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Dedicated to 'B' Block



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Editorial

We are very pleased to publish the first issue of the thirty-first volume of the *Coventry Law Journal*. As with previous issues, this issue contains pieces covering contemporary legal issues and dilemmas, such as asylum law, constitutional law and practice, freedom of expression, equality and the law, prisoners' rights, land law, comparative contract law and dispute resolution. We are particularly pleased to publish pieces by former undergraduate students, based on their independent research, and we wish them every success in the future as academic writers and professional lawyers. We are also happy to include an article by one student from our partner university in China – SWUPL – on comparative contract law. We also have contributions from our regular contributors – your editors, a book review from Dr Rona Epstein, an obituary for Lord Mackay of Clashfern, who died on 7 July 2026, by Dr Stuart MacLennan, and a recent development from our former colleague, Professor Sukhninder Panesar, on trust law. We thank them all for their continued support and for sharing their research and expertise. We are equally delighted to include an article from Francis Ekene Ikebundu, a Nigerian academic, in this issue, on dispute resolution.

This issue is dedicated to the George Eliot Building at the University, which has been the home to the Law School since the 1960's. Formerly 'B' block, George Eliot housed the Law School and, in its time, Social Studies, Business Studies, International Studies, the Chinese Centre and various languages' departments. We will now be moved to the William Morris building and will continue our teaching, research and other activities with our colleagues from the College of Business and Law. In any case, the Moot Room and the lecture theatres on the ground floor will remain in operation.

Your editor has worked in the George Eliot Building for nearly 50 years and, together with existing and former students, will miss the old building, which remained largely unchanged in the 60 years since it was built. Former students and staff have been notified of the change of location and expressed sadness, but at the same time a deep affection and nostalgia for the building and their time there as lecturers and students. A number of our authors have especially fond memories of the building: Rona Epstein began her law career by studying her LLB (part-time) there, in 1995; and Sukhninder Panesar was taught in the building between 1988 and 1991 and then taught in George Eliot for many years before leaving the university. Many former students, now very successful lawyers, warmly remember 'B' block and those that taught them there, providing opportunities for them to learn their basic legal skills and to participate in mooting, clinical practice and legal and social debate. The building also hosted several social events in the classrooms, to celebrate graduations and to welcome guest lecturers and speakers.

The Law School was proud to be housed in the last building at the University to provide individual and shared offices, as opposed to general shared working places, which have become the norm these days, and which fail to encourage students to converse with their lecturers. Your editor, for one, believes that the office space we enjoyed contributed significantly to our teaching and research and to student satisfaction. But time passes, and we will continue to operate from the William Morris Building and provide the excellent standards of teaching and support we pride ourselves on. So, farewell B Block: this issue is dedicated to you, and all the staff and students who worked and studied there.

We hope you enjoy reading this issue and find something of interest to satisfy your academic research and curiosity. We also look forward to receiving your contributions for future issues. We encourage contributions from students, academic staff and practitioners, and if you wish to contribute to the Journal and want any advice or assistance in getting published, then please contact the editors. For the next issue we are interested in receiving contributions in all legal areas. The next publication date is December 2026, and contributions need to be forwarded to us by early November 2026 at the latest.

Dr Steve Foster and Dr Stuart MacLennan

LEGAL ESSAY

Proscription, national security, freedom of speech and the separation of powers

Dr Steve Foster*

Introduction

On 16 June 2026, the Court of Appeal overruled the decision of the High Court, delivered earlier in the year (*Ammori v Secretary of State for the Home Department* [2026] EWHC 292 (Admin)), that the Home Secretary had acted unlawfully in proscribing the action group Palestine Action under s.1 of the Terrorism Act 2000 (*Ammori v Secretary of State for the Home Department* [2026] EWCA Civ 721)). On 30 July 2026, the Supreme Court gave permission for Ammori, the co-founder of Palestine Action, to appeal that ruling. This will hopefully clarify the relationship between the government and the judiciary in the balancing of rights (particularly freedom of expression) and national security policy. It will be important for a variety of political and constitutional reasons – the standing of human rights in our constitution, and the level of deference that the courts must show to the executive when reviewing its decisions. Of course, it will be even more important for those who have been arrested and detained for ‘supporting’ Palestine Action by taking part in entirely peaceful protests.

The challenge to the proscription of Palestine Action

Palestine Action had been proscribed by the Home Secretary. under s.3 of the Terrorism Act 2000. Under ss.3(3) and (4), she may do that if she believes an organisation is concerned in terrorism. “Concerned in terrorism” is defined in s.3(5) – an organisation is concerned in terrorism if it – (a) commits or participates in acts of terrorism, (b) prepares for terrorism, (c) promotes or encourages terrorism, or (d) is otherwise concerned in terrorism. “Terrorism” is then defined in s. 1 as the “use or threat of action” when the use or threat is “designed to influence the government ... or to intimidate the public or a section of the public” and “is made for the purpose of advancing a political, religious, racial or ideological cause”. By s.1(2), ‘action’ must involve either “serious violence against a person” or “serious damage to property”.

Palestine Action (a group whose aim is to lend support to the Palestine cause in and against Israel) was proscribed in July 2025 by the Proscribed Organisations) (Amendment) Order 2025, which was approved by both Houses of Parliament. This was weeks after the group broke into an RAF base and spray-painted two military aircraft, resulting in £7m of damage. The consequence of proscription affected a number of demonstrations expressing support for a proscribed group (under s.13 of the 2000 Act), and many protestors who help up placards supporting the group were arrested under the Terrorism Act and were detained in prison, some still awaiting trial. The claimant brought an action challenging the proscription, claiming that the secretary had acted unlawfully and in breach of the rights to free speech and peaceful assembly under Articles 10 and 11 of the European Convention, as given effect by the Human Rights Act 1998.

