.parliament.uk/parliamentary-sovereignty-and-the-european-convention-on-human-rights/> accessed 8 January 2026

[346] Protocol No. 14 to the Convention on the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) CETS No. 194 (ECHR) arts 6-7; Protocol No. 15 to the Convention on the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) CETS No. 213 (ECHR) art 4

[347] Council of Europe, 'The Council of Europe and the European Union: different roles, shared values' (no date) <https://www.coe.int/en/web/portal/european-union> accessed 5 January 2026

elections at reasonable intervals by secret ballot, the Court was accused of "attempting to overrule British law on prisoner voting",[348] and was in direct conflict with the sovereignty of the British parliament.[349] The reaction of the UK's parliament to the ECtHR's rulings *Hirst (No. 2)* and *Greens and MT* cases is a clear source of legal friction, as the reaction of British parliamentarians can be understood as representing public opinion, as a majority of Britons polled in 2012 were in favour of retaining the blanket ban.[350]

2.1.2. Doctrinal concerns

The above case studies of *Hirst (No. 2)* and *Greens and MT* are substantially intertwined with doctrines the Court employs in its judgments, namely the 'European consensus' and 'living instrument' doctrines, from which complaints of 'excessive interference' can arise. These doctrines were first elaborated upon by the Court in *Tyrer v the United Kingdom*.[351] In this case, the Court argued that the ECHR: required interpretation "in light of present-day conditions",[352] and that if the laws and practice of other CoE member States evidence "commonly accepted standards", the respondent State's margin of appreciation is reduced.[353]

These doctrines have been employed since by the Court, in cases concerning both substantive (negative) and procedural (positive) obligations of states party to the ECHR,[354] upon which said doctrines can be criticised. The substantive criticism of this doctrine is its majoritarian nature: consensus suggests a majoritarian approach to human rights adjudication that conflicts with their

[348] David Davis, '7. Britain must defy the European Court of Human Rights as Strasbourg is exceeding its authority' in Spyridon Flogaitis, Tom Zwart and Julien Fraser (eds.) *The European Court of Human Rights and its discontents* (Edward Elgar 2013) 70; Peter Hollobone, MP also refers to "interference" by ECtHR in UK affairs in HC Deb 11 January 2011, vol 521, col 2WH

[349] ECHR (n 1) Protocol No 1, art 3; *Hirst v. the United Kingdom (No. 2)* (2006) 42 EHRR 41; *Greens and MT v. the United Kingdom* (2011) 53 EHRR 21

[350] Joel Rogers de Waal, 'Public says no to prison votes' (*YouGov UK*, 25 November 2012) <https://yougov.co.uk/politics/articles/5267-public-says-no-prison-votes> accessed 7 January 2026

[351] *Tyrer v the United Kingdom* (1979) 2 EHRR 1

[352] Ibid, para 31

[353] Ibid

[354] Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (CUP 2015) 17-20

inherently anti-majoritarian nature, especially when considering the protection of minorities and their rights under art 14 of the ECHR and states party to Protocol No.12 of the Convention.[355]

However, given that this essay focuses on Contracting Parties' criticisms of the ECHR and its application by the ECtHR, I will instead discuss the procedural issue with the doctrine of European consensus. The procedural criticism of the 'European consensus' doctrine focuses instead on how consensus is identified and applied in the Court's reasoning.[356] The ECtHR's jurisprudence reveals, if anything, an inconsistent application and broad interpretation of both the source and meaning of consensus. Dzehtsiarou establishes four conceptions of 'European consensus' that the Court has deployed: legal consensus based on Contracting Parties' national laws and treaty obligations; consensus based on international trends; internal consensus (i.e. public opinion), and; expert consensus.[357] For the sake of brevity, I will discuss the Court's use of 'European consensus' based on international trends and internal consensus, and the problems their inconsistent application presents.

In the *Tyrer* case, the Manx attorney general argued that corporal punishment did not outrage public opinion on the Isle of Man (internal consensus), which the Court then balanced with penal standards from other CoE member states (external consensus), with external consensus overriding internal consensus in the Court's judgment.[358] The Court contrasted this somewhat in *A, B and C v Ireland*[359], noting that although there was external consensus on the liberalisation of abortion laws, Ireland's internal consensus was that abortion laws should remain restricted.[360] In this case it should be acknowledged that, were the Court to override what could be understood as a 'hard' consensus in Ireland, based on the outcomes of legally-binding referenda on the issue, this could have represented

[355] Dzehtsiarou (n 14) 115; Eyal Benivenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31 *J. Int'l Law & Pol*. 843; ECHR (n 1) art 14; Protocol No. 12 to the Convention on the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) CETS No. 177 (ECHR)
[356] Dzehtsiarou (n 14) at 115
[357] Ibid, at 71
[358] *Tyrer* (n 12) para 31
[359] *A, B and C v Ireland* (2011) 53 ECHR 13
[360] Ibid, paras 226 and 235

excessive interference and cast doubt over the Convention system's legitimacy.[361] Returning to the case study of *Hirst (No. 2)*, although the Court acknowledged that no European consensus existed on prisoner voting, the judgment overrode what could be described as a 'soft' internal consensus on retaining the blanket ban on prisoners' right to vote, as previously illustrated by public and parliamentary opinion on the matter.[362] This implicit differentiation between 'hard' and 'soft' consensuses by the ECtHR, in either affording or denying a state's margin of appreciation in the Convention's application, thus provides fertile ground for accusing the Court of 'excessive interference'.

Meanwhile the Court's application of the 'European consensus' doctrine, based on international trends, in the case of *Christine Goodwin v the United Kingdom*[363], was arguably a controversial evolution of this doctrine. In this case, the Court relied on the notion of an "emerging international trend" amongst *some* CoE states and third states[364], to rule that the UK's absence of legal recognition for sex changes, as well as the impossibility for transsexuals to marry, were violations of the Convention.[365] In other words, the argument could be made that the Court's reasoning was based on an unstable foundation of international *trends* outside of the CoE, undermining the transparency and predictability of this doctrine's use in future judgments, as well as overriding the UK legislature through the creation of new rights. Unsurprisingly, the employment of the 'living instrument' doctrine has also been heavily criticised on similar grounds, especially in contentious cases, for giving the Court a *de facto* legislative capacity to create new rights, as seen in the reaction to *Verein KlimaSeniorinnen Schweiz and Others v Switzerland*.[366] The living instrument is also contentious due to its inconsistent

[361] Dzehtsiarou (n 14) at 62-3
[362] de Waal (n 11); HC Deb 11 Jan. 2011 (n 9); Horne and Miller (n 6)
[363] *Christine Goodwin v the United Kingdom* (2002) 35 EHRR 447
[364] Ibid, para 85
[365] Ibid, judgment paras 1-2
[366] Marc Bossuyt, 'The judges in Strasbourg are just making up new human rights' (*Brussels Report*, 15 April 2024) <https://www.brusselsreport.eu/2024/04/15/the-judges-in-strasbourg-are-just-making-up-new-human-rights/> accessed 9 January 2026; *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* (2024) 79 EHRR 1, partly dissenting partly concurring opinion of Judge Eicke

application, which undermines the Court's credibility, which calls into question the legitimacy of its processes, as this reduces the predictability of the outcomes of cases.[367]

3.1. 'Excessive interference' in the Court's jurisprudence on asylum and deportation cases

3.1.1. Substantiating the 'excessive interference' claim

As the above section highlighted, the ECtHR is susceptible to significant criticism on political and doctrinal grounds; this section will focus on criticisms of the Court's case law on the issue of asylum and deportation. One issue with the ECtHR's asylum cases is the lowered threshold for abuse it employs, i.e. living conditions in detention centres and receiving states, when assessing cases for art 3 violations. In *MSS v Belgium and Greece*, the Court argued that this lowered threshold to prove a violation vis-a-vis the applicant's treatment by the receiving state's authorities, concerning the burden of proof on the part of the applicant,[368] was legitimised by an international consensus, which indicated that asylum seekers are "a particularly underprivileged and vulnerable group in need of special protection".[369] Criticism of this judgment through the lens of 'excessive interference' can be inferred from judge Sajó's dissenting opinion, who argued that the Court unnecessarily restricted states' margin of appreciation by 'homogenising' asylum seekers, despite their heterogeneity as a group.[370] Bossuyt extends Sajó's dissenting opinion on the *MSS* judgment, arguing that the application of the *MSS* precedent by the Court has seen the creation of new categories of 'vulnerability' that interferes with states' asylum policies, as well as expanded the Convention to protect social rights by considering applicants' essential characteristics.[371]

The Court has been accused of adopting a more 'liberal' interpretation of the Convention in certain controversial asylum and deportation cases, and arguably demonstrated 'excessive interference', by

[367] Kanstantsin Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights' (2011) 12(10) *German LJ* 1730, 1742
[368] *M.S.S v Belgium and Greece* (2011) 53 EHRR 2 para 352
[369] *M.S.S v Belgium and Greece* (n29) para 251
[370] ibid, partly concurring and partly dissenting opinion of judge Sajó, part II
[371] Marc Bossuyt, 'Is the European Court of Human Rights on a slippery slope?' in Flogaitis, Zwart and Fraser (eds) (n 9) 27-36

applying art 3 to living conditions in Convention parties, and receiving third states.[372] In *Rahimi v Greece*[373], the ECtHR judged that the failure of Greek authorities to ensure the accommodation and care of the applicant constituted an art 3 violation; the Court similarly attributed indirect responsibility of living conditions in receiving third states to deporting ECHR states in *Sufi and Elmi v the United Kingdom*.[374] The risk of materially unsafe conditions for deportation, as well as that of *refoulement*, is clearly a substantial concern for the Court in deciding the outcome of asylum and deportation cases. As *Ilias and Ahmed v Hungary* demonstrated, even if a Convention state reserves the right to deport asylum seekers to a third/unconnected state (i.e. not nation of the applicant's origin), there must be substantial guarantees that the deportee will not be subject to torture or degrading treatment.[375] This is complicated by the fact that adjudicators need to consider a factual assessment of the situation in the applicant's country of origin alongside the 'likelihood' or 'possibility' of persecution; striking balance between these subjective and objective elements requires serious consideration, with substantial room for error from which Convention states could claim 'excessive interference'.[376]

3.1.2. Problematising the 'excessive interference' claim

Although I agree with Bossuyt that the Court's evolution of art 3 from a civil right to a social right may undermine the Court's credibility, his argument that the *Sufi and Elmi* judgment marks a "future prohibition on the removal of any asylum seeker"[377] fundamentally ignores the absolutist nature of art 3, of which a dilution for asylum and deportation cases would represent a 'slippery slope' for undermining the Convention's object and purpose, especially if Convention states collude on how to minimally, or not at all, comply with their obligations.[378] I also take further issue with this argument,

[372] ibid 31-3
[373] *Rahimi v Greece* App no. 8687/08 (ECtHR 5 April 2011)
[374] *Sufi and Elmi v the United Kingdom* App nos. 8319/07 and 11449/07 (ECtHR 28 June 2011) para 291
[375] *Ilias and Ahmed v Hungary* (2020) 71 EHRR 6 para 137
[376] UN High Commissioner for Refugees (UNHCR), *Note on Burden and Standard of Proof in Refugee Claims* (16 December 1998) <https://www.refworld.org/policy/legalguidance/unhcr/1998/en/23696> accessed 10 January 2026
[377] Bossuyt (n 30) 32
[378] Veronica Fikfak, 'ECHR Reform: A Danger of Contagion in Relation to Article 3' (*UK Const. L. Blog*, 9 December 2025) <https://ukconstitutionallaw.org/2025/12/09/veronika-fikfak-echr-reform-a-danger-of-

insofar that Bossuyt's criticism could be interpreted as attempting to absolve Convention states of implementing proper risk assessments, by implying that Convention states cannot be held responsible for the conditions in receiving states. Whilst I concede that Convention states cannot be *directly* responsible for the material conditions in receiving states, the Court's jurisprudence suggests that removals to third states with unstable political environments are permissible, provided that (*inter alia*) a proper risk assessment has been conducted by the deporting state, even if the deporting state has received diplomatic assurances from the receiving states that the applicant is at no risk of harm.[379]

I would therefore contend that these claims of 'excessive interference' in the Court's assessment of asylum and deportation cases, while to some extent legitimate, are primarily political in nature. Whilst I do not wish to suggest that the Court's judgments should be free from criticism, this should be based on factually accurate and sober reports of the Court's judgments; opportunistic politicians and media outlets have taken to sensationalising and misrepresenting the Court's judgments, with deleterious consequences for the Convention system's legitimacy in the court of public opinion.[380] However, given the political pressure the Court is subject to, how can it adapt to safeguard the Convention's existence?

4.1. Proposed reforms to the Convention system

4.1.1. Doctrinal prioritisation and clarification

The first section of this essay contended that the ECtHR's employment of doctrines in interpreting its precedent has been inconsistent. Although the Court has not fully committed itself to *stare decisis* in

contagion-in-relation-to-article-3/> accessed 10 January 2026; Simon Kuper, 'Europe's second-class citizens' (*Financial Times*, 18 December 2025) <https://www.ft.com/content/432948ca-2f30-4ad0-a3cf-109d8fc3312b> accessed 10 January 2026

[379] See *A. A. v Sweden* App no. 4677/20 (ECtHR, 13 July 2023); *Khasanov and Rakhmanov* App nos. 28492/15 and 44975/15 (ECtHR, 29 April 2022); *Saadi v Italy* (2008) 49 EHRR 30; *Soering v the United Kingdom* (1989) 11 EHRR 439

[380] Victoria Adelmant, Alice Donald, and Başak Çali, 'The European Convention on Human Rights and Immigration Control in the UK: Informing Public Debate' (*Bonavero Institute of Human Rights*, 4 September 2025) <https://www.law.ox.ac.uk/sites/default/files/2025-09/European%20Convention%20on%20Human%20Rights%20and%20Immigration%20Control%20in%20the%20UK_4%20Sept%202025.pdf> accessed 12 January 2026; Ashifa Kassam, ''Who's it going to be next time?': ECHR rethink is 'moral retreat', say rights experts' (*The Guardian*, 13 December 2025) <https://www.theguardian.com/law/2025/dec/13/europe-echr-rethink-moral-retreat-say-human-rights-experts> accessed 12 January 2026

its judgments, to allow for the deployment of the 'living instrument' doctrine, this means that the unpredictability of the Court's judgment undermines legal certainty and consistency, threatening its legitimacy.[381] A clear example of this was the difference in rulings between *K.R.S v the United Kingdom* and the *MSS* case, despite the material similarities between the cases and six-month gap between them.[382] By more explicitly binding itself to its own case law, under the doctrine of *stare decisis*, the Court's future jurisprudence would become more predictable and consistent.

A benefit of this would be fewer legal conflicts with Convention states, especially in cases that are morally sensitive (e.g. *Hirst No.2*).[383] In such cases, the Court should also consider whether internal consensuses exist on certain issues when deciding a state's margin of appreciation, should there be an absence of 'hard' or 'external' consensuses. In my view, this would help the ECtHR approach contentious cases with greater context-sensitivity in its judgments, which could help de-fang the narrative of the ECtHR being a 'foreign court' by its detractors.[384] However, the Court should still have the prerogative to deploy the living instrument and European consensus doctrines, particularly for *sui generis* cases.

4.1.2. Institutional safeguarding

This reform proposes that, to safeguard its integrity, the Court should establish specialist tribunals, as well as ensure that it is more transparent in the information it releases and assertive in challenging misrepresentations of its judgments. The first sub-component is clear in its scope: for cases that are morally sensitive and complex (e.g. asylum and deportation), provided they are admissible, the Court would refer cases to dedicated permanent or *ad-hoc* chambers. These chambers would also consult and coordinate with national governments and courts, with a dual purpose of understanding national

[381] Tom Zwart, 'More human rights than Court: Why the legitimacy of the European Court of Human Rights is in need of repair and how it can be done' in Flogaitis, Zwart and Fraser (eds) (n 9) 84-6
[382] ibid; *K.R.S. v the United Kingdom* (2008) 48 EHRR SE8; *MSS* (n 28)
[383] *Hirst (No. 2)* (n 10)
[384] Pablo Castillo-Ortiz, ''A Foreign Court': ECHR-scepticism in Comparative Perspective' (*UK Constitutional Law Association Blog*, 25 June 2024) Available at: <https://ukconstitutionallaw.org/2024/06/25/pablo-castillo-ortiz-a-foreign-court-echr-scepticism-in-comparative-perspective/> accessed 25 September 2026

contexts and establishing pathways to ensure the effective implementation of judgments. Implementing such a reform may be beyond the scope of the Convention, which warrants further investigation, but in my view, this would have the benefit of 'translating' the Court's case law for all Convention parties. The second sub-component would ensure that the Court publishes more detailed breakdowns of its caseloads in annual reports, which would also enable it to (within reason) challenge politicians and media outlets that misrepresent its judgments, giving the Court an ability to robustly defend itself and hold its critics to account.

4.1.3. Scoping deportation cases

The joint statement by the Ministers of Justice calls for the Court to respect the right of Convention parties to enter into third-country deportation agreements, provided that the rights of irregular migrants and asylum seekers can be guaranteed.[385] This is a welcome recognition by Convention states of their procedural obligations to ensure the safety and security of individuals they are deporting; in these instances it may be prudent for the Court to disregard its homogenisation of asylum seekers in the *MSS* case, and instead assess the legality of their deportations on the grounds of individually protected characteristics.[386] This serves a dual purpose: the first is that deporting states would have greater clarity in their risk assessments regarding any potential violations of the convention, helping states with stricter asylum processes establish consensuses on which third states could be considered 'safe'; the second purpose is that, by de-homogenising asylum seekers as a *sui generis* protected categories, applicants would be active *claimants* of Convention rights instead of passive beneficiaries.[387]

4.1.4. Securing the Convention from external threats

[385] MoJ (UK) (n 2) para 6 point 3
[386] *MSS* (n 28)
[387] Ekaterina Yahyaoui Krivenko, 'Reassessing the Relationship between Equality and Vulnerability in relation to Refugees and Asylum Seekers in the ECtHR: The *MSS* Case 10 Years On' (2022) 34(2) *IJRL* 192; Victoria Oluwatobi Isa Daniel and Brid Ní Ghráinne, 'Revisiting *MSS v Belgium and Greece* and Interim Measures before the European Court of Human Rights' (2024) 43(2) *Refugee Survey Quarterly* 127

This final reform concerns the 'instrumentalisation' of migration.[388] Using large-scale human flight has been used by Convention states such as Turkey to gain diplomatic leverage over other states[389], but the alleged use of this tactic by non-Convention state Belarus serves an insidious role in attempting to destabilise Europe, by encouraging populist backlash against the Convention system, and bringing security-conscious Convention states' border policies into conflict with their obligations to provide routes to asylum.[390] The response to such an existential threat, which cynically uses highly vulnerable individuals as coercive leverage, must carefully balance security considerations with the need to avoid securitising a sensitive human rights issue.[391]

To counteract this, Convention states that may be subject to hybrid measures, i.e. (in this case Latvia, Lithuania, and Poland) can reserve the right to close their borders entirely with the hostile state, caveated by the existence of clear, safe, and legal routes for individuals to claim asylum in those Convention parties from third states (in line with their legal obligations). However, in instances concerning dissidents from the hostile state seeking asylum, exceptional measures must be in place to ensure that they can exercise their right to claim asylum. Moreover, the Court must also be more assertive in scrutinising the abuse of extradition requests, such as that of Belarus using Interpol Red Notices to engage in transnational repression of dissidents.[392]

5.1. Conclusion

[388] Consiglio dei Ministri (n 2) para 13 point 3; MoJ (UK) (n 2) para 6 point 5

[389] *Agence-France Presse*, 'Turkish president threatens to send millions of Syrian refugees to EU' (*The Guardian*, 11 February 2016) <https://www.theguardian.com/world/2016/feb/12/turkish-president-threatens-to-send-millions-of-syrian-refugees-to-eu> accessed 14 January 2026; 'Turkey threatens to let asylum-seekers flood into Europe' (*The Economist*, 5 March 2020) <https://www.economist.com/europe/2020/03/05/turkey-threatens-to-let-asylum-seekers-flood-into-europe> accessed 14 January 2026

[390] Aurel Sari, 'Instrumentalized migration and the Belarus crisis: Strategies of legal coercion' (Hybrid CoE Paper 17, April 2023) 17-20 <https://www.hybridcoe.fi/wp-content/uploads/2023/04/20230425-Hybrid-CoE-Paper-17-Instrumentalized-migration-and-Belarus-WEB.pdf> accessed 15 January 2026

[391] Mirko Forti, 'Belarus-sponsored Migration Movements and the Response by Lithuania, Latvia, and Poland: A Critical Appraisal' (*European Forum, Insight*, 11 July 2023) <https://www.europeanpapers.eu/europeanforum/belarus-sponsored-migration-movements-and-response-by-lithuania-latvia-and-poland> accessed 15 January 2026

[392] Ben Keith and Jacqueline Jahnel, 'Repression through Interpol: How Belarus Turns Police Cooperation Into A Tool Of Transnational Repression And Creates Challenges For Europe' (*Verfassungsblog*, 9 January 2026) <https://verfassungsblog.de/repression-through-interpol/> accessed 15 January 2026

Owing to the Convention's nature as an instrument that intersects law and politics, as well as its ambition to harmonise human rights standards in over forty countries, it is understandable why the Court's judgments come under considerable scrutiny from Convention states. The inconsistent application of its various legal doctrines is also another understandable source of frustration, particularly when the Court can seemingly apply or override its precedent on a whim; when applied to the current political climate surrounding immigration and pressure governments face from populist and authoritarian movements, one can appreciate why there is a desire for reform among Convention states.

In my proposed reforms for the Court, I aimed to strike a balance between the need for the Court to consider and be responsive to external pressures, whilst ensuring that the object and purpose of the Convention is not undermined. The Court should be able to consider 'soft' consensuses in Convention states, whilst understanding that public and political opinion can be ill-informed and vacillate; the Court must be able to build a more consistent body of jurisprudence, to improve the predictability of outcomes, and; the Court should reserve the right to challenge misrepresentations of its judgments, to safeguard its legitimacy from those that wish to undermine the Convention. However, the Court should not also be ignorant of the fact that the Convention is limited in its capacity to respond to hybrid threats to both the Convention and its member states; these threats seriously imperil the Convention system and the protection of human rights more broadly, and I believe the only way to ensure the Convention's survival against these threats will be through substantial modernisation.

Intertwining Religion and the Law: A Comparative Exploration of the Rights of Women and Non-Muslim Citizens Under the Influence of Islam Within Select Arab States

Olivia Morland

Abstract

The rights of women and non-Muslim citizens within selected Arab states remain significantly constrained by the interaction between religion and the law. While Islam has played an integral role in shaping legal frameworks across the Arab world, its influence need not inherently result in the legal discrimination that has often emerged through traditional interpretations and applications of Islamic principles. Indeed, certain Arab states, most notably Tunisia, have demonstrated significant progress towards gender and religious equality through the interpretive mechanism of *Ijtihad*. By enabling reinterpretation of Islamic texts in accordance with contemporary principles of equality and inclusivity, *Ijtihad* provides a potential pathway for positive legal reform. This article compares Tunisia, Libya, Egypt, Morocco, and Syria in relation to divorce, inheritance and polygamy laws, alongside examining the legal treatment of non-Muslim communities, to identify areas where reform may be achieved through reinterpretation. Unfortunately, progress towards achieving equality in Egypt and Syria remains impeded by a strong adherence to traditional interpretations of Islam, alongside an apparent political reluctance to pursue meaningful reform. Whilst this article acknowledges that some significant progress has been achieved, particularly following demands for equality and non-discrimination associated with the Arab Spring, substantial barriers do remain. Ultimately, achieving gender and religious equality requires continued reinterpretation of Islamic legal principles, supported by sufficient and proactive political will.