The decision of the High Court

The High Court allowed the claim. It found that the secretary had acted disproportionately in breaching the rights under Articles 10 and 11 in deciding to proscribe. It applied the test laid down by the Supreme Court in *Bank Mellat v HM Treasury (No 2)* ([2013] UKSC 38): whether the objectives of the proscription decision were sufficiently important to justify the limitation of fundamental rights; whether the decision was rationally connected to those objectives; whether a

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less intrusive measure could have been used instead of the proscription decision; and whether, having regard to those matters and to the severity of the consequences of the proscription decision, a fair balance has been struck between the rights of the individual and the interests of the community.

In the Court's view, the secretary had adopted an appropriate approach of examining the nature and scale of Palestine Action's activities and had been entitled to attach significant weight to any act occurring in the UK that came within the s.1 definition. However a theme in the documents leading to the decision had been that proscription would be advantageous because it would mean that the offences at s.11, s.12 and s.13 could be used against persons supporting Palestine Action. That, in the court's view, was not a relevant consideration: the purpose of the policy was to limit use of the discretionary power to proscribe, and any "other factor" considered when applying the policy had to explain the particular need to proscribe the organisation above and beyond the belief that the organisation was concerned in terrorism.

With respect to the claim under the HRA, the Court measured the interference with the Convention rights by reference to the restrictions imposed by criminal offences consequent on proscription, and by the extent to which people would exercise self-restraint in conducting lawful activities. In its view, even discounting Palestine Action's non-peaceful activities, proscription resulted in a very significant interference with the right to freedom of speech and the right to freedom of assembly. Further, as the policy had not been properly applied, the interference with the right of freedom of speech and freedom of association did not meet the requirement that any interference with Convention rights by a public authority had to be prescribed by law (Article 10(2)). Then, applying a proportionality test, although it attached real weight to the fact that Palestine Action has undertaken activities amounting to terrorism under s.1(1), and to the opinion formed by the Home Secretary who has both political and practical responsibility to ensure public safety, the proscription of Palestine Action was disproportionate. Thus, a very small number of Palestine Action's activities amounted to acts of terrorism, and for these, and for Palestine Action's other criminal activities, the general criminal law remained available.

The decision of the Court of Appeal

On appeal, the Court of Appeal held that the Home Secretary had been entitled to exercise her discretion to proscribe the group, and that a fair balance had been struck between individual rights under Articles 10 and 11 and community rights of national security and the protection of the rights of others.

On the question of the secretary's policy, the Court of Appeal found that the purpose of the secretary's proscription policy was to render transparent some of the non-exhaustive factors that would be considered in a proscription decision. Thus, nothing in the wording indicated that its purpose was to constrain those factors, and the other factors that the secretary had been entitled to consider – including the operational benefits of proscription in a case that she was considering. The operational consequences concerned the efficacy of proscription, which was a highly material factor in the proportionality balance.

Moving to the balance of rights and state interests in addressing proportionality, it held that the Court of Appeal itself would undertake the *Bank Mellat* proportionality exercise afresh, rather than merely reviewing the High Court's decision. This was because the appeal was of such major public importance, that the public would expect the Court (which contained five Lord/Ladyships) to exercise its own judgment. The Court stressed that the secretary had special constitutional responsibilities regarding national security, and was, thus, better placed than the courts to adjudicate the balance engaged in the context of national security. Although the court was the ultimate arbiter, the secretary should be accorded a wide margin of appreciation regarding each stage of the *Bank Mellat* test. Applying the four-stage test, it ruled that the protection of the rights and freedoms of others, and the interests of national security, were sufficiently important objectives to justify the limitation of the rights, *in some circumstances*. It then found that the

proscription was rationally connected to those legitimate objectives, and that no less intrusive measures than proscription had been identified to achieve the objectives. The secretary could not have sought civil remedies such as injunctions, and she could not be expected to abrogate her proscription powers in the face of terrorist activity on the basis that she could instead promote civil self-help remedies. Further, prosecution for individuals' crimes would not directly disrupt the organisation and thus be an effective alternative action.

The Court then considered factors that weighed against proscription, including that it entailed a very significant interference with the right to free speech and freedom of association and assembly, and that law-abiding people could be deterred from assembling lawfully or making pro-Palestinian views public for fear of their actions being construed as support for Palestine Action. However, it noted that proscription would not prevent public expressions of support for the Palestinian cause. Also relevant was the limited number of the group's terrorist incidents compared to other activities. Thus, proscription might be regarded by some as heavy-handed, coupled with the fact that most proscribed organisations advocated violence against people, making it unusual to proscribe an organisation whose primary objective was property damage. However, it then considered factors in favour of proscription, including the nature of the group as a covert organisation whose main aim was to damage property belonging to the defence contractor and other companies trading lawfully. Further, the secretary's advisers had found a future threat of an escalating campaign from Palestine Action involving serious property damage. It also noted that the operational benefits of proscription in degrading the organisation also weighed in the balance.

Judicial review, proscription, human rights and judicial deference

Despite the different conclusions on the legality of the decision, the role of judicial deference is central to identifying the conflict between the two approaches on the question of proportionality. Deference and respect to the executive (and the legislature) is essential in maintaining the separation of powers in any constitution and legal system. It consists of both a *constitutional* and *political* deference to the other arms of government. Thus, courts display a *constitutional* respect to the legislature and executive in passing and executing law and policy, as well as a more practical, *institutional* deference, where the courts recognise the institutional expertise and knowledge of the decision-maker. This then limits the judiciary's power to interfere with the detail and consequences of policy decisions, whilst ensuring that the courts' constitutional duty to recognise and enforce basic human rights is not thwarted by historical restraints, which may now conflict with the development of international human rights law, and the United Kingdom's international obligations transposed into domestic law by the 1998 Act.