Introduction

The strong relationship between religion and the law in Arab countries is deeply rooted in Islam's influence on social, political, and legal systems. As Farah observes, the role that religion has played in

'structuring and shaping the relations between state and society in early civilizations is undisputed'.393 This dynamic is particularly evident in constitutional texts and personal status laws, often grounded in Sharia law394. However, traditional interpretations of Sharia have often prioritised the rights and interests of Muslims over non-Muslims, while also reflecting conventional expectations of women's roles within the private sphere. This article will explore how these interpretations have resulted in entrenched forms of discrimination within legal frameworks.

Sharia, meaning 'the path to be followed',395 makes up the body of Islamic law. The two primary sources of Sharia are the Qur'an and the Sunnah, complemented by Ijma and Ijtihad. Ijtihad is the 'intellectual exertion'396 of a qualified jurist to derive or interpret rules of Sharia from their sources, and Ijma is the 'consensus of agreement'397 amongst them. This article explores the application of Sharia in Tunisia, Egypt, Morocco and Syria, with a focus on how Islam functions as a cornerstone of national identity in these societies to shape the law. In accordance with Coulson's observation that 'the fusion of law and religion is complete within the Sharia texts',[398] this article explores the inconsistent protection of the rights of women and non-Muslim citizens across different states, focussing on divorce, polygamy, inheritance, and the treatment of religion within the law as areas that display significant inconsistencies. Despite attempts to modernise these areas of the law, the achievement of full equality within these states remains elusive. However, there is potential to

[393] Paolo Farah, Law, Society and Religion: Islam and the West. in Lorenzo Ramaioli (ed), Juridical Perspectives between Islam and the West – A Tale of Two Worlds (Palgrave MacMillan (United Kingdom) 2024).

[394] Lynn Welchman, Women, family and the law: the Muslim personal status ;aw debate in Arab states. in RW Hefner (ed), The New Cambridge History of Islam (Cambridge University Press 2010) 411- 437.

[395] Amira Mashhour, 'Islamic Law and Gender Equality: Could There Be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt' [2005] 27(2) Human Rights Quarterly 562-596.

[396] Sajila Kausar, 'Collective Ijtihad: History and Current Perspective' [2017] III(V) International Journal of Humanities & Social Science Studies 151-152.

[397] Sajila Kausar, 'Collective Ijtihad: History and Current Perspective' [2017] III(V) International Journal of Humanities & Social Science Studies 153.

[398] Noel Coulson, 'Law and Religion in Contemporary Islam' [1978] 29(6) Hastings Law Journal 1449.

strengthen women's and non-Muslim citizens' rights whilst preserving the relationship between religion and the law through the interpretive power of *Ijtihad*. It is important to note that the exercise of independent reasoning through *Ijtihad* is limited to qualified jurists (*Mujtahid*).[399] Accordingly, this article explores the extent to which *Ijtihad* can enhance the rights of women and non-Muslim citizens, arguing that, while it provides an important mechanism for reform, it cannot be regarded as a panacea.

The historical basis for the strong relationship between Islam and the law

To understand the strong relationship between religion and the law in Arab countries, it is beneficial to recognise Islam's role as the national identity amongst the majority of states within the MENA region. As Charrad describes, Islam serves as an ''umbrella identity' and idiom of cultural unity'[400] integrating diverse social and legal elements. This is clear within many Arab constitutions, for example Egypt's 2014 Constitution (Article 2), which declares Sharia as the principal source of legislation,[401] deeply intertwining religion with its legal frameworks.

In Egypt, the historical application of Hanafi jurisprudence within personal status laws has solidified traditional family roles and reinforced gender inequalities.[402] Of the four schools of Sunni Islamic Jurisprudence – Hanafi, Maliki, Shafii, and Hanbali –the Hanafi school is the most widespread within Islamic law[403] and emphasises 'reason, logic [and] opinion'.[404] Having been unaffected by colonial

[399] Wael B Hallaw, 'Was the Gate of Ijtihad Closed?' [1984] 16(1) International Journal of Middle East Studies 3-41.

[400] Mounira Charrad, 'Gender in the Middle East: Islam, State, Agency' [2011] 37 Annual Review of Sociology 417-437.

[401] Constitution of the Arab Republic of Egypt 2014, art 2.

[402] Sara Abdel Ghany and Azza Soliman, 'Reforming the Egyptian Personal Status Laws A case for Islamic feminism' [2020] 44(2) Al-Raida Journal 125.

[403] Hyder Gulam, 'Comparing the legal rules (Akham-I Shariah) in the Maliki and Shafii Schools with the Hanafi School of thought' [2016] 16(1) Jurnal Ilmiah Islam Futura 4.

[404] Hyder Gulam, 'Comparing the legal rules (Akham-I Shariah) in the Maliki and Shafii Schools with the Hanafi School of thought' [2016] 16(1) Jurnal Ilmiah Islam Futura 4.

codification efforts in Egypt,[405] Hanafi jurisprudence 'sustains a hierarchical regime of gendered spousal roles'[406] within its present-day family law, codified into the Egyptian Personal Status Laws in the twentieth century.[407] In this context, religion and the law are intertwined, creating 'policies where both law and religion [are] intermix[ed], each supportive of the other',[408] and as will be explored in the latter half of this essay, the law has consequently foregone many rights of women and non-Muslim citizens within Egypt and other identified Arab states.

However, some argue that gender disparities within the law stem not from the historic influence of Islamic jurisprudence itself, but from its misinterpretation. Haddad in 'Our women in the Sharia and society',[409] advocated for social change for women, and presented the opinion that 'over many years, Islam had been misinterpreted to such an extent that women were unaware of their duties and the legitimate advantages they could expect in life'.[410] This is particularly interesting, as it highlights the argument that Islam is not exclusively and inherently discriminatory against women, but rather the interpretations of Islam have developed over many years to reinforce inequalities towards women, and such interpretations have influenced the law. On this basis, we can consider the importance of Ijtihad to rethink traditional Sharia principles to align with more modern ideas of fairness and gender equality. This article therefore affirms Haddad's case for the reform of personal status laws to

[405] Nadia Sonneveld, The Case of Women's Unilateral Divorce Rights in Egypt Revolution and Counterrevolution? from Part IV - What Is Law? Oral and Codified Law. in Doris Gray and Nadia Sonneveld (eds), Women and Social change in North Africa *What counts as Revolutionary?* (Cambridge University Press 2017) 331-352.

[406] Sara Abdel Ghany and Azza Soliman, 'Reforming the Egyptian Personal Status Laws A case for Islamic feminism' [2020] 44(2) Al-Raida Journal 125.

[407] Yakare-Oule Jansen, 'Muslim Brides and the Ghost of the Shari'a: Have the Recent Law Reforms in Egypt, Tunisia and Morocco Improved Women 's Position in Marriage and Divorce, and Can Religious Moderates Bring Reform and Make It Stick?' [2007] 5(2) Northwestern Journal of Human Rights 198.

[408] Paolo Farah, Law, Society and Religion: Islam and the West. in Lorenzo Ramaioli (ed), Juridical Perspectives between Islam and the West – A Tale of Two Worlds (Palgrave MacMillan (United Kingdom) 2024).

[409] Tahar Haddid, Our women in the Sharia and society (1st edn, 1930).

[410] Amel Grami, 'Gender Equality in Tunisia' [2008] 35(3) British Journal of Middle Eastern studies 349-361.

accurately reflect women's position in the society through interpretations of the Qur'an through a different lens.

The 'Interpretive power' of Ijtihad

The application of Ijtihad has provided a means of interpreting Sharia in response to changing social circumstances, particularly strengthening the rights of women's and non-Muslim citizens' rights whilst continuing to recognise Islam as the National identify within select Arab states. *Ijtihad* is one of the sources of Sharia, and as acknowledged by Dunne, is described as a 'rethinking',[411] or perhaps even more commonly a 'juristic reasoning'[412] that is 'used to regulate the whole field of human relationships'.[413] One of the earliest and most influential examples of *Ijtihad* is attributed to Caliph Omar ibn-al-Khattab, who suspended the application of the Qur'anic punishment of cutting the hands of thieves by prioritising and applying the broader principles of 'justice and fairness'.[414] Indeed, the application of such principles can be applied in a range of different contexts. As such, Arab countries like Tunisia have embraced the concept of *Ijtihad* with regard to the achievement of gender equality within polygamy and divorce laws. Crucially, *Ijtihad* facilitates the reinterpretation of Sharia in a way that can reflect modern understandings of gender equality and non-discrimination, whilst retaining the cultural and religious importance of traditional Islamic teachings.[415]

Challenges to the influence of traditional interpretations of Islamic law in the modern world

The impact of the Arab Spring on the relationship between religion and the law, particularly regarding constitutional texts and personal status laws concerning women's rights, varied immensely across the

[411] Shaista P Ali-karamali and Fiona Dunne, 'The Ijtihad Controversy' [1994] 9(3) Arab Law Quarterly 238-257.

[412] Noel Coulson, 'Law and Religion in Contemporary Islam' [1978] 29(6) Hastings Law Journal 1448.

[413] Noel Coulson, 'Law and Religion in Contemporary Islam' [1978] 29(6) Hastings Law Journal 1449.

[414] David Smock, Ijtihad: Reinterpreting Islamic Principles for the Twenty-First Century (United States Institute of Peace 2004).

[415] Miyase Yavuz, 'Allah (God), al-Watan (the Nation), al-Malik (the King, and the role of ijtihad in the family law reforms of Morocco', [2016] 7(2) The Journal of the Middle East and Africa 207-227.

countries in the MENA region. This wave of 'anti-regime uprisings'[416] saw significant protest by both women and men regarding the 'ineptitude and transgressions'[417] of their governments, and the desire for heightened gender equality. Women actively rallied for equal socio- economic, political and legal rights, as well as equitable representation in the political transitions expected to follow the uprisings.[418] During this period, the relationship between religion and the law came under intense scrutiny, particularly regarding the inequalities faced by women; the impact was so profound during the uprisings that Egyptian feminist Nawal El Saadwi acknowledged 'I felt for the first time that women are equal to men'.[419]

These uprisings had varying results across the MENA region. Tunisia greatly benefited from the Arab Spring and marked a huge progression by ensuring that gender equality was recognised in the subsequent 2014 constitution[420] (and amended 2022 constitution[421]), as explored in the latter half of this article. Here, we can see Tunisian legislation committing to a significant shift towards achieving equality between the genders, with particular efforts being made in regard to divorce rights.[422] This step towards equality however was not reflective of the whole of the MENA region, with many other countries unfortunately remaining stagnant in the face of gender equality progressions. Johansson notes that the political changes following the uprisings have 'arguably so far only ushered in mixed

[416] Elisabeth Johansson-Nogués, 'Gendering the Arab Spring? Rights and (in)security of Tunisian, Egyptian and Libyan women' [2013] 44(5/6) Security Dialogue 393-409.

[417] Elisabeth Johansson-Nogués, 'Gendering the Arab Spring? Rights and (in)security of Tunisian, Egyptian and Libyan women' [2013] 44(5/6) Security Dialogue 393-409.

[418] Elisabeth Johansson-Nogués, 'Gendering the Arab Spring? Rights and (in)security of Tunisian, Egyptian and Libyan women' [2013] 44(5/6) Security Dialogue 393-409.

[419] Lauren Bohn, Lynch Sarah, 'Women and the Revolution: What does the new democratic future hold for Egyptian women?' (*Foreign Policy*, 2 March 2011) <https://foreignpolicy.com/2011/03/02/women-and-the-revolution-2/> accessed 5 December 2024.

[420] Constitution of the Tunisian Republic 2014.

[421] Constitution of the Tunisian Republic 2022.

[422] Adrian Morse and Leila Sayeh, 'Tunisia: Marriage, Divorce, and Foreign Recognition' [1995] 29(3) Family Law Quarterly 701-720.

messages and continued insecurity for women'.[423] Indeed, such is the case in Egypt's 2014 constitution, where, despite proclaiming equality,[424] there remains a rather traditional approach to gender rights. The previously identified areas of law will now be considered in depth, examining the relevant constitutional provisions and personal status laws within each of the states identified above.

Islam and the Law: Divorce

Marriage in Islam is regarded as an 'everlasting institution',[425] and while Sharia does permit divorce in exceptional circumstances, it does so reluctantly, prioritising the preservation of the family unit. Indeed, divorce is seen as a compromise – allowing the dissolution of the marriage rather than forcing individuals to endure a 'companionship that has become odious'.[426] However, the permissibility of divorce is strongly disapproved within Sharia principles, influencing the perception and application of Islamic law regarding divorce across the Arab world. Ahmad describes divorce as 'only a necessary evil',[427] a sentiment echoed in the Hadith of the Prophet Muhammad which states 'Allah did not make anything lawful more abominable to Him than divorce'.[428] This article will subsequently explore how this heavy influence of cultural and religious disfavour has translated into legal systems that make divorce more accessible to men.

As aforementioned, Sharia is the principal source of legislation within Egypt,[429] and this influence is reflected in Egypt's divorce laws, which afford men greater rights to initiate divorce. In Sharia, Muslim

[423] Elisabeth Johansson-Nogués, 'Gendering the Arab Spring? Rights and (in)security of Tunisian, Egyptian and Libyan women' [2013] 44(5/6) Security Dialogue 401.
[424] Constitution of the Arab Republic of Egypt 2014, art 53.

[425] Shagufta Omar, 'Dissolution of Marriage: Practices, Laws and Islamic Teachings' [2007] 4(1) Policy Perspectives 91-117.

[426] G.C. Cheshire, 'The International Validity of Divorces' [1945] 61 Law Quarterly Review 352.

[427] Furqan Ahmad, 'Understanding the Islamic Law of Divorce' [2003] 45(3/4) Journal of the Indian Law Institute 484-490.

[428] Sunan Abi Dawud, hadith 2177.

[429] Constitution of the Arab Republic of Egypt 2014, Art 2.

men can terminate their marriage by *Talaq* (meaning 'repudiation'[430]) which is actionable unilaterally by the husband against the wife. It is interesting to note the different forms of *Talaq;* this article will discuss the *Talaq al Sunna,* (as opposed to the *Talaaq al Bidaa* which poses inconsistencies with 'Allah's teachings'[431]). *Talaq al Sunna* enables the husband to simply pronounce the divorce, and then to dissolve the marriage at a later date, following the period of the *Iddah*[432] (the period of reconsideration). This is however problematic, since under Sharia, to obtain a divorce (a '*Khul*'), in many instances a woman must provide her husband financial compensation in the form of the dowry[433] (the *Mahr*) which places an additional burden on the woman[434]. This is confirmed in *Surah Al- Baqarah* of the Qur'an*,* 'If you fear that they would not be able to keep the limits ordained by Allah, then there is no sin on either of them if she gives back'.[435]

Importantly, Article 20 of the Egyptian personal status law No.1 of 2000[436] codifies the '*Khul* law' to enable women to access divorce without having to prove any harm from the husband, so long as she forfeits her financial right of the *Mahr*[437] – the *Mahr* is the sum of money provided by the groom to the bride during the wedding ceremony. Significantly, this codification 'marks a radical discontinuity

[430] Amira Mashhour, 'Islamic Law and Gender Equality: Could There Be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt' [2005] 27(2) Human Rights Quarterly 562-596.

[431] Maria Reiss, 'The materialization of legal pluralism in Britain: Why Sharia Council decisions should be non-Binding' [2009] 26(3) Arizona Journal of International & Comparative Law 748.

[432] Amira Mashhour, 'Islamic Law and Gender Equality: Could There Be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt' [2005] 27(2) Human Rights Quarterly 572.

[433] Ashraf Booley, 'Divorce and the law of khul: A type of no fault divorce found within an Islamic legal framework' [2014] 18(1) Law, Democracy and Development 37-57.

[434] Pascale Fournier, 'In the (Canadian) shadow of Islamic law: Translating mahr as a bargaining endowment' [2006] 44(4) Osgoode Hall Law Journal 650-677.

[435] Qur'an, surah al-Baqarah 2:229.

[436] Personal Status Law No. 1 of 2000, Art 20.

[437] Aliaa Zakaria and Alaa Abouahmed, 'Constitutional protection of Egyptian women's rights in personal affairs' [2023] 9(1) Cogent social sciences.

with extant family law'[438] and empowers women to access divorce through the interpretative power of *Ijtihad,* which can address gender inequalities within the law whilst maintaining within the framework of Sharia, through the aforementioned 'exertion'[439] of interpretation granted to qualified jurists.[440] However, women's rights remain significantly constrained by the requirement attached to *Khul*, given that the condition to forfeit the *Mahr* results in the loss of such a foundational financial right for women in Islam.[441] Requiring women to relinquish this right as a condition of obtaining divorce is therefore inconsistent with the pursuit of full gender equality within Egyptian law. The Personal Status laws ultimately remain somewhat problematic since women must still forfeit their financial rights simply to separate – men are not held to the same requirements.

Additionally, this law was not passed without serious scrutiny. As acknowledged by Mashhour, 34 parliamentary members approved the law and 17 rejected it after a contentious debate regarding the judiciary, the consent of the two partners, and any social effects the *Khul* may have.[442] This is interesting, as despite the personal status law demonstrating an, albeit flawed, progression of gender equality, alongside marking attempts to tackle the influence of Sharia based inequalities, it is clear that many within the Egyptian parliament remain stifled by an 'adherence to a conservative interpretation of the Sharia'.[443]

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[438] Oussama Arabi, 'The Dawning of the Third Millennium on Shari'a: Egypt's Law no 1 of 2000, or Women May Divorce at Will' [2001] 16(1) Arab Law Quarterly 2-21.

[439] Sajila Kausar, 'Collective Ijtihad: History and Current Perspective' [2017] III(V) International Journal of Humanities & Social Science Studies 151-152.

[440] Sajila Kausar, 'Collective Ijtihad: History and Current Perspective' [2017] III(V) International Journal of Humanities & Social Science Studies 151-152.

[441] Jihan Safar, The Dower (Mahr) and Wedding Ceremony among the Shi'a of Oman: Religion, Class, and Ethnicity. in Yafa Shanneik and Annelies Moors (eds), Global Dynamics of Shi'a Marriages: Religion, Gender, and Belonging (Rutgers University Press 2022) 59-84

[442] Amira Mashhour, 'Islamic Law and Gender Equality: Could There Be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt' [2005] 27(2) Human Rights Quarterly 572.

[443] Amira Mashhour, 'Islamic Law and Gender Equality: Could There Be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt' [2005] 27(2) Human Rights Quarterly 584.

An interesting comparison can be drawn here to the divorce laws in Tunisia. In comparison to Egypt's rather conservative laws on divorce, Tunisia has granted equal divorce rights to both men and women. Article 49 of Tunisia's 2014 Constitution[444] commits the state to protecting and promoting women's rights, with equal access to divorce, codified in Article 31 of Tunisia's code of personal status.[445] This even requires the divorce to take place before a court 'in the interest of justice and equality among women and men'.[446] This is a prime example of *Ijtihad* being used to interpret Islam to maintain alignment with the Qur'an whilst promoting equal rights amongst men and women; on this basis, Morse and Sayeh recognise the divorce laws in Tunisia as 'an example of social engineering'.[447]

The 2004 Moudawana[448] (Family Code) of Morocco expanded divorce rights for women by replacing the 1958 Personal Status Code,[449] but it fell short of matching the full equality achieved by Tunisia. Significantly, the 2004 Moudawana improved women's rights by permitting two new categories of divorce: mutual consent[450] and irreconcilable differences[451] (Shiqaq). This is particularly important because women were granted greater accessibility to initiate divorce proceedings and indeed can now do so without requiring explicit justification.[452] As acknowledged by Yavuz, this change within divorce law is one part of a series of reforms within Morocco, widely observed to be one of the 'most

[444] Constitution of the Tunisian Republic 2014, art 49.

[445] Tunisian Code of Personal Status, art 31.

[446] Adrian Morse and Leila Sayeh, 'Tunisia: Marriage, Divorce, and Foreign Recognition' [1995] 29(3) Family Law Quarterly 701-720.

[447] Adrian Morse and Leila Sayeh, 'Tunisia: Marriage, Divorce, and Foreign Recognition' [1995] 29(3) Family Law Quarterly 701-720.

[448] Moroccan Family code (Moudawana) 2004.

[449] Moroccan Personal Status Code (Moudawana) 1958.

[450] Moroccan Family code (Moudawana) 2004, art 114.

[451] Moroccan Family code (Moudawana) 2004, arts 94-97.

[452] Katie Zoglin, 'Morocco's Family Code: Improving Equality for Women' [2009] 31(4) Human Rights Quarterly 964-984.

progressive and egalitarian Muslim family laws'[453] within the Arab world. Crucially, such a change had once again been facilitated by the exercise of 'innovative *Ijtihad',*[454] wherein the law interprets Islam through the principles of gender equality. Whilst by no means the sole influencing factor, with the role of King Mohammed VI having been equally as influential on the enhancement of women's rights with his pledge to improve gender equality in 1999[455], *Ijtihad* undeniably aided here in such significant reform of Moroccan law.

However, whilst these divorce laws do somewhat align with Morocco's constitutional declaration of committing the state to gender equality and eliminating discrimination (Article 19),[456] the Code fails to achieve the greater substantive equality of Tunisia. Within the 2004 Moudawana[457], the *Khul* procedure maintains that women must sacrifice financial compensation to their husband (in the form of the *Mahr*), and men retain the power to *Talaq*. Despite the Moudawana attempting to reduce such an imbalance in divorce law by requiring judicial oversights of the public prosecutor,[458] Morocco ultimately retains a rather conservative application of Islamic jurisprudence.

Islam and the Law: Polygamy

In Sharia law, polygamy is permitted under specific conditions, in particular the requirement of justice between wives. This is enforced in the Qur'an, where monogamy is encouraged if justice cannot be ensured; *Surah an Nisa* 4:3 states 'if you were to marry them, then marry other women of your choice

[453] Miyase Yavuz, 'Allah (God), al-Watan (the Nation), al-Malik (the King), and the role of ijtihād in the family law reforms of Morocco' [2016] 7(2) The Journal of the Middle East and Africa 208.

[454] Miyase Yavuz, 'Allah (God), al-Watan (the Nation), al-Malik (the King), and the role of ijtihād in the family law reforms of Morocco' [2016] 7(2) The Journal of the Middle East and Africa 214.

[455] Selman Zahid Özdemir, 'Islamic Law in Morocco: Historical developments and Reforms' [2025] 16(1) DergiPark Akademik 116.

[456] Morocco Constitution 2011, art 19.

[457] Moroccan Family code (Moudawana) 2004.

[458] Katie Zoglin, 'Morocco's Family Code: Improving Equality for Women' [2009] 31(4) Human Rights Quarterly 970.

– two, three, or four. But if you are afraid you will fail to maintain justice, then content yourselves with one.'[459]

In Tunisia, this verse of the Qur'an is interpreted as a justification to ban polygamy entirely within Article 18 of its Code of Personal Status 1956.[460] Indeed, Tunisia's prohibition of polygamy has its legal basis in *Surah An Nisa* 4:3 where it finds its 'juristic justification'[461] to ban polygamy in the 'impossibility of fulfilling the Quranic injunction that a plurality of wives must be given equal treatment'.[462] Once again, the interpretive power of *Ijtihad* to align Sharia with modern views of gender equality is profound, enabling Tunisia to become the first Islamic country to ban polygamy within state law.[463] However, it is interesting to briefly consider Chusnayaini's argument that this progression may not solely be down to the influence of Islamic Sharia law and the interpretative power of *Ijtihad,* but equally the result of Western influences on Tunisian President Bourgiba, and the emergence of secularisation of Islamic law at the time.[464]

The Syrian laws on Polygamy in its Personal Status Law of 1953 sharply contrast the revolutionary Tunisian laws on polygamy in the 1956 Code of Personal Status[465]. In Syrian Personal Status Law No.59 of 1953, Article 17[466] permits polygamy, but remains silent on the requirement for consent of the first wife. Whilst permitted, the Syrian Qādī is empowered to restrict polygamous practises where the

[459] Surah An Nisa, 4:3.

[460] Code of Personal Status 1956, Article 18.

[461] JND Anderson, 'The Tunisian Law of Personal Status' [1958] 7(2) The International and Comparative Law Quarterly 262-279.

[462] JND Anderson, 'The Tunisian Law of Personal Status' [1958] 7(2) The International and Comparative Law Quarterly 262-279.

[463] Mufliha Wijayati, 'FAMILY LAW REFORM IN TUNISIA (Reading the Rules of Polygamy in The Tunisian Code of Personal Status 1957)' [2021] 8(1) Jurnal Ilmiah MIZANI 133-141.

[464] Ayyus Chusnayaini, 'Dynamics of Tunisian Polygamy Law in Gender perspective' [2014] 5(2) Jurisdictie 133.

[465] Tunisian Code of Personal Status 1956.

[466] Syrian Personal Status Law 1953, Art 17.

husband cannot prove his financial capacity to support both his current wife and any potential additional wives. As observed by Anderson, this provision of Syrian law is 'outstandingly interesting',[467] considering that it imposes a restriction on polygamous practises in accordance with a traditional interpretation of Hanafi Sharia in *Surah – An-Nisa* 4:3, contrasting the progressive interpretation taken by Tunisia. The Syrian interpretation appears to balance the historically strict adherence to Islamic religious practise within the law by retaining access to polygamy, alongside the emerging external pressures to increase women's rights. In doing so, Article 17 takes account of the economic consideration of equal treatment in an effort to safeguard the economic well-being of all wives. However, despite providing an obstacle to polygamy through the potential for interference by the Syrian judiciary, in reality very little has changed with regard to the number of polygamous marriages that continue to occur within Syria.[468] Further reform is therefore required, perhaps through the power of Ijtihad, to reconsider traditional interpretations of Islamic principles underpinning polygamy and facilitate further legal reform towards gender equality.

It is worth acknowledging that despite making progressive change with regard to divorce, Morocco's 2004 Moudawana remains silent on both the 'delicate issues of polygamy and inheritance'[469] due to continuing 'socio-political tensions'[470] within Morocco at the time of the Codes inception. Thus, despite progressive reform within the Tunisian state regarding the abolition of the practise of polygamy, the strong influence of Islam within Morocco appears to continue to restrict women's rights within the law.

Islam and the Law: Inheritance

[467] JND Anderson 'The Syrian Law of Personal Status' [1955] 17(1) Bulletin of the School of Oriental and African Studies 36.

[468] Freedom House, Women's Rights in the Middle East and North Africa 2010: Syria (Freedom House, 3 March 2010) https://www.refworld.org/reference/countryrep/freehou/2010/71621?utm_source=chatgpt.com accessed 9 July 2026.

[469] Miyase Yavuz, 'Allah (God), al-Watan (the Nation), al-Malik (the King), and the role of ijtihād in the family law reforms of Morocco' [2016] 7(2) The Journal of the Middle East and Africa 219.

[470] Miyase Yavuz, 'Allah (God), al-Watan (the Nation), al-Malik (the King), and the role of ijtihād in the family law reforms of Morocco' [2016] 7(2) The Journal of the Middle East and Africa 208.

It is particularly interesting to pay attention to women's rights in the laws on inheritance within the Arab countries. Inheritance laws within Egypt and Tunisia in particular are deeply rooted in Islamic jurisprudence, reflecting Sharia principles of the traditional role of women in the family.

Despite the Arab Spring further solidifying Tunisia's reputation as being at the 'forefront of 'women friendly' legislative changes in the Arab-Muslim world',[471] the uprisings nevertheless left inheritance law largely unchanged, with its provisions remaining grounded in traditional Islamic principles as reflected in the 1956 Code of Personal Status. Inheritance is directly regulated by the Qur'an itself. *Sura An-Nisa* 4:11 establishes inheritance allocations, stating that 'Allah commands you regarding your children: for the male, what is equal to the share of two females'.[472] However, the Qur'anic framework for inheritance contains an apparent tension between the recognition of women's inheritance rights, and the differentiation of shares between men and women. *Sura An- Nisa* 4:7, provides significant recognition of women's legal status by establishing that both men and women, 'be it little or much' are entitled to inherit 'an obligatory share'[473]. Despite this recognition of women as legal heirs, Tunisia's personal status laws have largely maintained the traditional Qur'anic, unequal allocation—when girls inherit from their parents, they inherit half the share of boys. This allocation is codified in the personal status laws, Article 103[474]. This codification is unfortunately representative of the 'out-dated system that Islam has not replaced completely',[475] and in this context the views of Haddad are particularly significant. This paper affirms Haddad's advocations for the elimination of the patriarchal interpretation of the Qur'an that enables boys to inherit double the share of their sisters.[476] Crucially,

[471] Mounira Charrad, 'Tunisia at the Forefront of the Arab World: Two Waves of Gender Legislation ' [2007] 64(4) Washington and Lee Law Review.

[472] Surah An- Nisa, 4:11.

[473] Surah An- Nisa, 4:7.

[474] Tunisian Code of Personal Status 1956, Art 103.

[475] Abdulmajeed Hassan bello, 'Islamic Law of Inheritance: Ultimate Solution to Social Inequality against Women' [2015] 29(3) Arab Law Quarterly 261-273.

[476] Tahar Haddid, Our women in the Sharia and society (1st edn, 1930).

such an elimination may be achieved through the use of interpretive power of *Ijtihad* to emphasise the broader principle expressed in *Sura An-Nisa* 4:7, and to reconsider the allocation in *Sura An-Nisa* 4:11 in light of wider principles of gender equality.

Similarly to Tunisia, inheritance in Egypt is primarily governed by Islamic Sharia law, as highlighted by Article 2 of the Egyptian constitution 2014.[477] Where both states continue to restrict the daughters share of inheritance to half that of the son, it is clear that the area of inheritance law in the MENA region as a whole is one that requires a significant amount of progression. Perhaps the interpretive power of *Ijtihad* may be applied to modernise these areas of inheritance law whilst retaining Islam as the national identity of Tunisia and Egypt.

The influence of Islam on discrimination of non-Muslims

The influence of Islam in constitutional texts and personal status laws in many Arab countries often perpetuates systemic discrimination against non-Muslims. Despite new constitutions following the Arab Spring emphasising equality, many principles remain tied to Sharia, which upholds inherently discriminatory practises against women and non-Muslims. Sharia divides people into Muslims, "People of the book" (Christians and Jews) and non-believers. Unfortunately, the constitutional reforms that followed the Arab Spring did not consistently translate into substantive equality for non-Muslim groups in practice.[478]

Inequalities between religious groups trace back to shifts in Quranic periods, and this article will focus on interpretations of only the late Meccan period (c.619-622 CE) and the Medinan period (c.622- 632 CE) for clarity. The Meccan period promoted religious unity; 'Indeed this, your religion, is one religion, and I am your Lord, so worship Me'.[479] Whereas the later Medinan period reflects the emergence of

[477] Constitution of the Arab Republic of Egypt 2014, art 2.

[478] Francesco Biagi, Constitution-Building After the Arab Spring: A comparative perspective (Cambridge University Press 2025) 189-267.

[479] Surah Al- Anbya, 21:92-93.

Islam as a distinct religious community, resulting in more defined legal and social distinctions between Muslims and non-Muslims, including the People of the Book. It is particularly interesting to consider Sura 3, verse 110, which stresses the sentiment that 'Among [people of the book] are believers, but most of them are defiantly disobedient'.[480] Indeed, certain interpretations of this reading from within the Medinan have contributed to current legal frameworks that are discriminatory towards those who do not conform to dominant Islamic legal norms. An-Na'im articulates this concern by simply observing that 'Muslim males are the only full citizens of the Islamic state'.[481]

It is interesting to observe how constitutional texts within the Arab countries are influenced by Islam to reflect inequalities and discrimination against non-Muslims, despite *de facto* claims of equality. For instance, Article 3 of the 2014 Egyptian Constitution grants the People of the Book the freedom to openly practice their religion and apply their own religious principles.[482] However, the omission to reference other religions (such as Buddhism and Hinduism) inherently excludes adherents of non-Abrahamic faiths from the same rights, effectively limiting these freedoms to Muslims, Christians, and Jews. Resultingly, Egypt appears to have made 'little progress'[483] with regard to the tangible improvement of human rights for non-Muslims of non-Abrahamic faiths. It is interesting to consider how the influence of Islam, and in particular the Medinan period has materialised within these constitutional texts, as the absence of recognition of other religions and belief systems reflects a constitution that institutionalizes discrimination.

[480] Surah Ali 'imran, 3:110.

[481] Abdullahi A An-Na'im, 'Religious Minorities under Islamic Law and the Limits of Cultural Relativism' [1987] 9(1) Human Rights Quarterly 1-18.

[482] Constitution of the Arab Republic of Egypt 2014, Art 3.

[483] Barbara Ann Rieffer- Flanagan, 'Statism, Tolerance and Religious Freedom in Egypt' [2016] 13(1) Muslim World Journal of Human Rights 1.

Furthermore, Article 64 of the Egyptian constitution[484] guarantees freedom of belief, but the right to establish places of worship and practise religion is afforded only to those who follow the divinely revealed religions; unfortunately, this right does not extend equally to followers of non-Abrahamic faiths. Despite claims of this freedom of belief being 'absolute',[485] the failure to provide non-Abrahamic religious communities with mechanisms or guarantees to build places of worships inherently inhibits their ability to practice their faith. On this basis, the Egyptian constitution demonstrates significant disparity in protection of freedom of belief, reflecting the substantial influence of traditional interpretations of Sharia within Egypt's legal framework.

The deficiencies of the Egyptian constitution to include language pertaining to the freedom of belief of all religions can be directly contrasted with the Tunisian constitution of 2014, particularly Article 6. Here, the state explicitly guarantees the importance of freedom of religion; 'The state is the guardian of religion. It guarantees freedom of conscience and belief, the free exercise of religious practises and the neutrality of mosques and places of worship from all partisan instrumentalization'.[486] Despite not explicitly stating the inclusion of non-Abrahamic religions, Article 6 provides an 'ostensibly'[487] broad protection of the freedom of religion, demonstrating Tunisia's significant commitment to non-discriminatory practices and contrasting with the more restrictive approach of Egypt. It would however be ignorant to assert that Tunisia has entirely solved all issues of legal equality and freedom of religion based on traditional religious discrimination within Sharia. Article 74 of Tunisia's 2014 constitution retains preference to those of Islamic faith, by stipulating that '[e]very male and female voter… whose religion is Islam shall have the right to stand for election to the position of President of the Republic'.[488]

[484] Constitution of the Arab Republic of Egypt 2014, Art 64.

[485] Constitution of the Arab Republic of Egypt 2014, Art 69.

[486] Constitution of the Tunisian Republic 2014, art 6.

[487] Allison Bitz, 'Freedom of Religion in the 2014 Tunisian Constitution' [2019] 100 International Immersion Program Papers 2.

[488] Constitution of the Tunisian Republic 2014, art 74.

By enforcing this exclusion to candidates outside of the Islamic faith, Tunisia continues to retain religious bias as based in Sharia.

Conclusion

To conclude, it is undeniable that the relationship between religion and the law remains deeply rooted in Islam, which influences the constitutional texts and personal status laws of the countries within the MENA region. This intertwining of religion and the law can be traced historically through the development of the Arab countries, often reinforcing traditional interpretations encompassing gender inequalities and discrimination against non-Muslims. However, it is clear that governmental reform in recent years, in particular the use of *Ijtihad*, has demonstrated the potential for reinterpretation and progressive change. In the areas of polygamy and divorce, women in Tunisia have enjoyed the full extent of the potential of this 'exercising independent juristic reasoning',[489] used to propel women's rights by aligning Islamic principles with modern notions of equality. This is crucial for understanding that Islamic jurisprudence *can* be employed to promote gender justice whilst retaining the verses of the Qur'an and the Sunna*,* and without abandoning religious foundations. However, it remains disheartening to acknowledge the persistence of patriarchal norms in inheritance law, the continuation of conservative divorce procedures, and the reluctance to facilitate non-Muslim religious practises within many Arab states, all of which significantly inhibit meaningful progress: as Johansson-Nogués observes in relation to Egypt, 'the prospect for a breakthrough anytime soon appears remote, given the new constitution'.[490] Ultimately, the evolution of laws in the Arab countries reveals that Islam's influence is not monolithic, and that, through the use of *Ijtihad* to reinterpret Sharia*,* a balance

[489] Amira Mashhour, 'Islamic Law and Gender Equality: Could There Be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt' [2005] 27(2) Human Rights Quarterly 562-596.

[490] Elisabeth Johansson-Nogués, 'Gendering the Arab Spring? Rights and (in)security of Tunisian, Egyptian and Libyan women' [2013] 44(5/6) Security Dialogue 405.

between religious principles and the principles of equality and non-discrimination can be achieved, albeit not without difficulty.

Justice Deferred, Not Denied: Balancing Peace and Accountability through Amnesty

Marie Nemec

Abstract

This essay argues that amnesty as a whole cannot be condemned as inappropriate, but that - when considering case complexities – the utilisation of partial amnesties, alongside other accountability measures, poses as a pragmatic tool to balance both peace and justice within transitional justice efforts. The matter at hand will be initially introduced by an examination and definition of various forms of amnesty. Secondly, the international legal framework involving amnesty, as well as theories around amnesty and accountability will be explored. Lastly, an evaluation of three case studies which employed amnesty to varying degrees within their Truth and Reconciliation Commissions (TRC) constitutes the final body of this work. These cases substantiate the notion that amnesty proves effective and stabilising when applied in a limited manner, as cases of both blanket amnesty and partial amnesty will be examined regarding their success and their ability – or lack thereof – to establish long-lasting peace and afford justice to victims. For the sake of coherence, this essay is limited to TRC-related amnesties only, but recognises the significance of conventional amnesties.

1.1. Defining Amnesty

Amnesty is a frequently utilised, integral measure of transitional justice (TJ), and lies often at the forefront of international and national post-conflict responses. To contextualise, TJ represents an intergenerational, complex set of 'judicial and non-judicial'[491] mechanisms, with the aim to delegitimise past oppression[492] and human rights abuse. It may facilitate and accelerate peaceful regime changes, institutional reforms, social reconciliation and stabilisation through multi-dimensional initiatives in

[491] Rachel Kerr and Eirin Mobekk, *Peace and Justice* (1st edn, Polity Press 2013), 3.
[492] Ruti Teitel, 'Editorial Note—Transitional Justice Globalized' (2008) 2 *The International Journal of Transitional Justice*, 1.

post-conflict societies.[493] It is 'critical'[494] for recovery from historical and contemporaneous injustice and consists of retributive and restorative justice measures.[495]

The term "amnesty" commonly refers to 'legal measures adopted by states that have the effect of prospectively barring criminal prosecutions against certain individuals'.[496] In their role of 'extinguishing criminal or civil liability for crimes'[497], amnesties are frequently issued alongside other transitional justice efforts, such as institutional reforms, and play an 'integral part of the political and legal measures adopted by state and international bodies'[498] after a violent conflict. Amnesties may materialise as part of domestic legislation (Spain's 1977 Amnesty Law[499]), an executive decree (Chile's 1978 Amnesty Law[500]), or of peace agreements, as was the case in Mozambique.[501] Additionally, amnesties have often been issued alongside TRCs, which will be the focus of this work.

Traditionally, amnesties have been issued as "unconditional", granting absolute immunity for all criminal acts committed during conflict, or within a designated timeframe.[502] They are often employed by regimes that have committed extensive human rights violations,[503] and may be considered 'particularly egregious'.[504] Generally, blanket amnesties are heavily contested due to their frequent incompatibility with modern human rights standards, an issue that will be explored further in Section 1.2.

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[493] Olivera Simic, (ed) An *Introduction to Transitional Justice* (Routledge 2021), 20-21.
[494] Teitel, (n1), 3.
[495] Simic, (n3), 28-29.
[496] Francesca Lessa and Leigh A. Payne, 'Introduction' in Francesca Lessa and Leigh A. Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012), 4.
[497] Kieran McEvoy and Louise Mallinder, 'Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy' (2012) 39(3) *Journal of Law and Society*, 413.
[498] Tom Hadden 'Transitional Justice and Amnesties' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Edward Elgar Publishing 2017), 385.
[499] Ley 46/1977, de 15 de octubre, de amnistía, Boletín Oficial del Estado, 16 October 1977, no 252; Paloma Aguilar 'Justice, Politics and Memory in the Spanish Transition' in Alexandra Barahona de Brito, Carmen González Enríquez, and Paloma Aguilar (eds), *The Politics of Memory and Democratization* (Oxford University Press, 2001), p. 92.
[500] Decreto Ley No 2.191, de 19 de abril de 1978, Diario Oficial de la República de Chile, 20 April 1978.
[501] General Peace Agreement between the Government of the Republic of Mozambique and RENAMO (Rome, 4 October 1992).
[502] Hadden, (n8), 359.
[503] Louise Mallinder, 'Amnesties and Transitional Justice' in Cheryl Lawther and Luke Moffett (eds), *Research Handbook on Transitional Justice* (Edward Elgar Publishing 2023), p.6.
[504] Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge University Press 2010), p. 152.

"Conditional amnesties" on the other hand are limited, and tied to 'explicit restrictions'[505] regarding both who, and what crimes, may be protected from criminal investigation or prosecution. In the context of transitional justice, these amnesties may impose conditions such as demilitarisation, truth-telling or reparatory measures.[506] Such conditional amnesties are widely regarded as legitimate.[507] Other amnesties such as formal pardons are outside of the scope of this essay.

1.2. Contextualising Amnesty Within Law and Theory

As amnesties – in any form - are often used by political and military powers to, figuratively, "wipe the slate clean" after grave misconduct[508], they pose a complex and contentious issue within international criminal law. This debate was initially triggered by evolving expectations toward international accountability – a concept coined the "Justice Cascade"[509] by Kathryn Sikkink.

The Nuremberg Trials marked a pivotal moment for the prosecution of grave human rights violations.[510] In the decades that followed, they contributed to a 'rapid and dramatic shift in the legitimacy of the norms of individual criminal accountability',[511] as responsibility for such violations increasingly extended beyond states to individuals. International advocacy promoting the legitimacy of human rights, and the principle of individual liability for prosecution of serious human rights violations, was cultivated.[512] Likewise, 'international and regional action to effect compliance with those norms'[513] developed. Since the 1970s, the Justice Cascade has globally steered toward norms of international accountability[514], and a 'trend of a growing entrenchment and institutionalisation of the norms and mechanisms of transitional justice'[515] has been established. Little has signalled the international interest

[505] Mallinder, (n13), 6.
[506] Hadden, (n17), 359.
[507] Ibid, 368-373.
[508] Mallinder (n15), 5.
[509] Ellen Lutz and Kathryn Sikkink, 'The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America' (2001) 2(1) *Chicago Journal of International Law*, 3.
[510]Kathryn Sikkink and Hun Joon Kim 'The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations' in *Annual Review of Law and Social Science*, 2013, 271.
[511] Ibid, 270.
[512] Ibid, 271.
[513] Lutz and Sikkink, (n19), 4.
[514] Jeffrey D Pugh, 'Eroding the Barrier between Peace and Justice: Transitional Justice Mechanisms and Sustainable Peace' (2019) 1 (3) *International Journal of Peace Studies 24*, 3.
[515] Teitel, (n4), 3.

in holding political leaders 'criminally accountable for past human rights violations'[516] more than the establishment of the Rome Statute[517], and subsequently, that of the International Criminal Court (ICC). As they explicitly affirm a state's duty to prosecute human rights violations, and through this, deny impunity[518], both international and domestic justice systems have followed suit, contributing to the growing recognition and institutionalisation of accountability as international customary norm[519] through various legal instruments and international pressure to comply with obligations and human rights standards.

Prompted by the Justice Cascade, the international perception and applications of amnesty within post-conflict societies have shifted[520], from 'broader to more tailored, […] from laws with no reference to international law to those which explicitly try to stay within its strictures'.[521] As human rights gain international priority, their protection has become 'increasingly codified'[522] within an international legal framework of treaties and conventions, directly affecting the possibility for amnesty. Most significant in this framework are the ICC, a permanent international tribunal which was established in July 2002[523], and the Rome Statute.