The courts' reluctance, or willingness, to interfere in cases such as the present is not only affected by the court's views on constitutional or institutional deference, but also by the extent of their acceptance of the fundamental nature and extent of the human rights raised in the proceedings. Domestic courts now have the power, granted by Parliament, to employ concepts such as necessity and proportionality in balancing laws and policy with the recognition and enforcement of human rights. Thus, they have the final say on whether a measure is proportionate, albeit tempered by the margin of appreciation offered to states by the European Court of Human Rights. This margin reflects and can justify judicial deference in the domestic courts, but deference at both levels must not destroy the aims of the Convention, or the essence of the rights protected under it, as articulated by the relevant case law of the European Court of Human Rights. Yet, in addition to deference and the domestic courts' application of the margin of appreciation, what is equally important is their legal and constitutional views on proscription and the extent to which it impinges on the fundamental rights of free speech and freedom of peaceful assembly. Hence, proscription which criminalises acts of peaceful assembly and free speech can be seen, on one view, as a gross and arbitrary encroachment on democratic free speech, or, on another view, a marginal and thus justifiable interference with the (conditional) right of free speech; leaving speakers free to air their views in ways not covered by the relevant legislative restriction.

The nature of proscription

Proscription is a preventative measure taken by the state to deal with extraordinary and unacceptable threats caused by a group's existence and its previous and present activities. Thus, instead of, or in addition to, waiting for a group or its supporters to commit a breach of the regular law (trespass, criminal damage, obstruction of the highway, etc.), proscription will result in the automatic application of anti-terrorism law to that group, its members, and those 'supporting' its views, rendering membership and support illegal irrespective of the harm caused by a particular activity.

As with other forms of prior restraint, proscription thus has a 'chilling effect' on the right of association, peaceful assembly and freedom of expression: those who are affected by the proscription will desist from becoming members or lending support to its views. Further, if people are willing to disobey the proscription order, they will face severe penalties under the 2000 Act, often for an activity that would not be a breach of general public order laws. For example, thousands of people have been arrested, and some charged under the 2000 Act, for holding up signs declaring support for Palestine Action. Such actions are, generally, entirely peaceful, and are not likely to be in breach of even the lowest level of public order offences (s.5 of the Public Order Act 1986). Yet, if that group is proscribed, that activity is in breach of the 2000 Act, and the police do not have to show that the activity has caused any further harm beyond unlawfully supporting the group. Nevertheless, proscription is seen by the state as the most effective, and convenient, way of outlawing certain views and behaviour, as the group's activities become unlawful despite them not breaching the regular law. It can also lend public and political support to the state in its efforts to maintain security and safety. Although this form of restraint is not automatically in breach of human rights law, exceptionally strong and convincing evidence should be presented, *by the state*, to justify it.

The courts' role in reviewing the minister's decision is now clearly focused on judging its compatibility with the rights in the European Convention on Human Rights, and its powers of review under the Human Rights Act 1998. Assuming that the wording of the 2000 Act was clear, the domestic courts are now allowed to ask the following questions: was the use of that statutory power proportionate and necessary in a democratic society to achieve the aims of the Act itself and the reasons the Minister gave in using the legislation? In addressing those questions the court is allowed, under s.2 of the 1998 Act, to employ the jurisprudence of the European Court in this area, and to consider the fundamental importance of the right in question, together with the constitutional and democratic dangers involved in applying proscription. Thus, it begs the question whether any subsequent appeal to the European Court would be successful (perhaps causing an international conflict between the government and the Council of Europe)? Article 11 of the European Convention on Human Rights provides for the right of association, and restrictions (including proscription) are allowed under Article 11(2), provided they are prescribed by law and necessary in a democratic society for the purpose of achieving (in this context) national security, public safety and the prevention of disorder and crime. The European Court would normally require that the group incites violence or infringes the rules of democracy (*Socialist Party v Turkey* (1998) 27 EHRR 51), or that the purpose of the group is inconsistent with the basic values of the Convention. The Court has also insisted that the term 'membership' is applied clearly and fairly and does not include those who may have taken part in support of its ideas, perhaps at a demonstration (*Isikirik v Turkey* ((App. No 41226/09)). These authorities will be presented to the Supreme Court in an attempt to sway its findings.

Equally important is the question whether the measure of proscription is damaging to *our own* constitutional values and feelings of justice? The domestic courts are supposedly the guardians of our fundamental rights, and in the past have ruled as unlawful detention without trial (even at a time of national emergency), and the acceptance of torture evidence in deportation proceedings; the government failing to provide convincing evidence for such measures. Domestic courts are no strangers to protecting human rights and legal justice – witness their enforcement of the basic rules of natural justice and the duty to act fairly, and their insistence that everyone, including

prisoners, should have access to the courts and legal representation. Such judicial powers have been buttressed by the European Court's rulings, and the passing of the Human Rights Act 1998, but have always been part and parcel of the domestic judiciary's belief in freedom and justice.

The appropriate role of the courts in reviewing executive security powers

The decisions of both courts in the present cases not only differ in terms of the final judgment but display a fundamentally different approach with respect to the role of the domestic courts in controlling executive security powers and in interpreting and applying domestic human rights law. The High Court adopts a robust and liberal approach to reviewing wide-ranging executive powers that interfere with fundamental rights. In contrast, the Court of Appeal apply a more traditional and conservative approach, reluctant to gainsay the judgment of the executive beyond ruling on the bare legality of the administrative policy and its execution.

This poses the classical dilemma affecting the relationship between the courts and the executive. A judiciary that interferes with policy decisions too freely risks stepping outside its constitutional and legal boundaries, producing decisions based on the merits and wisdom of the policy, rather than its compliance with the law. This is particularly so in the United Kingdom, where the executive and the legislature are fused, leading to further risks of the courts breaching the sovereignty of Parliament, as such decisions lack democratic legitimacy. On the other hand, failure by the courts to interfere with policies that encroach on fundamental rights, and which breach the basic rules of substantive and procedural justice (at common law or under statute), exposes a gap in effective enforcement of the separation of powers, and the courts' role in controlling the 'arbitrary' powers of the executive. This problem is complicated by the passing of the Human Rights Act 1998, where the courts have been given the power, by Parliament, to strike down administrative decisions that are incompatible with Convention rights, but where such judicial powers are limited by the provisions of the Act, which seek to retain parliamentary sovereignty and, in appropriate cases, executive autonomy. Thus, the Act does not rid us of the need for the courts to show due deference to the administration, or to Parliament, when considering the legality of administrative policy, and the compatibility of primary legislation with Convention rights.

As a result, when exercising their powers under the 1998 Act, the courts not only have to take on its role of adjudicating on rights' disputes but must do so in the context and limitations of its traditional constitutional role. The concern that the courts are departing from its conventional boundaries has been fuelled recently by political and judicial opinion, suggesting that the Act has forced judges to become involved in politics, and that the United Kingdom should consider withdrawing from the Convention and reforming the 1998 Act. (See Policy Exchange: Richard Edkins and John Larkin QC, 'How and Why to amend the Human Rights Act 1998' 11 December 2020.)

What is the limit of judicial review?

The solution to this dilemma was traditionally resolved by accepting that the court's role in judicial review was concerned with the *legality* of the body's decision, and not its *merits*. The courts' role was to ask whether the executive (or other bodies) acted within their legal powers: did Parliament or the common law allow for such powers (the *vires* question); did the executive take into account all relevant factors (and disregard all irrelevant factors); did it follow its own policies and published promises; and did it abide by the basic rules of procedural fairness and natural justice? Many of these grounds were relevant to the Home Secretary's decision to proscribe Palestine Action, and of the courts' review powers, yet the decisions of both courts are fundamentally different. This shows that a court can take a flexible approach in applying such factors, and that the final decision can be affected by different judicial policy (as opposed to the politics of the judge). Hence, in this case, the Court of Appeal expressed disagreement with the High Court's findings on many of grounds of challenge, such as whether the secretary could

consider the operational benefits of proscription, or whether she was allowed to digress from her own policy (and whether she had done so on the facts). Thus, even where the courts reserve their enquiry to the pure legality of the decision, judges will be affected by their different political and constitutional beliefs. The question whether a secretary *has* a legal right to carry out a particular act, might now become a question of whether the secretary *should* have such a power, or *should* be able to resile from their policies. Hence, the judicial answer to those questions will differ, not because of a judge's private or personal beliefs, but because of their jurisprudential understanding of what the executive should be allowed to do, and when the courts should be allowed to interfere.

The boundary of legitimate review then becomes more subjective and complex when grounds such as irrationality, and later proportionality, are used to challenge executive decisions. In these cases, we are asking the judge to make a value judgment about the secretary's decision – in this case, whether the secretary acted rationally and proportionally in deciding to proscribe the group, being aware of the consequences of such on the rights of others and the principles of democracy. The doctrine of irrationality – whereby a decision became reviewable if it defied any logic or rationality – led to concerns that the courts could now rule on the merits of a decision but was regulated by the courts' acceptance that they could not interfere simply because they disagreed with the policy or the final decision. This reservation is particularly important in retaining the traditional role of the courts when challenging executive decisions that have been bestowed on them by a supreme Parliament. However, the main conflict behind the courts' control of executive powers, arises when the policy and its enforcement conflicts with fundamental rights – either at common law (in the absence of a formal Bill of Rights) in the UK constitution, or ones established by the sovereign Parliament.

As noted above, the Human Rights Act 1998 expanded the courts' review powers in this respect, the Act giving further effect to rights contained in the European Convention on Human Rights and allowing the courts to employ principles of rights' adjudication used by the European Court of Human Rights in its case law. However, the Act did not allow the courts to disregard the basic principles of the UK Constitution, and in addition to the Act expressly preserving Parliamentary sovereignty, the doctrine of the separation of powers and judicial deference still play a major role in judicial review; concepts which the European Court will recognise through the doctrine of the margin of appreciation. This has posed a dilemma for the domestic courts in the post-Act era. Are the courts now the final arbiters on the legality and proportionality of measures that engage and impact on Convention rights, or are they still bound, as before, to respect the judgments of the administration, and, in appropriate cases, the political and policy judgment of Parliament itself? The answer to those questions depends not only on the importance of the right at issue (in this case freedom of expression) but also the reasons for imposing the measure (national security and safety). Further, in addressing those questions, the domestic courts will not simply take an abstract approach to the quality of the right and the importance of the restriction but will be guided by the specific constitutional development of such rights and restrictions and the history of judicial interference in such cases.

Judicial balancing of free speech with security and public safety – the devaluation of free speech

As the preservation of national security and public safety is viewed as fundamental to effective government, when there is some evidence that they are capable of being damaged, the fear is that a court is likely to attach little weight to freedom of expression in the balancing exercise, and, thus, side with the state and the public interest in maintaining safety and security. This means that the role of the courts in protecting free speech from arbitrary or unreasonable interference is compromised. Let us take the Supreme Court's decision in *R (on the application of Lord Carlile of Berriew QC and others) v Secretary of State for the Home Department* [2014] UKSC 60 as an example. Although *Carlile* involved a more specific right of free speech and parliamentary democracy, rather than individual or group speech and assembly, the Supreme Court's approach and reasoning in that case provides clear evidence of judicial deference when national security

and safety is under threat from freedom of speech. As we have seen, this deference was also employed by the Court of Appeal in *Ammori*, and which might be exercised by the Supreme Court on appeal.