The Preamble to the Rome Statute[524] of the ICC unambiguously emphasises that grave human rights violations (e.g. torture, war crimes, crimes against humanity) are international crimes that 'must not go unpunished, and that their effective prosecution must be ensured'.[525] This reflects the desire of emerging customary international law[526] to put an 'end to impunity'[527], and renders amnesty for such crimes

[516] Sikkink and Kim, (n20), 269.
[517] Rome Statute of the International Criminal Court, 17 July 1998, entered into force 1 July 2002.
[518] Francesca Lessa et al, 'Overcoming Impunity: Pathways to Accountability in Latin America' (2014) 8(1) *International Journal of Transitional Justice 75*, 91–92.
[519] Diane F Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100(8) *Yale Law Journal*, 2585.
[520] Naomi Roht-Arriaza, 'The Multiple Prosecutions of Augusto Pinochet' in Ellen L Lutz and Caitlin Reiger (eds), *Prosecuting Heads of State* (Cambridge University Press, 2000) 77- 78.
[521] Naomi Roht-Arriaza and Lauren Gibson, 'The Developing Jurisprudence on Amnesty' (1998) 20(4) *Human Rights Quarterly*, 884.
[522] Simic, (n5), 61.
[523]Joanna R Quinn, 'The Development of Transitional Justice' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Edward Elgar 2017), 18.
[524] Rome Statute, (n27), para. 4, 5.
[525] Ibid.
[526] Jessica Gavron, 'Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court' (2002) 51 *International and Comparative Law Quarterly* 91-93.
[527] Simic, (n32), 24.

illegitimate. While the ICC declares that the relevant state is obligated to act on such crimes, it is the ICC's mandate to both investigate and prosecute individuals if states fail[528] to do so themselves due to inability or refusal.[529] Through its complimentary, rather than primary role, in prosecuting grave human rights offenders, the ICC is often considered as 'the last resort'[530] when a society is confronted with grave international crimes. Alongside the Rome Statute, a multitude of international conventions and authoritative non-governmental organisations do not recognise amnesties that violate the convention's obligations[531], and explicitly impose a duty to investigate, and prosecute human rights abuses. Examples include the Geneva Conventions[532], the American Convention of Human Rights (ACHR)[533] as well as various United Nation Reports[534], Principles[535] and Resolutions.[536]

This international legal framework marks the concept of amnesty, its possibilities, and its limitations, a 'complex and divisive'[537] issue, and leaves its position somewhat contested. On the one hand, many scholars assert that international regulatory bodies and treaties explicitly designate unconditional amnesty for serious human rights violations *prima facie* illegitimate, and that states have a duty to prosecute those most responsible.[538] Meanwhile others argue that, depending on the convention, such obligations in practice 'maintain a measure of flexibility'.[539] Furthermore, scholars note that due to the

[528] Rome Statute, (n35), arts. 17, 27.
[529] Sikkink and Kim, (n26), 272.
[530] Quinn, (n33), 18.
[531] Michael Scharf, 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes' (1996) 59(4) *Law and Contemporary Problems*, 41.
[532] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31, art 49; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85, art 50; Geneva Convention (III) relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, art 129; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, art 146.
[533] *American Convention on Human Rights* (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, arts. 4, 5, 8, 25.
[534] United Nations Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, UN Doc S/2004/616 (23 August 2004), para. 64 (c), 65.
[535] Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN Doc E/CN.4/2005/102/Add 1, Principles 19, 20, 27.
[536] UN Security Council, *Resolution 1580 (2004)*, UN Doc S/RES/1580 (22 January 2004).
[537] Freeman (n14), 1.
[538] Hadden (n16), 370.
[539] Ibid.

restricted definition of crimes against humanity and war crimes within the Rome Statute[540], national authorities may 'justify'[541] amnesty for such crimes if they do not meet the specific criteria.[542]

Alongside these aforementioned legal complexities regarding amnesty and its scope, discussions about the 'duty to investigate' and the 'duty to prosecute' are frequent. Legal analysts debate to what extent these duties are anchored within the international law[543], and how they may affect a state's ability to grant amnesty.[544] Gross violations of human rights, war crimes, and crimes against humanity are explicitly linked to an 'absolute'[545] duty to both investigate and prosecute under the Geneva Conventions[546], the Genocide Convention[547], and the CAT[548]. This undoubtedly renders potential amnesties for such crimes as 'inconsistent with state obligations under numerous ratified treaties and UN policy'.[549] Likewise, court rulings may provide insight into the degree to which investigative duties can be infringed upon by amnesties, as demonstrated by IACtHR[550] and ECtHR rulings[551], which sought to clarify that amnesty laws that obstruct effective investigations violate Article 2 of the European Convention of Human Rights.[552] However, most significantly, some legal instruments, such as the ICCPR[553], leave prosecutorial obligations up to interpretation[554] or great limitation[555], which, in turn, leaves room for the establishment of conditional amnesties regarding certain crimes.[556]

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[540] Rome Statute, (n38), art 7 (1), 8 (1).
[541] Hadden, (n48), 368.
[542] Ibid, 368-370.
[543] Orentlicher (n29), 2551.
[544] Ibid.
[545] Scharf, (n41), 44.
[546] GC I (1949) 75 UNTS 31, art 49; GC II (1949) 75 UNTS 85, art 50; GC III (1949) 75 UNTS 135, art 129; GC IV (1949) 75 UNTS 287, art 146.
[547] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 art 4.
[548] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (entered into force 26 June 1987) art 5,7.
[549] Simic, (n37), 165.
[550] *Velásquez Rodríguez v Honduras* (Inter-American Court of Human Rights, Judgment of 29 July 1988) Series C No 4.
[551] ECtHR, *McCann and Others v United Kingdom* (1995) GC, Application No. 18984/91; ECtHR, *Jordan v United Kingdom* (2001), Application no. 24746/94.
[552] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) ETS 5, art 2.
[553] The International Covenant on Civil and Political Rights (entered into force 23 Mar. 1976): 999 UNTS 171 (hereafter, ICCPR).
[554] Orentlicher, (n53), 2551.
[555] Scharf, (n55), 44-46.
[556] Simic, (n59), 173.

A socio-legal theory that considers the positive potential of amnesty is Louise Mallinder's approach to amnesty as a measure of "mercy".[557] It attempts to reframe[558] amnesty from a denial of justice and a means to simply grant impunity for violators, to a positive tool of peace facilitation. Granting conditional amnesty may allow for stability and serve as a tool to 'prevent harm [and] provide a remedy for victims'.[559] Mallinder asserts that a general dismissal of amnesty and the prioritising of prosecution over peace, regardless of circumstance, may lead to prolonged struggle.[560] However, she clarifies that amnesties must not apply to grave human rights violations, and stresses the importance of balance when applying amnesty in order to not forgo a victim's right to justice.[561] When amnesties are conditional, they may enhance the 'rule of law, strengthen justice norms and assist with broader processes of social and communal' healing.[562] In short, Mallinder's theory does not aim to deny the existence of a crime or abuse, but rather interprets amnesty as a humanitarian measure toward post-conflict peace and stability'.[563]

2.1. Unconditional Amnesty

The concept of unconditional amnesty, especially regarding human rights abuse, is deemed illegitimate by international legal instruments, which condemn and deny its application. To contextualise the immediate and lasting impact of blanket amnesty in practice, two cases of initial unconditional amnesty will be examined in this section, Sierra-Leone and El Salvador. Particularly, points of contention, such as its lack of accountability, lack of justice for victims, and its antithetical nature to international law will be evaluated.

In Sierra Leone, a blanket amnesty was issued in 1999 as part of the Lomé Peace Agreement[564] (LPA) and was considered 'highly controversial'[565], as it protected all combatants from criminal prosecution.

[557] Mallinder, (n18), 5.
[558] Ibid.
[559] Ibid.
[560] Ibid, 16-18.
[561] McEvoy and Mallinder, (n7), 425.
[562] Ibid, 427-428.
[563] Ibid, 414.
[564] P*eace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Lomé Peace Agreement)* (signed 7 July 1999), art. XI.
[565] Laura Stovel *Long Road Home: Building Reconciliation and Trust in Post-War Sierra Leone* (Intersentia 2010), p. 169.

Due to this lack of accountability for perpetrators, and their immediate reclaim to positions of power, violent military activity did not entirely cease. This suggests that prioritising immediate peace through blanket amnesty did not necessarily secure durable peace or meaningful accountability. Sierra Leonean 'social structures [remained] unsettled and public faith in the solidity of the peace [was] undermined'.[566] This highlights unconditional amnesty's potential to 'undermine the legitimacy of a new government and breed cynicism toward civilian institutions'[567], as well as foster resentment within victimised communities.[568] Furthermore, the amnesty provision within the LPA drew substantial international criticism[569] and was not recognised by international bodies such as the United Nations[570]. To make the amnesty, and lack of justice, more palatable to the people of Sierra Leone, a TRC[571] was established alongside it[572], aiming to provide some sense of accountability through restorative TJ measures.[573] The Sierra Leone Truth and Reconciliation Commission (SLTRC) initiated forums for victims, promoted traditional reconciliation practices, 'religious cooperation'[574], acceptance, and forgiveness, as well as establishing an extensive record of committed atrocities.[575]

Paradoxically, in El Salvador, impunity was implemented as a result of the establishment of a Truth Commission.[576] During its civil war[577], most 'human rights abuses centred around the violent terror shown toward civilians'[578], enacted through horrific slaughter, such as the El Mozote massacre.[579] The global community was outraged by such grave violations and called for an end of conflict.[580] As a result

[566] Simic, (n66), 87.
[567] Orentlicher, (n64), 2543.
[568] Jeff Spinner-Halev, 'From Historical to Enduring Injustice' (2007) 35 *Political Theory*, 574.
[569] Stovel, (75), 37.
[570] Seventh Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone', 30 July 1999, UN Doc S/1999/836 [54].
[571] Truth and Reconciliation Commission Act 2000 (Sierra Leone), Act No 4 of 2000, s. 6 (1).
[572] Stovel, (n79), 188.
[573] Ibid, 45.
[574] Ibid, 59.
[575] Simic, (n76), 87-88.
[576] Quinn, (n40), 24.
[577] 'Digging for Justice; Human Rights in El Salvador' (The Economist, London, vol 418, Economist Intelligence Unit N.A. Inc 2016), 165.
[578] Pugh, (n24), 12.
[579] Cath Collins, 'Grounding Global Justice: International Networks and Domestic Human Rights Accountability in Chile and El Salvador' (2006) 38(4) *Journal of Latin American Studies*, 268.
[580] Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd edn, Routledge 2010), 91.

of this international pressure, the UN founded the Commission on the Truth for El Salvador[581] – part of the Chapultepec Peace Accord (1992) – to create a historical record of events, tackle social injustice and ascribe responsibility.[582] The Truth Commission's final report[583] contained explicit information regarding massacres, tortures and other grave human rights violations, naming perpetrators directly[584], and recommending 'the investigation and removal of the military officers responsible'.[585] However, upon these findings, the General Amnesty Law for the Consolidation of Peace[586] was issued, a blanket amnesty that completely undermined the TC, and effectively protected the ruling elite and military from repercussions.[587] This impunity allowed victimisers to 'remain in place'[588] and to re-establish authoritarian measures.[589] Furthermore, the General Amnesty Law was distinctly dismissive of victims[590] and their right to remedy[591], substantiating critic's claims that unconditional amnesty 'silence[s] crimes and protect[s] the perpetrators'[592], perpetuates violence and instability, and is an explicitly harmful[593] rejection of truth and justice.[594]

While impunity hindered the pursuit of justice, public trust and institutional reform[595], both countries' unconditional amnesties were eventually overturned[596] due to international pressure and domestic advocacy. These decisions highlight the inevitable failure to achieve a balance of peace and justice under blanket amnesty, as well as its incompatibility with international law.

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[581] *Chapultepec Peace Agreement* (signed 16 January 1992) art 5.
[582] Quinn, (n86), 29; Pugh, (n88), 14.
[583] United Nations, *From Madness to Hope: The 12-Year War in El Salvador: Report of the Commission on the Truth for El Salvador* (United Nations 1993).
[584] The Economist, (n87), 156-66.
[585] Pugh, (92), 12.
[586] *Ley de Amnistía General para la Consolidación de la Paz* (*General Amnesty Law for the Consolidation of Peace)* (No 486, 20 March 1993, published in *Diario Oficial* No 56, Vol 318, 22 March 1993).
[587] The Economist, (n94), 165.
[588] Emily Braid and Naomi Roht-Arriaza, 'De Facto and De Jure Amnesty Laws: The Central American Case', in *Amnesty in the Age of Human Rights Accountability*. Cambridge University Press, 184.
[589] Simic, (n85), 26.
[590] McEvoy and Mallinder, (n73), 430.
[591] Simic, (n99), 165.
[592] Ibid, 159.
[593] Orentlicher, (n77), 2544.
[594] Simic, (n101), 159.
[595] Spinner, (n78), 574.
[596] Sikkink and Kim (n39), 277-278.

Within Sierra Leone, the denunciation of its blanket amnesty was facilitated by the Special Court for Sierra Leone (SCSL)[597] in 2002, a cooperation[598] between the UN and the Sierra Leonean government, initiated by Sierra Leone following extensive domestic campaigning for justice.[599] The Statute of the SCSL explicitly rejects the previously granted amnesty under the LPA[600], and aims to 'prosecute those who bear the greatest responsibility for serious violations of international humanitarian law during the war'[601] which it achieved with relative success, limited by administrative and financial issues.[602] The SCSL's most significant achievement was the conviction of Liberian President Charles Taylor for aiding and abetting crimes against humanity and war crimes.[603]

In El Salvador, the General Amnesty Law was eventually overturned in 2016[604], as the Constitutional Chamber of the Supreme Court of Justice declared the law unconstitutional.[605] This was a consequence of the IACHR[606] and IACtHR's[607] verdict that amnesty for serious human rights violations was incompatible with the ACHR[608], an action hastened by the pleas of victims. This long-awaited annulment 'ultimately led to unprecedented levels of accountability for very high-level officials and officers'.[609]

The blanket amnesties granted in Sierra Leone and El Salvador created a glaring deficit in justice, significant resentment within opposing communities, and deepened socio-economic trauma.[610] Public need for accountability, healing, and institutional reform was great, but the eventual Special Court of

[597] *Statute of the Special Court for Sierra Leone* (16 January 2002) 2178 UNTS 145, arts. 2, 4, 10.
[598] *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone* (signed 16 January 2002, entered into force 12 April 2002) 2178 UNTS 137.
[599] Stovel, (n82), 191.
[600] *Statute of the Special Court for Sierra Leone*, (n107), arts. 2, 4, 10.
[601] Charles C Jalloh, 'Special Court for Sierra Leone; achieving justice?' (2011) 32(3) *Michigan Journal of International Law,* 399.
[602] Simic, (n104), 87.
[603] *Prosecutor v Charles Ghankay Taylor* (SCSL-03-01-T, Trial Judgment, 26 April 2012).
[604] McEvoy and Mallinder, (n100), 165.
[605] *Constitutional Chamber of the Supreme Court of El Salvador*, *Judgment No. 185-2016* (13 July 2016).
[606] IACHR, *Report on the Situation of Human Rights in El Salvador* (2000), OEA/Ser.L/V/II.111 Doc. 3 rev, para 223.
[607] *Massacres of El Mozote and Nearby Places v El Salvador* (Merits, Reparations and Costs) IACtHR Series C No 252 (25 October 2012).
[608] Scharf, (n65), 51.
[609] Pugh, (n95), 12.
[610] Braid and Roht-Arriaza, (n98), 183.

Sierra Leone and the annulment of the General Amnesty Law were severely overdue.[611] Momentum for reform and justice had diminished, and many victims prioritised closure and rebuilding over chasing possible justice.[612] Simultaneously, any remaining expectations of accountability were unreasonably high due to both governments prior failures to deliver justice, combat disorder, and facilitate reconciliation, which led to heightened international and domestic pressure on the SCSL, the SLTRC and El Salvador's TC. Therefore, it can be argued that blanket amnesty considerably undermined any subsequent transitional justice measures, whilst also indirectly adding significant pressure on the justice mechanisms once they were eventually established. These issues were further exacerbated by both countries' defunct justice systems, overlapping directives within the SCSL and SLTRC, and underfunding. In both cases blanket amnesty prioritised short-term political stability over justice, significantly eroded public trust in official institutions and amplified socio-economic collapse. Through this, it likely impacted any successive transitional justice mechanisms and their potential success negatively. It is likely that if TJ measures had been more strategically and timely implemented, potential for change, reform and civil engagement would have been greater, as 'hybrid TJ mechanisms tend to work better than either punitive or restorative mechanisms alone'.[613] In short, while both countries were somewhat successful[614] in maintaining the TJ goal of peace[615], the prevention of impunity is 'crucial to achieving reconciliation, […] ending human rights abuses and providing justice to victims'.[616]

3.1. Conditional Amnesty

While impunity for grave human rights violations is legally untenable, conditional amnesties can be both lawful and stabilising after conflict. This section aims to conduct a nuanced evaluation of the potential opportunities and constraints of conditional amnesty by examining the South African TRC.

[611] Stovel, (n82), 241.
[612] Simic, (n112), 88.
[613] Pugh, (n119), 18.
[614] Yinka Olomojobi, Olajumoke Yacob-Haliso and Bolaji Alabi, 'The Effectiveness of the Special Court for Sierra Leone as a Transitional Justice Mechanism for Post Conflict Stability' (2019) 7(2) *International Journal of Social Science and Humanities Research*, p. 1374.
[615]Nevin T Aiken, *Identity, Reconciliation and Transitional Justice, Overcoming Intractability in Divided Societies* (Routledge, 2013), 18.
[616] Simic, (n122), 28.

Furthermore, it argues that conditional amnesty – when tied to restorative accountability measures – presents a pragmatic approach to achieving reconciliation, forgiveness and long-lasting peace.

Some scholars[617] claim that the pursuit of full-scale prosecution may intensify conflict in the face of retribution, and 'sustain communal antagonism'.[618] While this theory is contested[619], 'amnesties can in some circumstances contribute positively to peace'.[620] When new regimes are still 'fragile'[621], politically charged trials may be unaffordable, destabilising[622], and could retraumatise victims.[623] Instead, conditional amnesties may encourage initial stability and pacify state security forces, allowing for disarmament[624] and other TJ measures to take effect and potentially facilitate justice.[625] Conditions that are 'designed to fulfil victims' rights'[626], such as amnesty for low-level perpetrators only, and in response to publicly acknowledging guilt and attending re-education programs, may present a form of 'alternative punishment'[627] and justice for victims, leading to reconciliation[628] and an end of violence.[629]

One of the most prominent examples of conditional amnesty combined with accountability measures was the South African TRC process, established post-Apartheid through the Promotion of National Unity and Reconciliation Act (1995).[630] Its goal was to paint 'as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed'.[631] The TRC utilised conditional amnesty as an 'essential element'[632] of its process and the creation of a 'common

[617] Mallinder (n69); McEvoy and Mallinder (n114).
[618] Hadden, (n52), 366
[619] Sikkink and Kim, (n106), 280.
[620] Mallinder, (n127), 4.
[621] Roht-Arriaza and Gibson, (n31), 510.
[622] Orentlicher, (n103), 2569.
[623] Simic, (n126), 82.
[624] Hadden, (n128), 362.
[625] Geoff Dancy et al., 'Behind Bars and Bargains: New Findings on Transitional Justice in Emerging Democracies' (2019) 63(1) *International Studies Quarterly*, 100-101.
[626] Mallinder, (n130), 20.
[627] Kathleen Daly, 'Revisiting the Relationship between Retributive and Restorative Justice' in H Strang and J Braithwaite (eds), *Restorative Justice: From Philosophy to Practice* (2000), 36.
[628] Orentlicher, (n132), 2550.
[629] Stephen Winter, *Transitional Justice in Established Democracies: A Political Theory* (Macmillan, 2014), 225.
[630] Promotion of National Unity and Reconciliation Act 34 of 1995 (South Africa) section 20.
[631] Ibid, art. 3.1.
[632] Hadden, (n134), 364.

narrative'[633], as it was applicable to all, in exchange for full disclosure of events and political motives.[634] This process was crucial for the healing of both victims and broader society[635], and the conditional amnesty - partnered with its 'humanizing approach to justice and reconciliation'[636] - allowed the TRC 'to obtain more truth than would have been possible without'[637] it, as perpetrators did not fear incrimination.[638] Furthermore, the TRC addressed racial and historical injustice by employing an inclusive[639] set of accountability measures, such as reparations, moral distinctions between oppressed and oppressor[640], and social reforms, to offset 'the potential "justice deficit" caused by the granting of conditional amnesties to perpetrators'.[641] The TRC demonstrated that successful 'punishment need not [always] take the form of incarceration'[642], but rather that incorporating holistic strategies of both restorative and retributive justice[643]are 'more effective in improving democracy and human rights practices than either amnesty or trials alone'.[644] Thus, an inclusive, multi-layered system of TJ measures, including conditional amnesty, shows the greatest potential for long-lasting stability, as clear distinctions between societies with conditional amnesty compared to those who practiced impunity can be observed.[645] However, conditional amnesty does present room for justice evasion, and should be assessed critically, on a case-by-case basis. Amnesty should always be conditional[646], as a successful restructuring of society toward peace after conflict requires the facilitation of justice to some extent.[647]

Conclusion

[633] Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (University Press, 2000), 19.
[634] Quinn, (n92), 21.
[635] McEvoy and Mallinder, (n127), 435.
[636] Stovel, (n121), 41.
[637] Mallinder, (n136), 11.
[638] Hadden, (n142), 365.
[639] Simic, (n133), 23; Diane, (n138), 253.
[640] James L Gibson, 'The Contributions of Truth to Reconciliation: Lessons from South Africa' (2006) 50(3) *Journal of Conflict Resolution* 409.
[641] Nevin T Aiken, 'Post-Conflict Peacebuilding and the Politics of Identity: Insights for Restoration and Reconciliation in Transitional Justice' (2008) 40 (2) *Peace Research*, 185.
[642] Roht-Arriaza and Gibson, (n131), 509.
[643]United Nations Secretary-General, *Ninth Report of the Secretary-General on the United Nations Mission in Sierra Leone* (16 March 2001) UN Doc S/2001/228, art. 26..
[644] Pugh, (n123), 5.
[645] Kathryn Sikkink and Carrie Booth Walling, 'The Impact of Human Rights Trials in Latin America' (2007) 44(4) *Journal of Peace Research* 442.
[646] McEvoy and Mallinder, (n145), 22-23.
[647] UN Security Council, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General, S/2004/616 (23 August 2004).

To conclude, the examination of both the international legal framework and the above case studies reinforces that amnesty cannot generally be condemned or acclaimed, and a nuanced and context-specific approach is necessary. Blanket amnesty toward gross human rights violations is *prima facie* illegitimate and morally problematic, and here, the assessed statement may ring true. However, full-scale prosecutions are neither viable post-conflict nor efficient long-term. Consequently, this essay argues that amnesty, when tied to expectations and limitations, presents as a viable resolution that combines both peace and justice. Within the legal framework, conditional amnesty, in its practice of forgiveness alongside various accountability mechanisms, is a pragmatic tool to achieve such balance.

A Licence to Breach: Who May Take Countermeasures, and Against Whom?

Mrinaal Tomar and Kiya Somal

Abstract

This paper addresses the law of countermeasures available to an injured State. A countermeasure is conduct by an injured State that would ordinarily breach an obligation owed to the State responsible for a prior internationally wrongful act, but whose wrongfulness is precluded because it responds to that act; the suspension of trade concessions or of treaty-based landing rights are familiar examples. Its purpose is to induce the responsible State to resume compliance rather than to punish it, which is why a countermeasure must be temporary and, so far as possible, reversible. It is therefore distinct both from retorsion, which is unfriendly but lawful conduct requiring no justification, and from enforcement measures authorised by the United Nations Security Council.

After locating countermeasures in the context of the International Law Commission's (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) and the circumstances precluding wrongfulness, this paper explores the substantive and procedural requirements for a countermeasure that complies with the law. It does so by reference to the seminal International Court of Justice, arbitral jurisprudence and recent academic scholarship. It focuses on the law and practice of countermeasures in investor–State arbitration in the light of the North American Free Trade Agreement (NAFTA) awards in the trilogy of Corn Products, Archer Daniels Midland and Cargill v Mexico. It also addresses the law and practice of countermeasures taken by third States, or by States acting collectively, and in particular the reaction of many States to the Russian Federation's invasion of Ukraine in 2022. Finally, it argues that the law is precise about how a countermeasure may be taken but not about who may take one, or against whom. Every condition set by ARSIWA assumes a bilateral relationship between an injured State and a responsible State, and where that assumption fails the answer is supplied by a prior classification, of investor rights in the first setting and of Article 54 ARSIWA in the second, rather than

by rule. The paper closes with recommendations addressed to tribunals, to States acting in the collective interest and to any future codification.