In that case, Maryam Rajavi, a dissident Iranian politician, had been excluded from the UK on the basis of her involvement with an Iranian opposition organisation that had formerly been proscribed as a terrorist organisation. Members of both Houses of Parliament wanted her to address meetings in Westminster about policy issues relating to Iran and asked the Home Secretary to lift the exclusion. The Secretary refused, considering that Iran would see any lifting of the exclusion as a political move against it, and would be likely to engage in reprisals that would put British interests and British nationals at risk. The members sought judicial review, claiming that the decision violated their right to freedom of expression.

The majority of the Supreme Court (Lord Kerr dissenting) held that when considering decisions of the executive, the courts would traditionally not usurp the function of the decision-maker, although it accepted that the Human Rights Act 1998 had made justiciable any arguable allegation that a person's Convention rights had been infringed. The court's role, therefore, was to test the adequacy of the factual basis of the decision, consider whether the objective was necessary, and review the rationality of the supposed connection between the objective and the means. Showing institutionalised deference, the Supreme Court stressed that it was entitled to attach special weight to the judgement of a decision-maker with special institutional competence. With respect to Article 10, as there had been no challenge to the facts or to the Secretary of State's bona fides, the court could only quash her decision if: she had underestimated the importance of freedom of expression; if the advice overstated the risks; or if her objective could reasonably have been achieved by some lesser measure. In the present case, the Secretary had not underestimated the importance of freedom of expression; no one had been denied the right to express their views, and parliamentarians had not been denied the right to receive them.

As much of the evidence for regulating free speech is based on the *likely* effects that such speech would have, national security and safety cases thus pose a particular problem for judicial review of the executive. As the courts are reined in by judicial deference and lack of institutional expertise, it may not be appropriate for the courts to substitute its view for that of the executive on these matters, unless the evidence to justify the restriction is flawed. Review by the courts is then made more difficult where judges devalue the inherent qualities of free speech and the impact any restriction has on it. In *Carlile*, Lord Sumption made the following statement on the level of interference and its relationship to the risks of allowing the visit:

'Putting the matter at its highest, the Secretary of State's decision deprives them of the use of one method and one location for their exchanges. It may be that the decision rules out the best method and the best venue for the purpose. For that reason, it would be wrong to suggest that such a restriction is trivial. It is not. Nor did the Secretary of State say that it was. The restriction is fairly described in her reasons as "limited." But the force of the point does not lie in the choice of adjectives. It lies *in the Secretary of State's* view that the particular restrictions of freedom of expression involved in her decision, in whatever language described, were outweighed by the risk to the safety of British persons and property and Embassy staff. That was a question to which she plainly did address herself (*italics added*).'

Lord Sumption then considered the court's role in challenging that evidence and the Home Secretary's decision:

'We are not in point of law bound to accept the factual assessment of the Foreign Office about the impact on our relations with Iran of admitting Mrs Rajavi to the United Kingdom. But if we reject it, we must have a proper basis for doing so. In this case, there is none. There is no challenge to the primary facts. We have absolutely no evidential basis and no expertise with which to substitute our assessment of the risks to national security, public safety and the rights of others for that of the Foreign

Office. We have only the material and the expertise to assess whether the Home Secretary has set about her task rationally, by reference to relevant matters and on the correct legal principle. Beyond that, in a case like this one, we would be substituting our own decision for that of the constitutional decision-maker without any proper ground for rejecting what she had done.’

Thus, following Lord Sumption’s dicta, the court’s role in cases such as this one and *Ammori* is limited, firstly by the fact that there is nothing placed before the Court *by the claimant* to refute the executive’s assessment of any relevant risk, and secondly, that in any case the courts might still be reluctant, by reason of constitutional and institutional deference, to gainsay the judgment of the executive.

In contrast, dissenting on the rationality and necessity of the Home Secretary’s refusal to allow the visit, Lord Kerr stressed that the courts have been given momentous obligations by the Human Rights Act, none more so than the duty to decide whether interferences with Convention rights are justified. In his view, convincing reasons for the interference *must be provided* (italics added), convincing, that is, to the court that is required to examine and assess them. In his view, it was unclear what specific consequences would flow from a decision to allow Rajavi to come to the United Kingdom, commenting that it was revealing that most of what is feared was already happening or has occurred in the past.

In contrast to this speculation, and Lord Sumption’s view, Lord Kerr then identified that the interference with the appellants’ Article 10 rights was direct and immediate; stressing that although such rights are, in any context, of especial significance, the critical importance of free speech in this case should not be underestimated:

“Our Parliament is the sovereign part of our constitution. Its laws prevail over everything else. The courts accord greater deference to the decisions of Parliament than to those of any other body. *When a distinguished group of parliamentarians wishes, in the interests of democracy, to conduct a face-to-face exchange with someone whose views they consider to be of critical importance*, only evidence of the most compelling kind will be sufficient to deny them their right to do so... the instant court had a bounden duty to uphold that right unless convinced of the inescapable need to interfere with it; and that he had not been brought to that point of conviction (italics added).

Thus, while the majority were prepared to accept this evidence – presumably on the basis that the risk to diplomatic relations was still real (on the evidence presented by the government), despite the lack of Iran’s democratic credentials, Lord Kerr refuses to surrender the democratic values of free speech on the basis of such risks. His dissent, therefore, is not based solely on his view of the proper constitutional role of the courts in challenging executive action and policy; it is founded in the proper role of free speech and other democratic values in our constitution, and its protection from anti-democratic and arbitrary interference.

Whichever is the correct constitutional and institutional approach to be taken by the courts in these cases, including *Ammori*, both the executive and the judiciary have often paid too little attention to the democratic arguments of upholding free speech, concentrating rather on the danger of upholding it and the undesirability of allowing a particular speaker from exercising that right. One would expect this deference to be particularly strong in national security and safety cases, although its application in cases where freedom of expression has been compromised has been more intense than in other cases, where, for example, the right to a fair trial and liberty of the person has been at issue. For example, the House of Lords’ judgment in *A v Secretary of State for the Home Department* ([2005] 2 AC 68), concerning the necessity and proportionality of measures allowing detention without trial of foreign terrorist suspects, shows a lack of judicial deference when liberty and due process are at risk. In that case Lord Bingham justified the House of Lord’s decision that the primary legislation of detention without trial was incompatible with

the right to liberty contained in Article 5 of the Convention and not permitted by the right of derogation in times of emergency:

‘... I accept that where government was threatened by terrorism, difficult choices had to be made.... Although judges were not elected, the function of the independent judge, charged with interpreting and applying the law, was a cardinal feature of the modern democratic state and a cornerstone of the rule of law. It would thus be wrong to stigmatise judicial decision-making as in some way undemocratic.’

In that case the courts were challenging primary legislation, whereas in the present dispute it was the Home Secretary’s executive decision to implement powers under primary legislation which was at issue. Judicial review in *Ammori* was not a threat as such to parliamentary sovereignty, which, it could be claimed, was the case in *A*. Yet, the majority of the House of Lords were prepared to declare the law and the emergency derogation as incompatible with the government’s obligations under the Convention and the Human Rights Act 1998, defending their approach by relying on their constitutional right and duty to interpret and apply the law. This was enhanced by the 1998 Act, which allowed them to question the law and administrative action to ensure legality and proportionality. It should also be noted that the majority of the House of Lords refused to gainsay the government’s view that there was a public emergency, a decision which was almost entirely political.

The reluctance to favour freedom of expression over national security was prevalent before the passing of the Human Rights Act 1998, where the courts were not permitted to have direct reference to Article 10 of the Convention, or the doctrine of proportionality. Thus, in *R v Secretary of State for the Home Department, ex parte Brind* ([1991] AC 696), the House of Lords refused to consider either in reviewing the Home Secretary’s policy of restricting the media’s broadcasting of words issues by terrorist organisations in Northern Ireland. Although the case was decided before the passing of the Act, the judicial balancing of free speech with national security indicated the courts’ reluctance to gainsay executive judgment on that balance. Thus, given that the Home Secretary had received parliamentary approval for imposing such restrictions, the question for their Lordships was whether *a reasonable Home Secretary*, being aware of the importance of free speech and broadcasting, would have imposed that restriction. Equally, in *Brind*, Lord Lowry failed to see that this ‘modest invasion of liberties’ would fail to satisfy any of the established grounds of review at that time, or indeed those of proportionality and necessity allowed under Convention law and jurisprudence. The dicta in the above case represents the Court of Appeal’s approach in the *Ammori* case, not only with respect to the question of deference, but also to the importance of freedom of expression and protest in a democratic state. It represents, thus, both a derogation of judicial duty to ensure proportionality, and a devaluation of free speech norms and a lack of appreciation of the impact restrictions have on its fundamental values.

Concluding remarks

We are still left uncertain as to which of both courts’ approaches in the *Ammori* case was correct. The High Court, in its efforts to nullify the Home Secretary’s decision, may have committed some legal errors on the question of what factors the secretary could and could not consider, and whether she should have followed her own guidance on proscribing such groups. In that sense, the Court of Appeal was probably right in correcting the errors of a perhaps over enthusiastic High Court. But that leaves us with the essential question: assuming that the secretary has not misinterpreted her *legal* powers, should a court gainsay the judgment of the Secretary in deciding to proscribe *this* group in *those* circumstances, being aware of the consequences of such a decision on the democratic rights of free speech and peaceful protest? That will be the essential question for the Supreme Court to address, and the answer will, of course, depend on the approach that the Supreme Court take with respect to its role in challenging executive action that threatens basic human rights; in this case, the essential qualities of freedom of expression on a matter of great public interest.

One approach, adopted by the Supreme Court in cases such as *Carlile*, is to refuse to allow the passing of the Human Rights Act 1998 to disturb the traditional principles of the constitutional and institutional respect that judges should show to the executive. In other words, although judges might disagree (as do many of us) with the logic or fairness of the effects of proscription in this case, it is not their role to gainsay a judgment made by a Minister charged with securing safety and security. On the other hand, as was stressed in *A*, the courts were given these extended powers of review by Parliament itself. Those powers go beyond determining the legality and procedural fairness of executive action and include the duty to ensure that the decision is necessary in a democratic society and proportionate in the circumstances. That does not allow the courts to ignore the deference they should offer to the executive in appropriate cases, but it reminds them of their increased legal and constitutional duties to safeguard human rights from arbitrary interference. A positive decision by the Supreme Court would be welcomed by those who support free speech and the right of peaceful protest. But that would require a robust approach by the Court, not only on the necessity of interfering with executive policy and decision making, but on the real value of free speech where it conflicts with public safety and national security. The domestic court's approach in that area has, thus far, been very deferential, and dismissive of the true value of free speech, compared to its more robust approach in protecting liberty and the right to a fair trial from such threats.

The decision of the Court of Appeal in *Ammori* will, no doubt, reignite support from those who advocate the reform of the Human Rights Act and the withdrawal of the UK from the Council of Europe – the retreat from European human rights law. It will also be welcomed by others, such as Lord Sumption, who feel that the courts have overstepped their constitutional role when examining the legality and reasonableness of government policy. For them, once the legality of the proscription policy is confirmed, as it was by the Court of Appeal, then its proportionality with respect to the balance between the aims of the proscription and its impact on freedom of expression and peaceful assembly is largely down to the executive and not the courts. Thus, despite the courts' duty under the 1998 Act to examine executive decisions through the principles of necessity and proportionality, the courts are still bound to respect the doctrine of judicial deference (or the margin of appreciation as it has been subsumed into domestic jurisprudence), and to refuse to gainsay executive judgments, especially when that concern national security and public safety.