Introduction

Countermeasures lie at the analytical heart of the international law of State responsibility. In codifying the rules relating to countermeasures in Articles 22 and 49–54 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA),[648] the International Law Commission confirmed the power of an injured State to suspend temporarily the performance of one or more of its obligations towards a wrongdoer in an effort to induce compliance with international obligations by the State at fault.[649] The historical ancestry of countermeasures can be traced to the seventeenth- and eighteenth-century practice of letters of marque and the eighteenth- and nineteenth-century practice of reprisals. However, its modern formulation, including a workable, five-part test, is crystallised in the International Court of Justice's 1997 decision in *Gabčíkovo-Nagymaros Project*, which summarised nearly a century of practice and arbitral case law in the field.[650] This paper describes the legal regime governing countermeasures available to an injured State and explores their doctrinal and theoretical dimensions in light of the contributions of recent scholarship to the field in general and then focusing on Paddeu and Jackson in particular. It also reflects on whether the framework of general international law is coherent and effective in designating the actors entitled to take countermeasures. This question arises most sharply in two contested areas. The first is international investment arbitration, where countermeasures have featured as an affirmative defence against claims brought against a host State. The second is the exercise of countermeasures by third States, that is, States that are not themselves injured under Article 42 of the ARSIWA, but that are entitled to invoke responsibility under Article 48. Article 48 permits such invocation where the obligation breached is owed to a group of States and protects a collective interest of that group, or where it is owed to the international community as a

[648] Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, ILC Yearbook 2001, vol II(2) ('ARSIWA'); annexed to UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83.
[649] ARSIWA, art 22; ILC, 'Commentary to the ARSIWA' (2001) UN Doc A/56/10, art 22, para 1.
[650] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7, paras 82–87.

whole, as the obligations *erga omnes* recognised in *Barcelona Traction* are.[651] That States which are not injured may invoke responsibility on this basis is settled law; whether they may also take countermeasures in the general interest is not.[652] Article 54 of the ARSIWA provides only that the chapter on countermeasures does not prejudice the right of such States to take lawful measures to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached. It therefore reserves the question rather than resolving it, and it is that unresolved extension of the regime which this essay later examines. Measures of this kind are called third-party countermeasures in this paper and are to be distinguished from enforcement measures decided or authorised by the Security Council under Chapter VII of the UN Charter, whose lawfulness derives from the Charter rather than from the law of State responsibility.[653]

The paper proceeds in five parts. Firstly, the paper considers what countermeasures are, and what they are not, with particular reference to Paddeu's reconceptualisation of countermeasures as a *justification* rather than an excuse.[654] Secondly, the authors explain the conditions required for a countermeasure to be lawful, and sets forth the rules of customary international law that emerged from the *Naulilaa*, *Air Services*, *Gabčíkovo-Nagymaros*, and the *Nicaragua* judgements, and which were then codified in ARSIWA. Those conditions are well established, and this article examines them not for their own sake but for what they reveal about the research question, since each is framed around the relationship between an injured State and a responsible State. The article then applies the regime of countermeasures to international investment law and the NAFTA tribunals' analysis of Mexico's countermeasure defence in the controversial NAFTA high-fructose corn syrup (HFCS) disputes

[651] ARSIWA (n 1) art 48(1)(a)–(b); ILC Commentary (n 2) art 48, paras 6–10; *Barcelona Traction, Light and Power Company, Ltd (Belgium v Spain)*, Second Phase [1970] ICJ Rep 3, paras 33–34.
[652] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 422, paras 68–70. On the position of countermeasures, see ILC Commentary (n 2) art 54, paras 3, 6.
[653] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI ('UN Charter') arts 25, 39–42, 103; ILC Commentary (n 2) art 22, para 3.
[654] FI Paddeu, *Justification and Excuse in International Law: Concept and Theory of General Defences* (CUP 2018) 73–112; FI Paddeu, 'Clarifying the Concept of Circumstances Precluding Wrongfulness (Justifications) in International Law' in L Bartels and FI Paddeu (eds), *Exceptions in International Law* (OUP 2020) 235.

in *Corn Products*, *Cargill*, and *Archer Daniels Midland v Mexico.* Finally, the authors address the law and practice of third-party countermeasures (measures taken by States that are not themselves injured) and enforcement measures in the light of Jackson and Paddeu's recent work and of the measures taken by States in response to Russia's 2022 invasion of Ukraine. The paper's claim is that general international law is coherent about how a countermeasure may be taken, but not about who may take one, or against whom. The conditions in Articles 49 to 53 of the ARSIWA are of two kinds: procedural conditions, which govern the steps the injured State must take before and while resorting to countermeasures, and substantive conditions, which govern the purpose, form and application of the measure itself. Both kinds presuppose a bilateral relationship between an injured State and a responsible State. Where that presupposition fails, because a private right-holder is interposed or because the reacting State is not itself injured, the outcome is settled by a prior classification of the rights or measures in issue rather than by any rule of the law of countermeasures. That is the gap this paper identifies and then moves on to suggest how it might be closed.

What Countermeasures Are

In essence, a countermeasure is conduct by an injured State that would otherwise be inconsistent with its international obligations towards the responsible State, but whose wrongfulness is precluded, under Article 22 of the ARSIWA, because it is taken in response to a prior internationally wrongful act of that State.[655] The traditional definition, which the *Naulilaa* tribunal recited in 1928, describes a reprisal as an act of self-help by the injured State in response, after an unsatisfied demand, to an internationally wrongful act on the part of the offending State.[656] The classical notion of reprisal was, however, wider than the modern one: it extended to forcible measures, whereas since the prohibition of the threat or use of force in Article 2(4) of the UN Charter a countermeasure may not involve

[655] ARSIWA (n 1) art 22; ILC Commentary (n 2) art 22, paras 1, 4–5. Article 22 precludes wrongfulness only 'if and to the extent that' the measure is taken against the responsible State, so that a measure directed at any other State cannot be justified as a countermeasure.
[656] *Naulilaa (Portugal v Germany)* (1928) 2 RIAA 1011, 1026.

force.[657] Modern doctrine, as developed by the ad hoc arbitral tribunal in the *Air Services* arbitration between the United States and France,[658] and upheld by the International Court of Justice in *Nicaragua*,[659] is that a countermeasure may only serve the goal of *inducing* the wrongdoing State to resume compliance with its primary obligations, not to punish it.[660] It is this functional limit which distinguishes countermeasures from the measures of collective security, such as sanctions, undertaken under Chapter VII of the UN Charter and from acts of retorsion (unfriendly but essentially lawful acts).[661]

There are two more concepts that are theoretically significant. First, countermeasures are, by their very nature, temporary and reversible.[662] This is established by Article 49, paragraphs (2) and (3), of the ARSIWA, which limit a countermeasure to the non-performance for the time being of obligations owed to the responsible State and require that it be taken, as far as possible, in a way that permits the resumption of performance of those obligations. The International Court linked this feature to the purpose of countermeasures in *Gabčíkovo-Nagymaros*, reasoning that because a countermeasure must aim to induce compliance, the measure must therefore be reversible; having found the diversion of the Danube disproportionate, the Court did not need to decide the point.[663] Secondly, the prevailing, if relatively recent, doctrinal view of countermeasures is that they are justifications, rather than excuses. The distinction turns on what a defence does to the conduct it covers. A justification renders the conduct lawful, so that in the circumstances there is no breach at all; an excuse leaves the breach intact but relieves its author of responsibility for it. Paddeu, in her monograph *Justification and Excuse in International Law* (2018), argues that the general defences in the ARSIWA can be classified along

[657] UN Charter (n 11) art 2(4); ARSIWA (n 1) art 50(1)(a); ILC Commentary (n 2) art 50, paras 4–6.
[658] *Air Services Agreement of 27 March 1946 (United States v France)* (1978) 54 ILR 303.
[659] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States), Merits* [1986] ICJ Rep 14, paras 248–249.
[660] ARSIWA (n 1) art 49(1).
[661] J Crawford, *State Responsibility: The General Part* (CUP 2013) 685.
[662] ARSIWA (n 1) art 49(2)–(3); ILC Commentary (n 2) art 49, paras 7–9.
[663] *Gabčíkovo-Nagymaros* (n 3) para 87.

this line, and that countermeasures, like self-defence, are justifications.[664] This is important because justified acts create no claim to reparation against the victim State, and cannot serve to give rise to the right to terminate the treaty, as stated in Article 60 of the Vienna Convention of the Law of Treaties.[665]

Conditions for a Lawful Countermeasure

There are five requirements for a lawful countermeasure, and they are cumulative: a measure that fails any one of them is not a lawful countermeasure. Each is well established in case law and literature, and this article does not rehearse them for their own sake. Rather, its purpose is to show what they reveal collectively about the question of entitlement. Among the five, only the second is procedural, governing the steps to be taken before and while countermeasures are resorted to; the remaining four are substantive, governing the purpose, form and application of the measure itself. All five requirements are framed around a single relationship: a wrong done to the reacting State, a demand addressed by that State to the wrongdoer, a response proportionate to that State's injury, and the suspension of obligations owed to the wrongdoer and to no one else. The conditions therefore answer the questions who may take a countermeasure, and against whom, only by assuming the answer. The authors will later examine what happens when that assumption fails.

Prior Internationally Wrongful Act

A countermeasure presupposes a prior internationally wrongful act by the targeted State.[666] Merely suffering damage or unfriendly treatment is not sufficient to justify countermeasures: the reacting State must be an injured State within the meaning of Article 42 of the ARSIWA. Article 42 covers three situations. Under paragraph (a), the State is injured because the obligation breached was owed to it individually, as under a bilateral treaty. Under paragraph (b)(i), the obligation was owed to a group of States or to the international community as a whole and the breach specially affects that State. Under

[664] Paddeu, *Justification and Excuse* (n 7) 73–112.
[665] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 60; ILC Commentary (n 2) Part Three, ch II, introductory commentary, para 4.
[666] ARSIWA (n 1) art 49; ILC Commentary (n 2) art 49, para 3.

paragraph (b)(ii), the breach is of such a character as radically to change the position of all the other States to which the obligation is owed, as with a disarmament treaty whose value to each party depends upon performance by all.[667] The entitlement to take countermeasures thus belongs to the injured State, and not to the wider class of States that Article 48 permits to invoke responsibility; as is later explained, that restriction is the source of the gap which Article 54 leaves open. A State that takes countermeasures therefore does so at its own peril: if the conduct to which it responded turns out not to have been internationally wrongful, its own measure is left without justification, and it will itself be responsible for the obligation it suspended.[668]

Procedural Requirements: Prior Demand, Notification and Offer to Negotiate

Two preliminary steps are required under Article 52(1) of the ARSIWA. First, the injured State must call on the responsible State to carry out its obligations,[669] which is the modern counterpart of the classical *sommation* in *Naulilaa*: the formal demand for redress that must be made, and left unsatisfied, before a reprisal may lawfully be taken. Second, the injured State is required to notify the responsible State of its decision to take countermeasures and offer to negotiate them. The two requirements have, in the ILC's formulation, no strict temporal order. The requirements are evidential as much as procedural, since they fix, at the moment the measure is taken, the link between the measure and the prior breach. In *Application of the Interim Accord*, Greece sought to justify its objection to the admission of the former Yugoslav Republic of Macedonia to NATO, which the Court found to breach Article 11(1) of the Accord, as a countermeasure among other grounds. The Court rejected that plea on the facts, because Greece had not shown that its objection was a response to the breaches it alleged, and it therefore

[667] ARSIWA (n 1) art 42; ILC Commentary (n 2) art 42, paras 5–15.
[668] ILC Commentary (n 2) art 49, para 3; Crawford (n 14) 685.
[669] ARSIWA (n 1) art 52(1)(a); ILC Commentary (n 2) art 52, para 3; *Naulilaa* (n 9) 1026.

did not examine the remaining conditions.[670] Article 52(2) of the ARSIWA nonetheless permits an injured State to take such urgent countermeasures as are necessary to preserve its rights.[671]

Proportionality

Proportionality is the principal substantive limit on countermeasures and the most disputed element of their interpretation. According to Article 51 of the ARSIWA, countermeasures 'must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question'.[672] Clearly, the test does not impose strict reciprocity. The ad hoc arbitral tribunal constituted by the United States and France in the *Air Services* dispute found that this test 'can at best be accomplished by approximation'.[673] Applying that standard, it held that the United States' order suspending Air France's service to Los Angeles, made in response to France's refusal to allow Pan American to change to a smaller aircraft in London on its route to Paris, was not 'clearly disproportionate' to the French measure.[674] Drawing on the Court's formulation in *Gabčíkovo-Nagymaros*, the ILC Commentary treats proportionality as both a quantitative and a qualitative standard: the measure is weighed not only against the material magnitude of the injury suffered but also against the importance of the interest protected by the rule breached and the seriousness of the breach.[675] The Court itself went so far as to find the diversion by Czechoslovakia of some 80 to 90 per cent of the waters of the Danube disproportionate, since it amounted to a unilateral seizure of a shared natural resource and deprived Hungary of its equitable share of it.[676] Cannizzaro and Franck have argued, on the basis of the ILC Commentary and arbitral precedents, that proportionality represents an inherent constraint on the force of unilateral self-help intended to moderate the escalatory spiral

[670] *Application of the Interim Accord of 13 September 1995 (FYROM v Greece)* [2011] ICJ Rep 644, paras 161–164.
[671] ARSIWA (n 1) art 52(2).
[672] ARSIWA (n 1) art 51; ILC Commentary (n 2) art 51, para 5.
[673] *Air Services* (n 11) para 83.
[674] *Air Services* (n 11) para 83.
[675] ILC Commentary (n 2) art 51, para 6.
[676] *Gabčíkovo-Nagymaros* (n 3) para 85.

of unilateral measures, rather than to guarantee parallelism within sectors of the same activity.[677] Most importantly, proportionality is not self-judging, in the sense that it is not left to the subjective assessment of the State taking the countermeasure but remains open to objective review by a court or tribunal. Two points support this. First, the International Court of Justice (ICJ) in *Gabčíkovo-Nagymaros* did not defer to Czechoslovakia's own assessment of its measure, nor inquire into its good faith, but weighed the effects of the diversion against Hungary's breach and the rights in question before reaching its own conclusion.[678] Second, the ARSIWA Commentary expressly envisages that a disproportionate response gives rise to the responding State's own international responsibility.[679]

Prohibitions: Article 50 ARSIWA

The obligations not to be affected by countermeasures, according to Article 50 of the ARSIWA, are the obligation of refraining from the threat or use of force, the fundamental human rights obligations, obligations of a humanitarian nature prohibiting reprisals, and the provisions of peremptory norms of general international law.[680] Article 50, paragraph 2, adds two further constraints: the State taking countermeasures is not relieved of its obligations under any dispute settlement procedure applicable between it and the responsible State, nor of its duty to respect the inviolability of diplomatic and consular agents, premises, archives and documents. The rationale of the second is practical as much as principled: these are the very channels through which a dispute must be communicated and settled, so suspending them would defeat the inducement function that justifies the countermeasure in the first place.[681] There is still disagreement about the precise scope of the prohibitions. For instance, the ILC Commentary equates 'the fundamental human rights' exception with the standard set forth in the *Barcelona Traction Case* for 'basic rights of the human person,'[682] which, in the words of Crawford, is

[677] E Cannizzaro, 'The Role of Proportionality in the Law of International Countermeasures' (2001) 12 EJIL 889, 897; TM Franck, 'On Proportionality of Countermeasures in International Law' (2008) 102 AJIL 715, 763.
[678] *Gabčíkovo-Nagymaros* (n 3) paras 85–87.
[679] ILC Commentary (n 2) art 51, para 1.
[680] ARSIWA (n 1) art 50(1); ILC Commentary (n 2) art 50, paras 1–9.
[681] ARSIWA (n 1) art 50(2); ILC Commentary (n 2) art 50, paras 12–15.
[682] *Barcelona Traction, Light and Power Company, Ltd (Belgium v Spain), Second Phase* [1970] ICJ Rep 3, para 34.

limited to *jus cogens* rules prohibiting slavery, racial discrimination, genocide and torture.[683] Decisions applying the limits in Article 50(1) are rare. *Prisoners of War - Eritrea's Claim 17*, decided by the Eritrea-Ethiopia Claims Commission, dealt with the suspension of the repatriation of prisoners of war in the context of an ongoing armed conflict; it is better seen as demonstrating the narrow scope of the exclusion than as a mandate for its broad construction.[684] The Committee on Economic, Social and Cultural Rights has warned that comprehensive economic sanctions can inflict widespread suffering on a civilian population. In General Comment No 8 it distinguishes such blanket measures from those whose effects on the general population are narrower and insists that Covenant rights be taken fully into account in the design of any sanctions regime.[685] The distinction suggests that the human rights limit in Article 50(1)(b) bites according to the impact of a measure on protected rights rather than according to its form. The preservation of diplomatic inviolability under Article 50(2)(b) raises a separate issue, recalling the Court's judgment in the *Hostages* case, according to which diplomatic rules constitute a self-contained regime that is not subject to exceptions resulting from countermeasures.[686]

Reversibility and termination

Under Article 49, paragraphs 2 and 3, of the ARSIWA, a countermeasure is confined to the non-performance 'for the time being' of obligations owed to the responsible State, and must, so far as possible, be taken in a way that permits the resumption of performance of the obligation suspended.[687] If the wrongful act has ceased, or in the event that the dispute has been submitted to a court or tribunal with the authority to decide the matter, the countermeasures must be halted (Article 53 of the ARSIWA) or suspended (Article 52(3)(b) of the ARSIWA). Reversibility is a condition of

[683] Crawford (n 14) 693.
[684] Eritrea-Ethiopia Claims Commission, *Prisoners of War – Eritrea's Claim 17* (Partial Award, 1 July 2003) 135 ILR 199, 247, paras 159–161.
[685] CESCR, 'General Comment No 8: The Relationship Between Economic Sanctions and Respect for Economic, Social and Cultural Rights' (12 December 1997) UN Doc E/C.12/1997/8, para 1.
[686] *United States Diplomatic and Consular Staff in Tehran (United States v Iran)* [1980] ICJ Rep 3, para 86.
[687] ARSIWA (n 1) art 49(2); ILC Commentary (n 2) art 49, paras 6-7.

lawfulness rather than a recommendation. A recommendation of that kind would guide the choice of measure without bearing on its lawfulness, whereas a condition of lawfulness qualifies the justification itself, so that a measure taken in disregard of it is not a lawful countermeasure at all. The reason lies in the connection between reversibility and purpose: as the Court indicated in *Gabčíkovo-Nagymaros*, it is because a countermeasure must aim to induce compliance that it must be reversible, and a measure whose effects cannot be undone once the wrongdoer complies does not induce compliance so much as punish.[688] It does not follow that reversibility is absolute. Article 49(3) of the ARSIWA qualifies the duty by what is possible, which makes it an obligation of conduct rather than one of result. An obligation of result requires the State to achieve a specified outcome; an obligation of conduct requires it only to take the reasonable and available measures directed to that outcome, without guaranteeing that the outcome is achieved, a distinction the International Court applied in *Bosnian Genocide* to the duty to prevent genocide.[689] The acting State must therefore choose a reversible measure where one is reasonably available, but is not required to guarantee that no irreversible consequence will follow. The ordinary example is a temporary suspension of tariff concessions: the concession can be restored the moment compliance is forthcoming, even though the trade diverted and the contracts lost in the interim cannot be. What Article 49(3) forbids is not every irreversible side effect, but the choice of an irreversible measure where a reversible one would have served.[690]

Countermeasures in Investment Treaty Arbitration (HFCS Trilogy)

Now widely regarded as customary law in inter-State practice and ICJ jurisprudence, the ARSIWA regime governing countermeasures has proved far more contested in investor–State arbitration, with serious consequences for the investment treaty system as a whole.[691] Three NAFTA tribunals sitting in

[688] *Gabčíkovo-Nagymaros* (n 3) para 87; ILC Commentary (n 2) art 49, para 9.
[689] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43, para 430.
[690] ILC Commentary (n 2) art 49, para 9.
[691] *Gabčíkovo-Nagymaros* (n 3) paras 82–87.

parallel, *Corn Products International, Inc v Mexico ('CPI')*,[692] *Archer Daniels Midland Co and Tate & Lyle v Mexico ('ADM')*,[693] and *Cargill, Inc v Mexico,*[694] each grappled with Mexico's argument that its 2002 levy on soft drinks containing High-Fructose Corn Syrup (HFCS) constituted a lawful countermeasure against a breach by the United States of NAFTA. Mexico's grievance concerned trade in goods: it alleged that the United States had denied Mexican sugar the market access for which NAFTA provided, and had frustrated the State-to-State procedure of Chapter Twenty, which governs disputes between the parties themselves, by failing to cooperate in the constitution of a panel.[695] NAFTA is described here in the past tense because it was superseded on 1 July 2020 by the Agreement between the United States of America, the United Mexican States, and Canada.[696] The three cases present a distinctive and highly instructive comparison, as there are three tribunals, identical facts, and three (if overlapping) different analyses.

The *CPI* tribunal conceded that Mexico might have a countermeasure claim against the US *inter se*, but concluded that the countermeasures doctrine could not exclude wrongfulness as a defence in an arbitration brought by an investor under Chapter Eleven.[697] In essence, Chapter Eleven sets out the substantive protections owed to investors, including national treatment and protection against uncompensated expropriation, as well as allowing them to enforce those protections in arbitration against the host State, and conferred rights directly on investors. This meant that Mexico could not invoke an inter-State countermeasure to justify conduct that breached obligations owed independently to the claimant. As the tribunal opined with obvious vigour, 'If the HFCS tax was intended as a countermeasure targeted against the United States, it had to have been crafted in such

[692] *Corn Products International, Inc v United Mexican States* (Decision on Responsibility) ICSID Case No ARB(AF)/04/01 (15 January 2008) ('*CPI v Mexico*') paras 145–161.
[693] *Archer Daniels Midland Co and Tate & Lyle Ingredients Americas, Inc v United Mexican States* (Award) ICSID Case No ARB(AF)/04/05 (21 November 2007) ('*ADM v Mexico*') paras 110–180.
[694] *Cargill, Inc v United Mexican States* (Award) ICSID Case No ARB(AF)/05/2 (18 September 2009) paras 379–429.
[695] *ADM v Mexico* (n 46) paras 110–180.
[696] Agreement between the United States of America, the United Mexican States, and Canada (signed 30 November 2018, entered into force 1 July 2020).
[697] *CPI v Mexico* (n 45) para 161.

a way that it bore especially heavily upon US interests, otherwise it would have had no chance of being effective or of being a lawful countermeasure', and the 'pain' of the countermeasure had to fall on the United States, not on private investors.[698] The reasoning is persuasive so far as it goes, but it is incomplete. NAFTA was a treaty between States, and Chapter Twenty preserved a State-to-State track alongside Chapter Eleven; the obligations in issue were therefore owed to the other parties as well as being enforceable by their investors. What *CPI* establishes is not that investment treaties lack reciprocal inter-State obligations, but that where an investor enforces the obligation in its own name, a countermeasure directed at its home State cannot be pleaded against it.