Although the Court of Appeal was right to correct the High Court on some of the findings related to the legality of the secretary's policy, and whether she had misinterpreted or misapplied that policy, it is more questionable as to whether the High Court came to an impermissible finding on the question of proportionality, and the weight it attached to the free speech rights of those who supported Palestine Action and its fight for the rights of Palestinians in Israel. Proscription is an extreme measure, and the fact that it has been imposed (largely) because of the danger of property damage, rather than protecting others from physical harm, places a strong onus on the government to justify the proscription and its impact on freedom of expression. The Court of Appeal stressed that protestors are still allowed to state their opinions in this area, without supporting Palestine Action. That, in your author's view, is irrelevant and ignores the democratic harm caused by the proscription and its impact on protestors and democratic dissent. The measure interferes with a vital method of voicing opinion on a matter of great public interests; as such it is an important restriction on free speech. Further, most of those who have supported Palestine Action do not wish to join the group and certainly do not want to take part in its illegal activities. Instead, they choose to support Palestine Action because the group head the public's protest of Israel's actions and have been instrumental in informing the public about the situation. Let us hope that the Supreme Court consider that point seriously in coming to its opinion.

ARTICLES

CONSTITUTIONAL LAW

A seat at the table: the Ministerial Salaries (Amendment) Act 2026

Dr Stuart MacLennan*

Introduction

The Ministerial and Other Salaries Act 1975 (the 1975 Act) is, arguably, a key element of the UK's constitutional architecture, yet it attracts remarkably little notice.¹ In 2026 the Government introduced a minor amendment – the Ministerial Salaries (Amendment) Act 2026 – which received Royal Assent on 29 April 2026. This raised the total number of ministerial salaries payable at any one time from 109 to 120, and lifted the cap on Cabinet-rank salaries from 21 to 22.² A companion instrument, the Ministerial and Other Salaries Act 1975 (Amendment) Order 2026, corrected at the same time an error in the salary-uprating formula that had gone unremedied since 1997.³

The reform's practical effect became visible within weeks. In June 2026 Sir Alan Campbell, Lord President of the Council and Leader of the House of Commons, was made a full member of the Cabinet, having previously only attended it.⁴ The salary status of a further eight ministers – seven of whom are members of the House of Lords – was changed to that of salaried ministers. These appointments illustrate the operation of the 1975 Act, and why its limits had become, by 2026, a binding constraint that the Government chose to loosen rather than observe.

The amendment sought to address an issue which had been identified several years previously, and which had become the subject of some disquiet among commentators and peers.⁵ The 1975 Act caps only the number of ministers who are entitled to a salary. In recent years, Prime Ministers have routinely appointed more ministers than the 1975 Act provides salaries for. Such ministers are, therefore, unpaid. The 2026 Act seeks to address this issue directly by raising the limit on the number of salaried ministers until unpaid ministers largely disappear beneath it. The difficulty, which this article seeks to address, is that the reform treated a symptom rather than the cause. Parliament has legislated for the level of ministerial pay,⁶ and for how many such ministers may sit and vote in the Commons,⁷ but it has never legislated for how many ministers actually exist at any given time. The number of ministers is not fixed by statute and is, instead, a matter of Crown prerogative.

This article begins by addressing the question in the salary debate often omits – who counts as a minister at all? – to demonstrate that status and salary rely on different legal bases. It then sets

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¹ Ministerial and Other Salaries Act 1975 (c 27).

² Ministerial Salaries (Amendment) Act 2026 (c 17); and see House of Commons Library, *Ministerial Salaries (Amendment) Act 2026: Passage of the Legislation* (CBP-10558, 2026) <<https://commonslibrary.parliament.uk/research-briefings/cbp-10558/>> accessed 3 July 2026.

³ The Ministerial and Other Salaries Act 1975 (Amendment) Order 2026, SI 2026/592.

⁴ Sir Alan Campbell's admission to the Cabinet took effect on 12 June 2026, see: Prime Minister's Office, 'Ministerial appointments: 12 June 2026' (*GOV.UK*, 12 June 2026)

<<https://www.gov.uk/government/news/ministerial-appointments-12-june-2026>> accessed 30 June 2026; for the purposes of the Schedule the conclusive record is the notification in the London Gazette required by the 1975 Act (n 1), Sch 1, para 1(2).

⁵ The size of the payroll and the problem of unpaid ministers had been examined by the Public Administration Select Committee more than a decade earlier, and the specific grievance of unsalaried ministers in the House of Lords resurfaced during the passage of the House of Lords (Hereditary Peers) Act 2026. Both discussed below.

⁶ The 1975 Act (n 1) s 1 and Sch 1.

⁷ House of Commons Disqualification Act 1975 s 2(1).

the 1975 Act in historical context, outlines its (relatively few) key features, and traces the widening gap between the statutory ceiling and the actual size of recent governments. A key element of this is the ‘attending Cabinet’ device whereby the political Cabinet has come to exceed the salaried one. This article then turns to the 2026 Act and concludes that it addresses the symptom of the problem (some ministers in recent years have been unpaid) rather than the cause which is, chiefly, that the question of the appropriate size of the government has never been settled as a matter of law.

Who is a minister?

A minister is appointed by the Crown on the advice of the Prime Minister, under the royal prerogative. There is no statutory enumeration of ministers, and no requirement that Parliament approve any appointment. Ministers (of whatever type) hold office at the pleasure of the Prime Minister and may be appointed or dismissed at will.⁸ A general statutory definition can be found in section 8(1) of the Ministers of the Crown Act 1975, which provides that a Minister of the Crown is ‘the holder of an office in His Majesty’s Government in the United Kingdom’, together with the Treasury, the Board of Trade and the Defence Council.⁹ This circular definition provides that a minister is a person who holds a ministerial office. It does not specify which offices shall exist, how many there may be, or what their office holders must be paid.