The *ADM* tribunal took a different doctrinal path. It accepted in principle that countermeasures might be used as a defence in investor–State arbitration, characterising investor rights as 'derivative' of those of the home State, in an architecture of 'delegated espousal.' However, on the facts, the tribunal concluded that the HFCS levy failed to satisfy the material requirements of a lawful countermeasure as it was not taken with a view to inducing US compliance, and was disproportionate.[699] The *Cargill* tribunal reached the same outcome as *CPI* (awarding USD 77.3 million in damages) on a marginally narrower ratio, as even assuming that Mexico's tax could qualify as a lawful countermeasure against the US, such countermeasures could not preclude wrongfulness in respect of obligations owed to the investor.[700] Of the two approaches, *CPI* and *Cargill* sit the more comfortably with general international law. Article 49(2) of the ARSIWA confines a countermeasure to the non-performance of obligations owed towards the responsible State, so the decisive question is to whom the obligation runs, not whether the claimant is a State. *ADM* answers that question by analogy with diplomatic protection, an analogy that the investor's capacity to commence, settle and discontinue a claim without its home State's concurrence does not readily support. *ADM* nevertheless identifies the real cost of the position taken by the majority of the three tribunals: a State genuinely injured by a treaty breach is denied the

[698] *CPI v Mexico* (n 45) para 137.
[699] *ADM v Mexico* (n 46) paras 151–180.
[700] *Cargill* (n 47) paras 379–429.

countermeasure that general international law would otherwise allow it and denied it in precisely the sector in which the breach was felt - since Mexico's grievance lay in the sweetener trade and it was in that trade that the claimants had invested. The trilogy therefore settles the outcome by classifying investor rights rather than by reasoning from the countermeasure's regime itself: the law of countermeasures supplied the question, and a theory of investor rights supplied the answer.

The HFCS trilogy thus constitutes an authoritative body of, albeit relatively recent, jurisprudence with significant doctrinal value. It solidifies the view, reflected in the leading commentaries on investment arbitration, that while countermeasures may be available in bilateral, inter-State relations, they are in practice unavailable as a defence in investor–State arbitration.[701] This is so because investment treaty rights are no longer fully analogous to inter-State rights of diplomatic protection. Once rights are bestowed directly on private investors, the inter-State doctrine of countermeasures is of limited use. As Paddeu and Jackson explain in their article from 2024, '[c]ountermeasures constitute justifications, they are defences that render permissible conduct that would otherwise be unlawful',[702] but 'who' is rendered permissible by the justification is crucial to the analysis, since a justification effective vis-à-vis State A might not be effective vis-à-vis Investor X. None of this denies that investment treaties also create reciprocal obligations between the States parties; they plainly do. The point is the narrower one that a countermeasure justifies non-performance only in the relationship between the State taking it and the State against which it is directed, as Articles 22 and 49(2) of the ARSIWA provide; precluding wrongfulness towards the home State therefore leaves untouched an obligation owed to the investor.[703] That the outcome is settled does not mean the reasoning is: only *CPI* and *Cargill* reached it as a matter of principle, *ADM* having accepted the defence in the abstract and rejected it only on the facts, so a future tribunal persuaded by *ADM*'s premise might not be driven to the same conclusion.

[701] K Yannaca-Small (ed), *Arbitration Under International Investment Agreements* (2nd edn, OUP 2018) 793; P Merkouris, A Kulick, JM Álvarez-Zarate and M Żenkiewicz (eds), *Custom and its Interpretation in International Investment Law* (CUP 2024).
[702] M Jackson and FI Paddeu, "The Countermeasures of Others: When Can States Collaborate in the Taking of Countermeasures?" (2024) 118 AJIL 231.
[703] ARSIWA (n 1) arts 22, 49(2); ILC Commentary (n 2) art 22, paras 4–5.

The question does not appear to have been squarely revisited in a published award since, and the inference drawn here is the author's own rather than one supported by later authority. Three positions should therefore be distinguished. The case law denies the defence, but two of the three tribunals did so as a matter of principle and the third only on the facts. The literature explains that outcome by the nature of investor rights, treating them either as the investor's own or as derivative of the home State's. The position taken here is that neither classification is necessary to the result, which follows from Article 49(2) of the ARSIWA: the decisive question in every case is to whom the obligation breached was owed.

Third-Party and Collaborative Countermeasures

The regime developed thus far by this paper relates to bilateral countermeasures. The new frontier of the doctrine, and therefore the main focus of recent literature, is the legal regime for countermeasures taken by States that are not themselves injured. Article 54 ARSIWA has a 'savings clause' for 'the right of any State, entitled under Article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach'.[704] The ILC Commentary refers to the practice as 'limited and embryonic' and declines to offer a view about the customary status of such measures, even though State practice has changed decisively since 2001. The lawfulness question can be stated simply: a measure adopted by a non-injured State either breaches an obligation owed to the target State or it does not. Where no obligation is breached, for instance, withdrawing voluntary aid or recalling an ambassador, the measure qualifies as retorsion and needs no justification at all. Where an obligation is breached, however, for instance, suspending treaty-based landing rights or freezing assets protected by treaty or immunity, justification becomes necessary. As Articles 22 and 49 apply only to injured States, the sole available justification under the law of State responsibility is a third-party countermeasure, grounded under the customary rule preserved by Article 54. The wording of Article 54 might suggest otherwise, since 'lawful measures' could be read as covering only measures

[704] ILC Commentary (n 2) art 54, para 6; ARSIWA (n 1) art 54.

that are lawful in any event, that is, acts of retorsion. The ILC explained, however, that it chose that phrase rather than 'countermeasures' precisely in order not to prejudice the position on measures taken by non-injured States in the collective interest; and a clause preserving only retorsion would have nothing to preserve, since retorsion falls outside the chapter on countermeasures altogether.[705]

In the 2017 monograph *Third-Party Countermeasures in International Law*, Martin Dawidowicz identifies 21 instances of third-party measures from 1960 to 2016, ranging from the measures taken by West African States against Liberia and Sierra Leone in the 1990s, through the Western and Arab League measures against Syria from 2011, through to the Economic Community of West African States (ECOWAS) measures against Mali in 2012. What unites these episodes is that in each the reacting States were not injured within the meaning of Article 42: they instead responded to grave breaches of obligations owed to the international community as a whole, such as mass atrocity, the unconstitutional overthrow of a government, systematic repression, by suspending trade preferences, aid, landing rights or diplomatic privileges. Whether they fall under Article 54 depends on a prior characterisation, since only a measure that would otherwise be unlawful needs the savings clause at all, and a good deal of the practice surveyed, the withdrawal of voluntary aid, for instance, consisted of lawful acts of retorsion requiring no justification.[706] Dawidowicz argues that the ILC's 2001 caution was unwarranted and that the practice is sufficient to establish a customary right of third party countermeasures to address serious breaches of *erga omnes* obligations.[707][708] He begins by analysing the main concerns raised by third party measures in the literature and the ILC. He argues that none are supported by the trend in practice. Firstly, he addresses the concern that third party measures would undermine the primary role of the Security Council. He notes that there is no evidence to support this concern. Secondly, he addresses the issue that the collective obligations upon which third

[705] ILC Commentary (n 2) art 54, para 7, and Part Three, ch II, introductory commentary, para 3.
[706] M Dawidowicz, *Third-Party Countermeasures in International Law* (CUP 2017) 1–4, 109–242.
[707] Dawidowicz (n 59) 281–284.
[708] CJ Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP 2005) 198–251; E Katselli Proukaki, *The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community* (Routledge 2010) 90–209.

party measures can be taken are unclear. He notes that this is not the case and there are examples of African states using third party measures in the form of ECOWAS. Thirdly, he addresses the issue that each state taking third party measures will have to decide for themselves if a serious breach has occurred. Finally, he addresses the issue that third party measures are ineffective. Again, he argues that there is no evidence to support this. Having analysed the main concerns surrounding third party measures, he concludes that third party measures can be taken but only to the extent that it is strictly necessary. The conditions upon which they can be taken are the same conditions upon which injured states can take measures (Articles 49-53 ARSIWA) but with some modifications. This view corresponds with the Institut de Droit International who, in 2005, recognised that if there is a well-recognised serious breach of an *erga omnes* obligation then all states to whom the obligation is owed can take non-forcible measures under similar conditions to a state which is specially affected.[709]

The sceptical position is defended by Hofer, who argues that studies of this kind acknowledge the absence of *opinio juris* and then infer it from practice, when the practice is itself ambiguous: States that impose unilateral sanctions generally present them as policy choices rather than as legal claims, and rarely say whether a given measure is retorsion, a treaty-based measure or a countermeasure.[710] This position is disputed: the ILC's own reservation reflected a difficulty that has not gone away, namely that of telling genuine countermeasures apart from retorsion. Where a measure is merely unfriendly rather than unlawful it requires no justification under Article 54 at all, and a good deal of the practice surveyed is open to that reading. It is therefore uncertain whether the reacting States acted as third-party countermeasure-takers, as retorsion-takers or under some other label. The terminological slippage is itself significant. 'Third-party measures' is the wider category, covering any response by a State that is not injured; 'third-party countermeasures' denotes the narrow subset that would breach an obligation owed to the target State and so requires a justification. This article uses the second term

[709] Dawidowicz (n 59) 239–282, 285–379; Institut de Droit International, 'Obligations and Rights *Erga Omnes* in International Law' (Krakow Session, 27 August 2005) art 5(c).

[710] A Hofer, 'Third-Party Countermeasures: Making Custom Out of Ambiguous Practice?' (2025) 74 ICLQ 287.

only in that narrow sense. Lim and Mitchell approach the problem from a different direction again: accepting that the rules of State responsibility do not rule out collective countermeasures in answer to erga omnes violations. They argue that the right to take third-party countermeasures remains an individual one, so that each State decides for itself whether to take part.[711] They invoke the law of neutrality in support of that freedom: the rules, codified principally in the Hague Conventions of 1907, governing the rights and duties of States that are not parties to an armed conflict. Those rules, they argue, tell against an expansive reading of the duty to cooperate in Article 41(1) of the ARSIWA, under which States are to cooperate to bring to an end, through lawful means, any serious breach of a peremptory norm, a duty the ILC itself acknowledged might reflect progressive development rather than existing law.[712]

The Russian Federation's 2022 invasion of Ukraine has made this debate especially pressing. The UN General Assembly voted against the Russian aggression by 141 votes;[713] the European Union, UK, US, Canada, Japan and others imposed unprecedented sanctions on virtually all sectors of the Russian economy and Russian Central Bank's reserves.[714] Many of these measures, taken by States that are not injured, must be justified as third party countermeasures if they contravene obligations otherwise owed to Russia, such as under bilateral investment treaties or the customary immunity of State property.[715] The lawfulness of confiscating frozen Russian sovereign assets outright, or transferring them to Ukraine, as opposed to merely freezing them, remains particularly contested. A freeze is by its nature reversible and so sits comfortably within Article 49(3), whereas confiscation is not, and would have to be justified on some other basis.

[711] CL Lim and R Martínez Mitchell, *'Neutral Rights and Collective Countermeasures for Erga Omnes Violations'* (2023) 72 ICLQ 361, 361–362, 386–391.
[712] ARSIWA (n 1) art 41(1); ILC Commentary (n 2) art 41, para 3.
[713] UNGA Res ES-11/1 (2 March 2022) UN Doc A/RES/ES-11/1.
[714] Council Regulation (EU) No 833/2014 of 31 July 2014, as repeatedly amended since 24 February 2022.
[715] A Hofer, 'The «Curiouser and Curiouser» Legal Nature of Non-UN Sanctions: The Case of the US Sanctions Against Russia' (2023) 28 JCSL 75; A Moiseienko, 'Trading with a Friend's Enemy' (2022) 116 AJIL 720, 727–730.

In a recent article on 'The Countermeasures of Others', Jackson and Paddeu add an important conceptual point: while the law may allow a State entitled to invoke responsibility under Article 48 to take third-party countermeasures of its own, they argue it does not generally allow States to collaborate in the exercise of another State's countermeasures.[716] Article 54 is in truth a savings clause rather than a grant of authority: it preserves the right of such States to take 'lawful measures' without settling whether measures that would otherwise be unlawful are among them, a non-injured State's response therefore qualifies as a countermeasure only if that reservation has since hardened into a positive entitlement, which is precisely what remains contested. Jackson and Paddeu discuss five different types of collaboration, including independent but coordinated action, secondment of units to another State's system, joint conduct in a single operation, assistance by another State to its countermeasure, and a State taking a countermeasure on behalf of another, 'principal' State, and argue that none of them allows a State to rely on another State's entitlement to take countermeasures.[717] They argue that instead, each State must find its own justification for its conduct, satisfy the criteria of justification for itself, and assume independent responsibility if it fails to meet those criteria.[718] In particular, they cast doubt on the lawfulness of proxy countermeasures in which a State acts on behalf of an injured State as its agent: they argue that the justification which the law of countermeasures affords is personal to the injured State and cannot be delegated, and that a State which assists another's unlawful countermeasure may itself be responsible for aiding or assisting under Article 16 of the ARSIWA.[719] It follows that solidarity sanctions, meaning measures taken by third States in support of a victim such as Ukraine, cannot rest on the victim's injury alone. Each participating State must establish an entitlement of its own, whether by way of retorsion, a treaty-based authorisation or, if it exists, the entitlement reserved by Article 54 of the ARSIWA. That conclusion invites a question the authors leave open: does so restrictive a rule leave the law able to answer serious

[716] A Hofer, 'The "Curiouser and Curiouser" Legal Nature of Non-UN Sanctions: The Case of the US Sanctions Against Russia' (2018) 23 JCSL 75; A Moiseienko, 'Trading with a Friend's Enemy' (2022) 116 AJIL 720, 727–730.
[717] Jackson and Paddeu (n 55) 239–246.
[718] Jackson and Paddeu (n 55) 246–249.
[719] Jackson and Paddeu (n 55) 252–254.

breaches of jus cogens, and in particular aggression by a permanent member shielded from Security Council action by its own veto? Two replies are available. The first is that retorsion carries much of the load, since the bulk of the 2022 measures, such as trade bans, freezes on private assets, exclusion from voluntary arrangements, breached no obligation owed to Russia and needed no justification at all, so the entitlement question arises only at the margin. The second is that the margin is where the hardest cases sit, and there the individual entitlement Jackson and Paddeu require may simply be unavailable to States with no relevant treaty relationship to the aggressor. The requirement of an individual entitlement, which is the approach Jackson and Paddeu defend, is on balance sounder than the alternative of allowing one State to act upon another's entitlement, because it keeps each justification tied to a right that the acting State itself holds. Its apparent cost in enforcement capacity is also smaller than it first appears. Where the obligation breached is owed to the international community as a whole, as the prohibition of aggression is, every State holds a right corresponding to it, which is why Article 48(1)(b) allows every State to invoke responsibility; a State responding to aggression therefore need not borrow the victim's entitlement. The real difficulty lies in the mismatch between the two remedial entitlements in the ARSIWA: the right to invoke responsibility belongs to every State to which the obligation is owed, while the right to take countermeasures belongs only to the State that is injured. Article 54 sits in the gap between them, preserving a right whose existence it does not confirm.[720]

Conclusion

The countermeasures of an injured State are foundational yet highly circumscribed. The injured State may suspend performance of obligations to the responsible State in response to a wrongful act, following a call for cessation, for the purpose of inducing compliance, and only in proportion to the injury, without breaching the Article 50 ARSIWA obligations. The framework, as crystallised in *Gabčíkovo-Nagymaros* and confirmed in subsequent ICJ practice, is now firmly part of customary

[720] Jackson and Paddeu (n 55) 256.

international law, and the ARSIWA provisions reflect accurately customary norms. On the question of which subjects are entitled to take countermeasures, and against whom those measures operate, the framework has been tested, both in investment arbitration and in third-party enforcement alike. Countermeasures may not have a direct impact on rights conferred on investors by investment agreements, as the HFCS cases show, and the sanctions practice following 2022 illustrates the uncertainty as to whether third-party countermeasures are justified in pursuit of the community interest, under customary international law. This article returns to its opening question, the answer is accordingly a qualified negative: general international law states the conditions of a lawful countermeasure with considerable precision, but it does not coherently designate the actors entitled to take one, and in both contested areas the gap is filled by classification rather than by rule. In investment arbitration, whether a countermeasure may be pleaded against a claimant depends upon whether investor rights are classified as the investor's own or as derivative of the home State's, a question the law of countermeasures does not answer. In the practice of non-injured States, the lawfulness of a measure depends upon whether it is classified as retorsion or as a countermeasure, and upon whether the lawful measures preserved by Article 54 are read as including countermeasures at all. In each case the result turns on a classification made outside the law of countermeasures, because the conditions of a lawful countermeasure presuppose a bilateral relationship that is no longer present. By way of an extensive and systematic engagement, Paddeu and Jackson have addressed both the nature of countermeasures as an international wrong-avoiding justification, and the boundaries on countermeasures by non-injured States and on proxy countermeasures.[721] Three recommendations follow. First, a tribunal faced with a countermeasures defence should ask to whom the particular obligation breached was owed, rather than classifying investor rights in the abstract; and a State that wishes to preserve countermeasures as a defence against investors should provide for it in the treaty, as Article 55 of the ARSIWA permits. Secondly, States taking measures in the collective

[721] Paddeu, *Justification and Excuse* (n 7) 367–425.

interest should say what they are doing, identifying the obligation suspended, the party to whom it is owed and the basis relied upon, whether retorsion, a treaty exception or a third-party countermeasure, and preferring reversible measures such as asset freezes to irreversible ones such as confiscation. Practice articulated in those terms would supply the *opinio juris* whose absence presently prevents the emergence of a customary rule. Thirdly, any future codification should close the gap between Articles 48 and 49 by recognising, for serious breaches of peremptory norms, an entitlement of States other than the injured State that is individual rather than delegated, with proportionality measured against the gravity of the breach and a duty of coordination where several States act.[722] As a result, the current law on countermeasures constitutes a regime of self-help that is, in 2026, both more sharply theorised and more politically charged than at any point in the post-ARSIWA era. Countermeasures of injured States may be more restricted than the common invocation of sanctions might suggest, but they are also more robust than is often recognised if properly deployed.

[722] ILC, 'Draft Articles Provisionally Adopted by the Drafting Committee on Second Reading' (2000) UN Doc A/CN.4/L.600, art 54, replaced by the saving clause in 2001.

Subsidised By Slavery: How States Are using Temporary Worker Programmes To Take Advantage of The World's Most Vulnerable Workers

Sameen Rehman

Abstract

Migrant workers, defined as "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a state of which he or she is not a national" under Article 2(1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), are arguably the backbone of most societies. However, many countries do not offer adequate legal protections to migrant workers. This allows them to be exploited by employers and denied provisions that are enjoyed by nationals, including access to healthcare and limits on daily working hours, which in turn perpetuates their vulnerability. In particular, this paper will focus on two 'smart cities,'' Dubai and Singapore, to exemplify how economic efficiency is built upon the unfair treatment of migrant workers. This author ultimately concludes that Temporary Worker Programmes have embedded this exploitation into the structure of the global order and many protections need to be put into place to stop this from continuing.

Introduction

This paper will explore the practical applications of migrant workers' participation in temporary worker programmes (TWP) and how this links to fairness, justice, and equality. Mantouvalou defined temporary worker programmes or TWP as "schemes whereby migrant workers arrive in a country to work, often without a route to permanent residence or citizenship".[723] For the purposes of this article, the definition of a "migrant worker" outlined in Article 2(1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) will be

[723] Virginia Mantouvalou, "Migrant Workers," Structural Injustice and Workers' Rights (2023)

adopted: " a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a state of which he or she is not a national".[724]

The first section of this article will discuss the implications of TWP on workers and how they continue to create an environment of exploitation. Following this, the author will draw upon previous cases of exploitation, placing a particular focus on Singapore and the United Arab Emirates (UAE) (specifically Dubai), which are collectively recognised as global metropolitans or "smart cities". Furthermore, the present legal protections available domestically and internationally will be addressed, emphasising the range of protection offered to migrant workers in different jurisdictions Next, the paper will briefly touch on undocumented migrant workers and the implications they face in their countries of employment. To conclude, a starting point for policy recommendations will be suggested, which aims to prevent further cases of exploitation of migrant workers.

Contemporary Labour Markets

This section will begin by examining migrant workers as the most vulnerable actors within contemporary labour markets, showing how legal precarity, social exclusion, and unfamiliar environments systematically undermine principles of inclusion and citizenship. TWPs are argued to constitute a "triple win", as they are advancing the goals for the workers themselves, as well as the country of destination and the country of nationality.[725] However, in reality, the worker is not "winning" as they are forced to accept substandard working conditions, such as workers at COP28 sites in Dubai where they are forced to work during hours of extreme heat, despite there being a government policy explicitly banning this.[726] In order to earn for the family in their home country, workers become trapped in an exploitative cycle until their visa ends. This is because regressing into an undocumented status would be a more insecure position,[727] as their lack of status would prohibit them from accessing public

[724] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (18 December 1990) General Assembly resolution 45/158.
[725] Virginia Mantouvalou, "Migrant Workers," Structural Injustice and Workers' Rights (2023).
[726] Human Rights Watch, 'Questions and Answers: Migrant Worker Abuses in the UAE and COP28' (2023) <https://www.hrw.org/news/2023/12/03/questions-and-answers-migrant-worker-abuses-uae-and-cop28> Accessed 11 January 2026.
[727] Hila Shamir, 'The Paradox of "Legality": Temporary Migrant Worker Programs and Vulnerability to Trafficking', in Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery, (2017) 471–502.

benefits and standard citizenship rights, such as education. Ordinary migrant workers already do not have the same rights as citizens to begin with, i.e. they cannot access healthcare, which can be subsequently exploited by employers, by falsely promising that they will provide these amenities in order to pressure them into working harder. It is therefore clear that the temporary migration status, rather than migration itself, is the key legal mechanism through which vulnerability is created,[728] which has led to worsening conditions for migrant workers. Despite this, there is an increased reliance on TWP due to its temporary nature as there is a growing societal fear that a large volume of fully right-holding migrants would lead to the region's cultural foundation being changed. However, in reality, this is simply implausible because of the ratio of ethically British citizens. For this reason, this author deplores the use of this reasoning to deny calls for reformation, such as increases in wages for current low skilled domestic workers, especially in countries, such as Canada, the United States and the United Kingdom.

Sengupta highlights critical views, such as that of Castle, of TWP to the effect that they were designed to import labour, not people.[729] For example, Canada's Seasonal Agricultural Workers' Programme was underwritten as an "administrative arrangement" opposed to an international agreement so they would not be subject to international labour laws.[730] The labour is being treated independent of the actual workers carrying out the work; the agency of the worker remains unconsidered when making senior decisions. This can also be seen at the citizen level where low-income migrant workers are given little consideration as constituents by major political parties because they are socially distant and seen as a means to an end for the government in terms of labour.[731]

Moreover, the combination of migrant populations living on outskirts of cities,[732] the purposefully constructed barriers to trade unions and their isolation from the domestic population, reinforces their experiences of social exclusion. Despite some migrants spending the majority of their life in the country of their employment, they will still be regarded as "foreigners". In 2019, 85% of migrants arriving via

[728] Mitu Sengupta, "Protecting Migrant Workers in The Twenty-First Century: Challenges in Rich Democracies." World Affairs: The Journal of International Issues, vol. 11, no. 3, 2007, 86–116.
[729] Ibid 111.
[730] Ibid, 97.
[731] Ibid. 86–116.
[732] Ibid.

skilled workers programmes remained after 5 years.[733] Routes towards permanent residency make this possible, such as through study or family paths. This makes it easier to segregate migrant workers, treat them with less dignity because of their route into the country, disregarding their rights such as those under Article 1 in the UDHR. While law may exist, it may create circumstances that reinforce this inequality rather than resolve it. This creates a paradoxical situation where initiatives that are perceived to be encouraging migration, such as TWPs, heighten migrants' vulnerability to exploitation rather than mitigating it, seen within the example of their temporary status. Overall, these structural vulnerabilities demonstrate that temporary worker programmes, while framed as mutually beneficial, systematically embed exploitation and exclusion.

Case studies

Singapore

Following on from this theoretical understanding, the author will now analyse the case studies of Dubai and Singapore - leading 'smart cities', which illustrate how advanced economic efficiency relies on, and conceals, the exploitation of migrant labour. For clarification, a smart city is a term denoting "the effective integration of physical, digital and human systems in the built environment to deliver a sustainable, prosperous and inclusive future for its citizens."[734]

Beginning with Singapore, as of June 2025, there was said to be 1,593,400 foreign workers, of which 308,700 were migrant domestic workers (MDWs), a number which continues to grow annually.[735] Singapore's labour legislation applies differently depending on skill level: skilled professionals' benefit from more favourable laws, while unskilled migrant workers, such as MDWs, are subject to stricter rules and have no pathway to permanent residency or citizenship. As a result, these migrant workers

[733] Home Office, 'Who stays, who leaves? Evidence from administrative records on the Skilled Worker route! (Migration Advisory Committee, 2024) <https://www.gov.uk/government/publications/who-stays-who-leaves-evidence-from-the-skilled-worker-route/who-stays-who-leaves-evidence-from-administrative-records-on-the-skilled-worker-route-accessible>. Accessed 15 September 2026

[734] BSI Knowledge, PAS:180, Smart Community Infrastructures (BSI, 2014) <https://knowledge.bsigroup.com/products/smart-cities-vocabulary>.

[735] Singapore Government Employment Pass (EP) Ministry of Manpower Singapore (September 22, 2025) <https://www.mom.gov.sg/foreign-workforce-numbers> Accessed 6 January 2026.

stay within Singapore on a temporary basis to work until they no longer have permission to do so. By restricting migrant workers from the main Employment Act, they are categorised under alternative statutes which omit certain provisions, including limits on daily working hours and mandatory days off, embedding vulnerability rather than legal protection.[736] As Devasahayam highlights this legal segmentation, has led to many Asian countries such as Singapore to openly limit the number of migrant workers, alongside their duration of residence and settlement rights based on skill level.[737] Although formal regulations exist, the conditional nature of these protections, combined with the threat of deportation and employer-controlled work permits, renders legal remedies largely inaccessible in practice. In parallel with Dubai, unsanitary and crowded accommodation are common among migrant workers – the dangers of which were magnified by the spread of Covid-19 when more than 90% of reported cases in Singapore in August 2021 were of workers in dormitories.[738] This demonstrates that legal frameworks systematically fail to account for the living and working realities of unskilled migrant workers, reinforcing their marginalisation.

Dubai

Currently, Dubai is known to be home for many nationalities, with 96% of the city's employed population said to be foreign nationals.[739] Dubai relies heavily on their Kafala system to facilitate a large number of migrant workers. This however exemplifies how migrant workers are excluded in practice from meaningful legal protection through immigration-linked labour control. [740] Under the Kafala system to reside and work, a sponsorship is required by an Emirati national or a local business. Despite recent reforms, issues with the system exploiting the migrant labour process and

[736] Human Rights Watch, 'Singapore' (Human Rights Watch, January 13, 2021) <https://www.hrw.org/world-report/2021/country-chapters/singapore#f176e9> Accessed 9 January 2026.
[737] Theresa W Devasahayam, 2010. "Placement and/or Protection? Singapore's Labour Policies and Practices for Temporary Women Migrant Workers." Journal of the Asia Pacific Economy 15 (1): 45–58.
[738] Human Rights Watch, 'Singapore' (Human Rights Watch, 13 January 2021) <https://www.hrw.org/world-report/2021/country-chapters/singapore#f176e9> Accessed 9 January 2026.
[739] Angelica Dona 'Dubai: "The Land of Opportunities" but Not for Everyone. "An Analysis of the Existent Dichotomy between Exploited Immigrant Workers and the Advantaged Foreign Investors & Companies' (2022) UniVè Repository, <https://unitesi.unive.it/handle/20.500.14247/15730?> Accessed 31 December 2025.
[740] Matthew T. Page, Jodi Vittori "Dubai's Role in Facilitating Corruption and Global Illicit Financial Flows" (Carnegie Endowment for International Peace) <https://carnegieendowment.org/research/2020/07/dubais-role-in-facilitating-corruption-and-global-illicit-financial-flows> Accessed 3 January 2026.

treating workers as commodities persist.[741] UAE authorities have justified this unequal legal status on the grounds of national security and social stability, but in reality, it enables the government to maintain advantages, such as access to more jobs, for those with citizenship. Empirical studies, such as the Gulf Labour Markets and Migration Report (2019), documents that migrant works suffer with perpetually low wages, overcrowded accommodation/transportation, hazardous working conditions, and degrading treatment, which gives rise to strikes, protests, and reported suicide cases. For example, during the building of Expo City Dubai where COP28 talks were said to be held, notwithstanding additional protections in place such as Expo2020's Worker Welfare Policy. [742] Despite this, there was minimal government response and no public legal action taken, demonstrating the disconnect between the existence of labour regulations and their effective application to migrant workers.[743]

Despite being branded as smart cities, it is clear that Singapore and Dubai fall short of creating an inclusive future where people from different backgrounds and skill levels are afforded equal access to opportunities. Instead, they have systematically imported migrant workers for labour, while excluding them from meaningful protection within legal frameworks.

Current legal protections

Notwithstanding an extensive framework of international labour standards, migrant workers remain excluded from meaningful protection due to weak enforcement and state resistance; as a result, these laws fail to deliver substantive equality of opportunity or condition. This is evident as many countries do not view migrant rights as fundamental human rights less than 50 countries ratified the 1990 UN International Convention of the ICRMW; the lowest among fundamental human rights treaties, with a third ratifying states adding reservations.[744] This pattern is particularly evident in migrant-concentrated countries, which are reluctant to allocate migrants equal rights reflecting a broader theme

[741] Mona Elsayed, 'An Overview: The United Arab Emirates' Labour Market' (London School of Economics, 2024) <https://eprints.lse.ac.uk/124359/1/MEC-series-89.pdf> Accessed 31 December 2025.
[742] Human Rights Watch, 'Questions and Answers: Migrant Worker Abuses in the UAE and COP28 (Human Rights Watch, 3 December 2023) <https://www.hrw.org/news/2023/12/03/questions-and-answers-migrant-worker-abuses-uae-and-cop28> Accessed 6 January 2026.
[743] Sara Hamza, 'Migrant Labor in the Arabian Gulf: A Case Study of Dubai, UAE', Pursuit - The Journal of Undergraduate Research at The University of Tennessee 6/1 (2015), 81–114.
[744] Martin Ruhs, (2012). The Human Rights of Migrant Workers: Why Do So Few Countries Care? American Behavioral Scientist, 56(9), 1277-1293.

of a lack of legal protections. Ruhs argues that the low ratification of treaties and limited success of migrant rights arises from states' desires to preserve labour flexibility; exclusion as a policy choice rather than an enforcement failure. [745] As such, migrant rights need to be studied in the wider context of domestic foreign policy in order to assess international migration as the economic and political contexts of the migrant workers home countries critically shape their circumstances. A country's response must account for these external factors, not merely its own domestic priorities.

Once migrant workers are within their workplace, if it is a properly regulated sector as per employment law in the UK, such as the Trade Union and Labour Relations (Consolidation) Act 1992, then they should have access to trade unions to represent their collective interests and to be able to "negotiate with employers and governments to defend and improve the conditions in which workers sell their labour to capital."[746] However, there is a tendency within trade unions to group them within the wider pool of workers without considering their specific challenges that arise as a result of being a migrant. For example, the intersection of 'race', gender, class, or other protected characteristics are often not considered in tandem when recruiting workers.[747] This universalistic approach undermines effective diversity practices. Moreover, even where labour laws formally apply, the inability of most migrant workers to leave employment without risking deportation as they are often in TWPs renders legal remedies largely inaccessible.[748] As a result, this demonstrates how the law itself can produce injustice, reinforcing the argument that the most vulnerable workers remain outside meaningful legal protection, despite the appearance of legality.

Potential reforms

[745] Asian-African Legal Consultative Organization and Secretariat, 'Legal Protection of Migrant Workers' (2025) <https://www.aalco.int/63rdAnnualSession/Briefs2025/Final%20Legal%20Protection%20of%20Migrant%20Workers%202025.pdf> Accessed 2 January 2026.

[746] Alberti Gabriella, Jane Holgate, and Maite Tapia. "Organising Migrants as Workers or as Migrant Workers? Intersectionality, Trade Unions and Precarious Work." The International Journal of Human Resource Management 2013. 24 (22): 4132–48.

[747] Ibid. 4134

[748] Maayan Niezna, 'Paper Chains: Tied Visas, Migration Policies, and Legal Coercion' (2022) 49 Journal of Law and Society 362.

This section briefly outlines policy reforms necessary to advance fairness and justice, ranging from stricter enforcement of existing international labour standards in the short term to longer-term restructuring of labour migration systems, with NGOs playing a key role. Positive examples of the domestic law incorporating international labour standards can be seen in Canada and Australia, as they have wage laws, anti-discrimination provisions as well as health and safety standards for migrants.[749] Working towards anti-discrimination legislation would be beneficial for any country wanting to continue to receive migrant workers. This follows on from the fact that an underutilised source of enforcement are non-domestic organisations, such as United Nations Special Rapporteur on the human rights of migrants, and particularly Non-profit Organisations (NGO), such as Migrant Rights in West Asia. NGOs have four main characteristics: independence from government and donors, voluntary in character, namely non-profit and public interest orientation.[750] Focusing on public interest would require greater awareness the link between healthier society conditions and better migrant worker rights would have to be explained to the public. Further potential reforms that NGOs and governments could work towards could include the advancement of the integration process through different courses, such as language and cultural orientations, alongside mentoring programs, to enable workers to attain jobs that fit their skillset.[751] Enhancing immigrant social safety nets, such as housing, healthcare, and unemployment benefits, could be another aim. Building on this, the Global Compact for Migration (GCM) signed by 152 countries, highlights key areas for improvement. It suggests for recommendations to be successful, they need to be grounded in labour market realities, with clearer employer responsibilities and stronger protections. A more practical, incremental approach is needed to create sustainable migration pathways and ensure better integration for workers.[752]

Conclusion

[749] Venkateswaran P.K., Dr. Geni Phillipose, (2025) An Analysis of the Effectiveness of International Human Rights Instruments in Protecting the Rights of Migrant Workers. Journal of Neonatal Surgery, 14 (16s), 404-410.
[750] Goel, Vaibhav, and Manoj Kr. Tripathi. (2010) "The Role of NGOs in the Enforcement of Human Rights: An Overview." The Indian Journal of Political Science, vol. 71, no. 3, 769–93.
[751] Florida Arrinaj, (2025) 'The necessity of a new approach in the legal migration policies of the EU due to discrimination in the labor market, considering the post-Covid 19 context', European Journal of Economics, Law and Social Sciences, 9(1), 1–10.
[752] Phillip Martin and Martin Ruhs (2019) 'Labour Market Realism and the Global Compacts on Migration and Refugees', International migration, 57(6), 88–90.

Overall, this essay critically analyses the statement through the evaluation of low-paid migrant workers, temporary worker programmes, and the use of case studies. Temporary worker programmes, rather than safeguarding participants, frequently perpetuate exploitative conditions and exclude migrant workers from substantive legal protection in practice. The inconsistent application of domestic and international labour standards reveals structural limitations in the pursuit of fairness, justice, and equality. The exclusion of vulnerable workers is therefore not accidental but structurally embedded within labour and immigration law. To achieve meaningful reform, states must reinforce enforcement mechanisms and ensure the principles enshrined in the ICRMW are realised in practice as well as in legislation.

Through the Looking-Glass: AI Holography, Digital Personas, and the CDPA 1988

Jakob A. R. Beecham

Abstract

The rapid development of artificial intelligence (AI) and digital holography has exposed gaps in UK legal protection for performers, particularly after death. This commentary examines whether the Copyright, Designs and Patents Act 1988 (CDPA) adequately protects performers against unauthorised posthumous digital reanimation through AI and deepfake technologies. It argues that the CDPA protects recorded performances rather than a performer's personality, likeness, voice, or identity, leaving estates with limited recourse where AI-generated recreations are not derived from identifiable copyrighted recordings or where training datasets cannot be established. The commentary distinguishes between direct and indirect digital personas and examines the evidential difficulties created by opaque AI datasets and synthetic performances. Comparative analysis of developments in Denmark, the Netherlands, France, the EU, and California identifies emerging approaches to personality rights, posthumous protection, and AI transparency. It concludes that the UK should introduce statutory personality rights, extend posthumous protection, and impose transparency obligations upon AI developers and deployers.

1.1 Introduction

The announcement that a British performer has been posthumously 'revived' using AI holography for a tour against the wishes of their estate furthers the argument that the rapid advancement of generative technologies - namely, artificial intelligence (AI) and 'deepfakes' - has fundamentally disrupted the creative sector. The prospect of performances without live performers, achieved through simulated (or digitally-exploited) personalities, resulting in a

lack of posthumous control over recordings and image rights, has now left the realm of science fiction.

Through comparison with the relative scope and limitations of other jurisdictions' legal frameworks, this commentary will argue that, at present, UK performance rights offer insufficient protection against posthumous digital reanimation. In summary, the Copyright Designs and Patents Act 1988 (CDPA) was designed to protect works and recorded performances, not a performer's 'personality rights': identity, image, persona or likeness. [753] As a result, the deceased performer's estate has next to no possibility to argue against the unauthorised digital resurrection of the performer via AI holography. Their only hope would be if they could prove (on an evidential basis) that an AI was *trained* on (and, as such, the final hologram *derived* from) recordings of the performer's qualifying performances, which would trigger the relevant 'performance rights' within the CDPA. [754] In this regard, this commentary will also present potential legal and policy reforms that could be introduced to the UK framework in order to better address issues such as posthumous protection and transparency over training datasets.

2.1 Holography and Performance

2.1.1 A Brief History of Holography

Before analysing this particular scenario and the UK's current legal framework, one must first understand the technology at the core of this legal question and acknowledge the flawed nomenclature at play. The term "hologram" is merely an umbrella term for the projection (or reflection) of a two-dimensional object or video to give the illusion of a three-dimensional

[753] Copyright, Designs and Patents Act 1988 (CDPA).

[754] *Ibid.*, s29A; *Ibid.*, ss180–182D.

image. [755] Early examples utilised a theatrical effect known as 'Pepper's Ghost' to reflect objects or actors in ghost-like form. [756] This technique was enhanced by the advent of computer-generated imagery (CGI) projection and advanced audio-visual systems. This modern method uses digitally-rendered two-dimensional footage to create the illusion of a three-dimensional performance (by evoking depth, volume, parallax etc.): a famous example is the performance of Tupac Shakur's 'digital persona' at Coachella in 2012. [757] This commentary will refer to all such technologies simply as "holograms."

2.1.2 Digital Personas and the Advent of AI

Crucial to understanding the potential use of AI in this field (and the performance rights of the CDPA) is the distinction between 'direct' and 'indirect' digital personas. In the direct approach, motion-capture is used to accurately map the movements and mannerisms of either the original performer or a body double onto a digital avatar: an example of the former is the four "ABBA-

[755] Victor Robert Kennedy, 'How the Music Machine Makes Myths Real: AI, Holograms, and Ashley Eternal' (2024)

13(5) *Humanities* 140, 140. See also Stephen Anson, 'Hologram Images and the Entertainment Industry: New Legal

Territory?' (2014) 10 *Washington Journal of Law, Technology & Arts*, 109, 111; Hannah Skopicki, 'Pixelated

Poltergeists: Synchronization Rights and the Audiovisual Nature of 'Dead Celebrity' Holograms (2020) 70 *American*

University Law Review Forum 1, 21; Alan Hughes, 'Death is No Longer a Deal Breaker: The Hologram Performer in

Live Music' in Ewa Mazierska, Les Gillon and Tony Rigg (eds) *The Future of Live Music* (Bloomsbury 2020) 114

28, 115; Kenny Forbes, 'Dead Stars Live: Exploring Holograms, Liveness, and Authenticity' in Chris Anderton and

Sergio Pisfil (eds) *Researching Live Music: Gigs, Tours, Concerts and Festivals* (Focal Press 2021) 156–69, 158.

[756] Joe Nickell, *Secrets of the Sideshows* (University Press of Kentucky 2005) 288-91.

[757] Marie A. Kessel, 'Holograms are Taking Over the World! An Analysis on Legal An Analysis on Legal

Implications Holograms Pose in Right of Publicity and Copyright Law' (2024) *Fordham Intellectual Property, Media and Entertainment Law Journal* 35(1) 200, 201-6.

tars" of *ABBA Voyage*. [758] Conversely, in the indirect approach - typically used for deceased original performers - an entirely new performance is created, ideally using archival recordings and (traditionally) CGI to reconstruct the likeness and mannerisms of the performer in a new performance context. [759] An example of this approach can be seen in the *Bizarre World of Frank Zappa* tour. [760]

AI entered the equation recently and has primarily been used to enhance the work of CGI artists: for instance, for *ABBA Voyage*, the direct digital personas (derived from motion-capture sessions) were de-aged by AI during post-production. [761] For the indirect process, hypothetically, AI could be trained during *production* to generate a digital avatar (complete with movements, mannerisms etc.) without the need for motion capture, perhaps by sifting through hours of archival footage and photography (or material perhaps evoking the performer rather than actual footage of them, as discussed in the following section). As of writing, no such examples exist and the extent to which AI has been used in the creation of the hologram in question has not been made sufficiently clear by the entertainment company.

[758] A. Kessel (n 5) 205-6. See also Shannon F. Smith, 'If It Looks Like Tupac, Walks Like Tupac, and Raps Like Tupac, It's Probably Tupac: Virtual Cloning and Post-Mortem Right-of-Publicity Implications' [2013] *Michigan State Law Review* 1719, 1724.

[759] A. Kessel (n 5) 206. See also F. Smith (n 6) 1725.

[760] Graeme Virtue, 'The Bizarre World of Frank Zappa review – toking poodles and holographic necromancy' *The Guardian* (London, 10 May 2019) <https://www.theguardian.com/music/2019/may/10/the-bizarre-world-of frankzappa-review-edinburgh-playhouse> [accessed 16 November 2025].

[761] Robert Kennedy (n 3) 152.

This is where the UK's legal framework (or potential lack thereof) comes in: if recorded qualifying performances (i.e., copyrighted works) were used to *train* an AI, and led to the creation of the hologram without a license, would this be in breach of the CDPA? [762]

3.1 The UK Position

3.1.1 The Copyright, Designs and Patents Act 1988

Under the CDPA, a performer has exclusive rights in relation to *recordings* of their live performances, recognised as 'fixated' (recorded) dramatic or musical works, depending upon the nature of the performance. [763] It is crucial to note that performers themselves - that is, their appearance, their performance style etc. - are not subject to protection in this regard. One assumes that the performance(s) in question will satisfy the current UK test (affirmed by Arnold LJ in *THJ v Sheridan*) that a work has been produced not only using technical means (skill, labour, and judgement) but with free and creative choices (artistic considerations): this approach designates the work as the author's *'own intellectual creation.'* [764] A concert film - such as *Stop Making Sense* (1984) - or other recorded material that could be used for the training of an AI on a performer's likeness, voice etc. - could be considered a 'dramatic work', provided it is capable of being played in front of an audience. [765] The CDPA therefore grants

[762] Nicole Sales Giles and Sebastian Sanchez, 'Cancel the Christie's AI Art Auction' *Open Letter* (8 February 2025)

<https://openletter.earth/cancel-the-christies-ai-art-auction-f5135435?limit=0> [accessed 20 November 2025]. See

also George Nelson, 'Thousands of Artists Demand Christie's Cancel AI Art Sale: 'AI Models Exploit Humans' *Financial Times* (London, 11 February 2025) <https://www.artnews.com/art-news/news/artists-demand christiescancels-ai-art-sale-claiming-ai-models-exploit-humans-1234732217/> [accessed 20 November 2025].

[763] CDPA (n 1) s3.

[764] *THJ v Sheridan* [2023] EWCA Civ 1354, para 14.

[765] Jonathan Demme, *Stop Making Sense* (USA, Arnold Stiefel Company 1984); *Norowzian v Arks Ltd and others*

the right to control the recordings or broadcasts of live performances and prohibits their unauthorised use, but lacks clarity as to the extent it includes their use for the training of AI. [766]

3.1.2 Analysis of the Framework

Despite the aforementioned protections, the question of whether a fully AI-generated performance is really an unauthorised 'recording of a performance' is not adequately addressed. AI is not considered a natural (or legal) person: under section 180(2) CDPA, a performance must be given by a live performer, so, arguably, a purely synthetic (indirect) AI-generated recreation is not a recording of a performance, but, rather, a new, computer-generated output *mimicking* an original performance. [767]

Realistically, without considerable forethought and technical knowhow (i.e., setting 'copyright traps' to catch an AI scraping material) from an estate, it would be impossible to reverse-engineer any AI-generated content (e.g. a hologram) to definitively conclude what dataset (archival recordings) the AI that generated it was trained on. [768] As seen in the High Court's

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(No 2) [1999] All ER (D) 1214, 1214.

[766] CDPA (n 1) ss180-184; *Getty Images v Stability AI* [2025] EWHC 2863 (Ch). See also Select Committee on Communications, 'AI, copyright and the creative industries' (HL 2023–24, 267) 16; Department for Science, Innovation and Technology, Department for Culture, Media and Sport and Intellectual Property Office, 'Report on Copyright and Artificial Intelligence' (2026) sD <https://www.gov.uk/government/publications/report-and-impact assessment-on-copyright-and-artificial-intelligence/report-on-copyright-and-artificial-intelligence#section-d-input transparency> [accessed 30 July 2026].

[767] CDPA (n 1) s180(2). See also Richard Arnold, 'Performers' rights and artificial intelligence' in Ryan Abbott (ed), *Research Handbook on Artificial Intelligence* (Edward Elgar Publishing 2025) 222-3.

[768] Matthieu Meeus, Igor Shilov, Manuel Fayesse and Yves-Alexandre de Montoje, 'Copyright Traps for Large Language Models' [2024] *41st ICML* 235, 235-6.

ruling in *Getty Images v Stability AI*, this lack of disclosure from AI developers creates an inordinately high evidential threshold for our deceased performer's estate to prove that the AI hologram was derived from CDPA-protected (qualifying) performances and thus constitutes 'primary infringement'. [769]

To further complicate matters, one could attempt to avoid the CDPA entirely. Two layers to this approach are arguably present here, the first being the creation of a direct digital persona. This would require a new motion-captured performance (*mimicking* the style of the deceased performer) to be mapped onto a digital avatar (generated by an AI prompted by style cues: clothing, hair etc.) by digital artists. [770]

Whilst the previous illustration could create a convincing-*looking* revival, it would require another performer's voice, as an isolated vocal track would be CDPA-protected as a 'sound recording.' [771] To further circumvent this protection, one could instruct an AI to generate an avatar (as before) but instruct it to also coincidentally mimic (or evoke) our deceased performer's mannerisms and voice. Training an AI on sound/look-alike tribute acts could allow for the *de novo* creation of an *indirect* digital persona without the use of any specific recorded audio or footage of the deceased performer. This would effectively serve as an automation (or replacement) of the work of the digital artists in the previous example. [772] Prompts such as 'sing in a voice *reminiscent* of artists *similar to…*' would negate the use of qualifying performances of the specific artist (protected by the CDPA) that the digital avatar is mimicking.

[769] CDPA (n 1) ss16(2)-(3); *Getty Images v Stability AI* (n 14) para 750.

[770] Smith (n 6).

[771] CDPA (n 1) s5A.

[772] Arnold (n 15) 218; *Ibid.*, 224.

The problem, as outlined by Arnold, is that AI falls through a gap in section 9(3) CDPA: if such an indirect digital persona was created by AI (which he defines as *'[...] a computer system operating autonomously without human input or intervention [...]'*) there is no natural or legal person *'undertaking the arrangements for its creation'* to pin liability to. [773]

This puts our performer's estate in a difficult legal position: the current UK copyright framework provides no recourse for the distortion of deceased individuals' legacy if undertaken in this indirect/synthetic (AI-generated) way. Furthermore, the UK does not recognise the broad, standalone 'right of publicity' (or 'personality right') unlike other jurisdictions, which currently (or will soon) offer posthumous protection for name, image and likeness without specific contractual terms. [774] Other approaches, namely the common law tort of 'passing off' and performers' (personal) moral rights, could also be ineffective here: the former requires commercial misrepresentation and the latter only extends 50 years from the original performance and cannot be posthumously asserted by an estate after this period (which would prevent any objection to the hologram's distortion of the performer's legacy, post-mortem). [775]

In summary, the performer's estate could not proceed with a copyright infringement claim in the UK against the entertainment company as, without the use of qualifying (fixated) performances in the training of the AI that generated it, the hologram would likely not fall within the scope of primary infringement in the CDPA (even if it were to, the evidential

[773] Arnold (n 15) 224; CDPA (n 1) s9(3). See also *Nova Productions Ltd v Mazooma Games Ltd & Ors* [2006] EWHC 24 (Ch) para 106.

[774] Emma Perot, *Commercialising Celebrity Persona: Intellectual Property Law and Practice* (Hart Publishing 2023) 36.

[775] *Reckitt & Colman v Borden* [1990] 1 WLR 491, 499; CDPA (n 1) s78; *Ibid.,* ss.80-3; *Ibid.*, s205F; *Ibid.*, s205J; *Ibid.*, s205M.

threshold would likely prove too high for them to successfully prove the use of copyrighted content before a court due to a lack of dataset transparency). [776]

There is arguably an 'integrity gap' in the CDPA that reflects an analogue-era assumption that performances, once recorded, were finite artefacts rather than endlessly-reanimatable data sets. [777] As these synthetic technologies evolve, the moral rights (and wider copyright) framework appears increasingly outdated in its temporal and conceptual limits. The UK should therefore look abroad and compare other jurisdictions' copyright frameworks with its own.

4.1 Other Jurisdictions

4.1.1 European Union

By comparison, EU Member States' respective stances on legal protection for personal characteristics (likeness, voice etc.) are somewhat varied. Whilst means of protection, such as the French *droit à l'image*, existed prior to the advent of AI, their original drafting - like that of the CDPA - required reinterpretation and even amendment in light of this emerging technology. [778]

Following the implementation of the EU's 'Digital Services Act' (November 2022), the 'AI Act' (June 2024), the AI Act-compliant 'Code of Practice on Transparency of AI-Generated Content' (July 2026), and the Commission's Guidelines on Article 50 (July 2026), Member States received a level of overarching protection (through a risk-based regulatory framework) against uses of AI that could contravene fundamental rights. [779] The most relevant aspect of the

[776] CDPA (n 1) ss16(2)-(3); *Getty Images v Stability AI* (n 14).

[777] Culture, Media and Sport Committee, *British film and high-end television* (HC 2024-5 328) para 202.

[778] *Code pénal* [French Criminal Code] art 226(8).

[779] Regulation (EU) 2022/2065 ('Digital Services Act') [2022] OJ L277/1; Council Regulation (EU) 2024/1689 ('AI

Act') [2024] OJ L2024/1689, arts 5, 6, 50; European Commission, 'Code of Practice on Transparency of AI

AI Act for this scenario is its requirement for transparency in relation to the datasets used to train AI models.

4.1.1.1 EU AI Act

Article 53 of the AI Act requires 'providers' (Article 3(3)) to maintain up-to-date technical documentation of their 'general-purpose' (Article 3(63)) AI model (including how it was trained and tested, what data was used, evaluation results, limitations etc.) and provide this to 'downstream' developers and deployers (who, unlike providers, are not directly caught by this requirement) so they can meet regulatory obligations while integrating the model. [780] Article 53(1)(d) of the Act also requires that providers *'draw up and make publicly available a sufficiently detailed summary about the content used for training of the general-purpose AI model, according to a template provided by the AI Office.'* [781] In addition to this, Article 50 imposes further transparency obligations on the 'deployers' (Article 3(4)) of AI systems - such as our entertainment company - requiring them to disclose whether any image, audio or video content - including deepfakes (Article 3(60)) - has been artificially generated or manipulated. [782]

Despite these protections, the Act, read alone, has a fatal flaw. Deepfakes generally fall within the transparency regime of the AI Act, rather than the prohibited or high-risk categories, with no prohibition, no requirement for their removal, no provision of rights over personal characteristics and no delineation between deepfakes used to defraud, blackmail or otherwise

Generated Content' (10 June 2026) [accessed 29 July 2026]; European Commission, Guidelines on transparency obligations for providers and deployers of certain AI systems under Article 50 of the AI Act [2026].

[780] AI Act (n 27) art3(3); *Ibid.*, art3(63); *Ibid.*, art53(1)(a)-(b).

[781] AI Act (n 27) art53(1)(d).

[782] *Ibid.*, art50(4); *Ibid.*, art3(60).

manipulate and those used for entertainment purposes. [783] The Act does not prevent Member States from legislating further in this area, as long as they do not attempt to undermine the Act, itself: this has led various national legislatures to attempt to plug the gaps, particularly in relation to providing their citizens with rights over their likeness (and other personal characteristics). [784]

4.1.1.2 Denmark

The first European jurisdiction to attempt to grant copyright over likenesses was Denmark. [785] From July 2026, the new amendment to the Danish Copyright Act granted *all* individuals 'ownership' (copyright or similar rights) over their face, voice and physical appearance when used in deepfakes. [786] The provision - whilst accounting for satire, parody, pastiche, and

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[783] *Ibid.*, art50; Dirk Visser, 'Deepfakes under a neighbouring right' (2024) 5 *Mediaforum* 138, 138

<https://scholarlypublications.universiteitleiden.nl/access/item%3A4172306/view> [accessed 8 December 2025].

[784] Visser (n 31) 138; Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2012]

OJ C326/47, art2(2); *Ibid.*, Protocol 25.

[785] Miranda Bryant, 'Denmark to tackle deepfakes by giving people copyright to their own features' *The Guardian*

(London, 27 June 2025) <https://www.theguardian.com/technology/2025/jun/27/deepfakes-denmark-copyright-law

artificial-intelligence> [accessed 17 December 2025].

[786] Habbine Estelle Kim, 'Denmark Proposes AI Deepfake Copyright Law to Protect Personal Likeness, Voice, and

Identity' (17 July 2025) <https://www.kimavocat.com/post/denmark-proposees-ai-deepfake-copyright-law-to

protect-personal-likeness-voice-and

identity#:~:text=On%20June%2026%2C%202025%2C%20Denmark's,the%20person%20sharing%20the%20conten

t.> [accessed 17 December 2025]; Luca Schirru, 'Danish Bill Proposes Using Copyright Law to Combat Deepfakes'

InfoJustice (15 July 2025)

<https://infojustice.org/archives/46588#:~:text=This%20Act%20shall%20enter%20into%20force%20on%20March

criticism - was designed to protect individuals through the prohibition of making *'realistic digitally-generated imitations of a natural person's personal, physical characteristics'* available to the public without their consent (section 73a). [787]

Crucial for our purposes is the fact that the legislation also specifically covers performers and artists by offering 50 years of post-mortem protection from realistic AI-generated copies of their artistic *performances*: deployers, developers, and other relevant stakeholders require permission from estates to distribute such copies to the public in this time (section 65a). [788] Such protection, if implemented into the UK's framework, could afford estates (such as our deceased performer's) the recourse to request the removal of an AI-generated/deepfake copy of a performance (such as a hologram) from a public forum (i.e. a touring production).

Despite this success, a critical hurdle encountered by other jurisdictions, such as the Netherlands, was the fear that copyright over personal characteristics was too far removed from the original vision for a given jurisdiction's copyright legislation, as the human face cannot (definitively) be said to be a work of creative, artistic achievement. [789]

%2031%2C%202026.&text=Subsection%201.,society%20services%20(codification)%E2%80%9D%20%E2%86%

A9%EF%B8%8E> [accessed 9 December 2025].

[787] Estelle Kim (n 34); *Ophavsretsloven* [Danish Copyright Act], Consolidated Act No 202 of 27 February 2010, s73a.

[788] Estelle Kim (n 34); *Ophavsretsloven* (n 35) s65a.

[789] Foort van Oosten (Ministry of Justice and Security, Netherlands), *Antwoorden Kamervragen over het bericht "In*

de strijd tegen deepfakes krijgen Denen copyright op eigen gezicht en stem" [Answers to parliamentary questions on

the report "In the fight against deepfakes, Danes receive copyright over their own face and voice"] (19 September

2025) 2025D40383, s6 <https://open.overheid.nl/documenten/78a54d7d-b16a-44ae-a997-cd425a4dfb8d/file>

[accessed 8 December 2025]; Giovanna Fleck, 'Denmark leads EU push to copyright faces in fight against

4.1.1.3 The Netherlands

Wanting to follow Denmark's example, Dutch plans were set in motion to replicate the Danish amendment, initially, in the Dutch Neighbouring Rights Act (DNRA): a key proponent of this update was Professor Dirk Visser, who drafted his own Article 7c. [790] Following Visser's proposal in October 2025, a draft amendment to the DNRA was introduced, seeking to grant individuals (natural persons) the power to allow or prohibit AI-generated deepfakes using their likeness or voice (including their distribution to the public) and set conditions for their commercial use, complementing the transparency obligations of Article 50 of the AI Act. [791]

Looking to our deceased performer, and building upon the Danish amendment - accounting for satire, caricature, parody, and criticism - should further proposed Dutch legislation be enacted in its current form, the DNRA could offer individuals post-mortem protection (70 years from the first January following the year of death) from deepfakes. [792] Developers, deployers, and other relevant stakeholders would also have an obligation to obtain the explicit consent from the individual before creation or distribution of any AI-generated content featuring their likeness. [793]

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deepfakes' *Tech Policy* (7 October 2025) <https://www.techpolicy.press/denmark-leads-eu-push-to-copyright-faces-

in-fight-against-deepfakes/> [accessed 17 December 2025].

[790] Visser (n 31) 139; 'Danish citizens to get copyright to their whole body – what about the Netherlands?' (Leiden

University, 18 July 2025) <https://www.universiteitleiden.nl/en/in-the-media/2025/07/danish-citizens-to-get-copyright-to-their-whole-body---what-about-the-netherlands> [accessed 10 September 2026].

[791] *Ibid.*, 140; *Voorstel van wet houdende regels ter uitvoering van Verordening* (EU) 2024/1689 ['Implementation

Act for the EU AI Act']; AI Act (n 27) art 50.

[792] Visser (n 31) 139.

[793] Visser (n 31) 138.

The main obstacle to reform has been governments' concern that rapidly legislating against this problem could undermine legal certainty: this has been compounded by fears that recognising rights over personal characteristics would extend the law beyond the original purpose of legislation designed to protect artistic expressions and their commercial exploitation, rather than inherent personal identity. [794] Initially, the Dutch government argued the current legal framework offered sufficient protection and that the amendment (applying it to personal characteristics, which are not creative achievements) warranted a potential misalignment with its original purpose: enabling creators of works to exploit them. [795] However, after much debate, the state-established (independent) Data Protection Authority (*Autoriteit Persoonsgegevens*) announced that it intended to undertake the supervision and investigation of the processing of personal data, among other responsibilities, to ensure compliance with the GDPR, whilst preserving legal certainty, comprehensibility, and enforceability. [796]

Whilst Professor Visser's proposed Article 7c continues to shape the debate on specialised civil recourse, the immediate regulatory landscape in the Netherlands is instead dictated by the rollout of the EU AI Act's horizontal obligations. Although these measures may provide some

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[794] *Autoriteit Persoonsgegevens* [Dutch Data Protection Authority], *'AP over Europees voorstel om wetten te wijzigen: mag niet ten koste gaan van mensenrechten'* ['AP on European proposal to change laws: must not come at the expense of human rights'] (20 November 2025) <https://www.autoriteitpersoonsgegevens.nl/actueel/ap-over-europees-voorstel-om-wetten-te-wijzigen-mag-niet-ten-koste-gaan-van-mensenrechten> [accessed 17 December 2025]; van Oosten (n 37) s6.

[795] *Ibid.*; PONT, 'Cabinet: no copyright on face or voice in fight against deepfakes' (22 September 2025) <https://privacy-web.nl/en/nieuws/kabinet-geen-auteursrecht-op-gezicht-of-stem-in-strijd-tegen-deepfakes/> [accessed 17 December 2025].

[796] *Autoriteit Persoonsgegevens*, 'Tasks and powers of the AP' <https://www.autoriteitpersoonsgegevens.nl/en/about-the-ap/tasks-and-powers-of-the-ap> [accessed 29 July 2026]; *Autoriteit Persoonsgegevens* (n 42); Implementation Act for the EU AI Act (n 39), art 3.

additional recourse for estates in the position of that of our deceased performer, they still do not assist in determining what deployers (such as the entertainment company) are training their AI models on. This dilemma is at the core of current developments in the French legislative framework.

4.1.1.4 France

The most recent French proposal was the reversal of the power dynamic between AI developers and artists. This would mean that their framework would have a (rebuttable) presumption of the use of infringing content (e.g. copyrighted material such as a performer's archival performance footage) in an AI model's training, rather than, for instance, a performer or their estate being tasked with proving such content had been used to produce an AI-generated copy. [797]

The proposal followed the publication of the Voss Report in June 2025, which advocated for forcing AI developers, deployers, and other relevant stakeholders to disclose all copyrighted content used to train their AI models, an irrebuttable presumption if they fail to disclose, and a blanket ruling that all AI-generated content be held ineligible for copyright protection. [798]

Although the Darcos Bill (April 2026) proposed such a reversal of the burden of proof through a 'presumption-of-use' model, it was subsequently dismissed by the National Assembly in May 2026: as a result, estates and other rightsholders must rely on the aforementioned transparency

[797] Barbara Casassus, French government considering AI bill 'to protect copyright and reward creators' *The Bookseller* (4 December 2025) <https://www.thebookseller.com/news/french-government-considering-ai-bill-to-protect-copyright-and-reward-creators> [accessed 17 December 2025].

[798] Axel Voss (Committee on Legal Affairs, European Parliament), *Draft Report on Copyright and generative artificial intelligence - opportunities and challenges* (2025/2058(INI)) 13, para R, para 11, para 12 <https://www.europarl.europa.eu/doceo/document/JURI-PR-775433_EN.pdf> [accessed 17 December 2025].

obligations of the EU AI Act. [799] Such a rebalance of power would certainly help to address the key flaw in the case of our deceased performer's estate against the entertainment company, as the burden of proof would be shifted to the latter, who must disprove the former's claim that copyrighted content was used in the training of the AI model (and the production of the hologram).

4.1.2 USA: California's 'Right of Publicity'

In addition to the above European reforms and proposals, there are jurisdictions that utilise legislative frameworks, drafted well before the advent of AI, that are capable of being read to include protection from deepfakes and unauthorised uses of personal characteristics and performances: California is one such jurisdiction.

The California Civil Code (CCC) contains two relevant, separate rights: the first (section 3344 CCC) protects living persons from unauthorised commercial uses of their name, voice, signature, photographs or likeness. [800] The second (section 3344.1 CCC, the 'Celebrities Rights Act') - more pertinent to our hologram case - protects deceased personalities whose identity had 'commercial value' at the time of their death (or thereafter). [801] This protection is granted for 70 years post-mortem, and protects the same categories as section 3344, considering each as property capable of being transferred, licensed, inherited or enforced by the deceased individual's estate. [802]

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[799] 'Darcos Bill Dismissed in the Assembly: Rights Holders Alone Against Article 53 of the AI Act' (ActuIA, 21 May

2026) <https://www.actuia.com/en/news/darcos-bill-dismissed-in-the-assembly-rights-holders-alone-against-article-

53-of-the-ai-act/> [accessed 29 July 2026].

[800] California Civil Code (CCC) s3344; Perot (n 22) 46-7.

[801] CCC (n 48) s3344.1; Perot (n 22) 47.

[802] CCC (n 48) s3344.1(b).

Like the European jurisdictions, where AI has been used for non-commercial (often criminal) purposes, a claim would likely fail, but in these specific circumstances - an entertainment company clearly using their AI hologram for profit - a claim made by our performer's estate may have a greater likelihood of success if it were lodged in California.

5.1 Potential UK Reforms

Considering all of the above, it can be deduced that our performers' estate is in a very weak legal position to object to the distortion of the performer's legacy (a digital reanimation) through the CDPA. The prevailing question now is how best to reform the UK's current copyright framework to amend this. The following proposals, if implemented successfully into the UK framework, may provide more sufficient protection for estates.

1. **'Personality Right(s)'** [DK/NL/CA] over personal characteristics (face, voice, likeness etc.) encompassing the general public and performers (perhaps with a higher penalty for unauthorised commercial use). This could be in the form of a requirement to obtain consent for the creation and distribution of AI-generated content featuring protected personal characteristics.
2. ***Posthumous*** **protection** [DK/NL/CA] of the above for 70 years post-mortem which is transferable to (and licensable, inheritable, and enforceable by) an estate.
3. **Transparency** [FR] enforced upon AI developers/deployers to ensure they disclose all copyrighted material used in AI training datasets. [803] This level of transparency would go beyond mere acknowledgment that a given output was AI-generated in order to rebalance the burden of proof in favour of estates.

[803] UK Parliament, 'Protect creators' rights: require AI firms to disclose training data' (Petition 765199) <https://petition.parliament.uk/petitions/765199> [accessed 1 August 2026].

6.1 Conclusion

When considered together, the above proposals admittedly make for a tall order. Some critics have even suggested it may be more efficient to entirely scrap section 9(3) CDPA (regarding computer-generated works) rather than attempt to reform it, due to the aforementioned issue of (lack of) liability for AI-generated indirect digital personas. [804] In conclusion, it can be said with certainty that CDPA performance rights currently offer insufficient protection against posthumous digital reanimations.

[804] Patrick Goold, 'The Curious Case of Computer-Generated Works under the Copyright, Designs and Patents Act 1988' (2021) 2 *Intellectual Property Quarterly* 119, 129; Arnold (n 15) 224.

Law Review Editorial Board (2025-26)

Aikaterini Stephanou



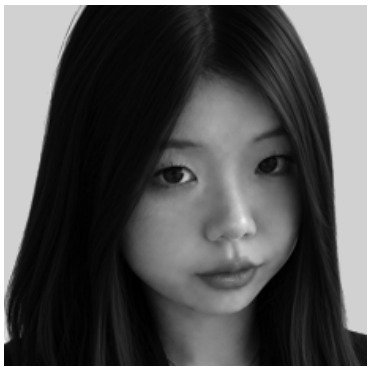
Aikaterini is currently in her 3rd year of study. She aims to work in Policy within a European or International institution. She is currently applying for master's degrees on International Relations and Diplomacy all around Europe.

Tamzin Sharrocks



Tamzin is currently completing her placement year at the NHS University Hospitals of Liverpool Group, where she has gained a broad range of legal experience and built strong relations with professionals across an array of sectors. In the future, Tamzin hopes to qualify as a solicitor within the healthcare sector and then progress into the judiciary.

Eileen Yee Ling Sim



Eileen recently graduated from the University of Liverpool with first-class honours in Law LLB. She aspires to become a barrister and is currently commencing her Bar studies in London.

Hannah Rand



Hannah recently graduated from the University of Liverpool with a first-class law degree. She is currently completing an internship with the Business and Human Rights Law Group and is coaching the 2026-27 UoL Helga Pedersen Moot Court team. In the future, she would like to complete a master's degree, specialising in Public International Law.

Jake Lynch



Jake is currently in 2nd year of Law with Politics and aims to become a solicitor. In his spare time, he enjoys music, art and baking.

Jasmine Lindsay



Jasmine is in 2nd year of study and aims to become a solicitor, specifically in digital law. She also plays the clarinet in LUMS.

Karim Acharki Perez



Karim recently graduated from the University of Liverpool with a First Class degree in Law with Accounting and Finance. He is currently working as a Legal Analyst at Herbert Smith Freehills Kramer and hopes to qualify as a commercial solicitor. Outside of law, Karim is a keen badminton player.

Kate Fripp-Higgins



After graduating with a First Class in Law with French in July, Kate is pursuing an LLM in International Development Law and Human Rights at the University of Warwick.

Louisa Martin-Perez



Louisa is currently on placement year for Law with a Year in Industry at Weightmans. She aims to become a solicitor in the future. She enjoys travelling and finding out about new cultures, this summer she travelled to South Korea.

Lydia Spencer



Lydia recently graduated from the University of Liverpool with a first-class law degree. She is currently working at law firm within the Clinical Negligence Department. She is interested in Medical Law and Family Law.

Mahi Sharma



Mahi is in 3rd year of study and aims to become a private equity solicitor. She is the first person to study law in her family.

Megan Yap Zhen Ning



Megan recently graduated from the University of Liverpool with first-class honours.

Sehar Ashraf



Sehar has completed her LLB and is graduating December 2026 with first class honours. She has now started her role as a paralegal and in the future aspires to practise as a corporate law solicitor.

Uzma Chaudry



Uzma has completed her LLB at the University of Liverpool, including a year abroad at Deakin University in Melbourne and is graduating December 2026. She aspires to qualify as a solicitor. Outside her studies, she enjoys reading and sewing.

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UNIVERSITY OF LIVERPOOL LAW REVIEW

SHAPING SOCIAL JUSTICE

2025/26