The sole purpose of the 1975 Act is to cap the number of ministers who may be paid and to provide a schedule for their remuneration. The other 1975 Act – the House of Commons Disqualification Act 1975 – caps, at ninety-five, the number who may sit and vote in the Commons, whether paid or not.¹⁰ The number of ministers there may be at any given time is not determined by statute, nor is the question of who may be appointed to such offices.¹¹ Brazier confirms the extent to which the establishment of ministerial office is held by convention and practice rather than law.¹²

While Ministerial office therefore flows from the prerogative, ministerial salaries are a product of statute. A person may be a minister of the Crown, exercise statutory powers, sit in Cabinet and be bound by collective responsibility, and yet count against none of the statutory limits, because those limits relate only to either salaries or membership of the House of Commons. This disjunct has enabled successive Prime Ministers to enlarge the size of their governments beyond the limits envisaged by the 1975 Act.

Origins and lineage

The Ministerial and Other Salaries Act is a consolidating statute, as illustrated by its long title: ‘An Act to consolidate the enactments relating to the salaries of Ministers and Opposition Leaders and Chief Whips and to other matters connected therewith’.¹³ The 1975 Act did not, therefore, establish the regulation of ministerial pay so much as gather up a body of law that had been accreting for the better part of two centuries.

The salaries of the most senior offices of state had been fixed by statute as far back as the 1830s and remained largely static for a remarkably long period afterwards. The salary of a minister of Cabinet rank, for instance, was fixed at £5,000 in 1831 and stood unaltered for well over a

⁸ Rodney Brazier, *Ministers of the Crown* (Clarendon Press 1997). Ministers are appointed by the Crown on the advice of the Prime Minister under the prerogative, hold office at the Prime Minister’s pleasure, and require no approval by Parliament: *ibid*, chs 1 and 5.

⁹ Ministers of the Crown Act 1975, s 8(1).

¹⁰ House of Commons Disqualification Act 1975 s 2(1).

¹¹ With some exceptions. For example, under the Constitutional Reform Act 2005, s 2, a person may not be recommended for the office of Lord Chancellor unless they appear to the Prime Minister to be ‘qualified by experience’.

¹² Brazier (n 8) ch 1.

¹³ The 1975 Act (n 1), long title.

century. The Ministers of the Crown Act 1937 placed salaries on a statutory footing without raising them, and they were not substantially increased until the Lawrence Report of 1964.¹⁴ The contemporary framework is a product of the post-war decades, when ministerial pay was referred repeatedly to independent review. The Lawrence Committee of 1964 recommended substantial increases, on the basis that ministers were then permitted to draw only a fraction of their parliamentary salary.¹⁵ The immediate predecessor of the 1975 Act was the Ministerial and Other Salaries Act 1972, which implemented the recommendations of the first report of the Review Body on Top Salaries, the Boyle Report,¹⁶ including the principle that ministers should receive some remuneration for the constituency work they continued to perform alongside their departmental duties.¹⁷

The 1975 Act, therefore, tidied up the existing framework rather than constructing a new one. The 1975 Act's role as a consolidating statute is significant for two reasons. First, the fact that the Act is something of a 'tidying-up exercise' explains its schedule-heavy and relatively uncontroversial nature. It also explains why the Act has come to carry constitutional weight which is arguably out of proportion to its decidedly un-sexy subject matter. By fixing the number of salaried ministerial offices, the 1975 Act, together with the House of Commons Disqualification Act 1975 enacted on the same day, establishes one of the few legal limits on the size of the executive.

The Ministerial and Other Salaries Act 1975

The 1975 Act performs two distinct functions. The first is to set the level of ministerial salaries. Section 1 provides for the holder of each office listed in Schedule 1 to be paid the amount provided for by that Schedule, and sections 1A and 1B contain the mechanism by which those amounts are uprated, tying ministerial pay to movements in the mid-points of the Senior Civil Service pay bands.¹⁸ In recent years the practical significance of the formula has been blunted by the convention that ministers waive their entitlement to annual increases.¹⁹

The second function is to cap the number of salaried posts – though the Act nowhere states that cap as a figure. Section 1 provides that the holder of each office in Schedule 1 be paid, paragraph 2 of Part 5 of which allows certain named offices (for example, Secretaries of State, Ministers of State, and whips) to be held by more than one salaried person at once, 'so long as not more than' a stated number of salaries 'are paid at the same time'.²⁰ No more than 21 (now 22) may be paid at Cabinet rank. The limit applies to the whole of Part 1 of the Schedule, the Prime Minister and Chancellor included, with the office of Secretary of State allowed to be held by more than one person simultaneously. No more than 50 (now 54) may be salaried across Cabinet and Minister of State rank combined; and no more than 83 (now 94) across those ranks together with the junior tier of Parliamentary Secretaries (with the Chief Whip's office excepted). Three smaller limits cap the Junior Lords of the Treasury, the Assistant Whips, and the paid Lords in Waiting. The limits operate cumulatively rather than as separate quotas, so that a salary unused at a senior rank cascade down to fund a more junior one.

By lifting the cap for the offices it names, paragraph 2 confirms that every other office in the Schedule is assumed to have a single holder, and so a single salary. The total is then reached by

¹⁴ *Report of the Committee on the Remuneration of Ministers and Members of Parliament* (Cmnd 2516, 1964).

¹⁵ Section 6 of the Ministers of the Crown Act 1937 expressly prohibited ministers from drawing a salary as an MP. The Ministerial Salaries Act 1946, section 3, permitted ministers to draw the princely sum of £500 from their MP wage.

¹⁶ First report of the Review Body on Top Salaries (the Boyle Report) (Cmnd 4836, 1971).

¹⁷ Ministerial and Other Salaries Act 1972; the Boyle Report (n 16).

¹⁸ The 1975 Act (n 1), ss 1, 1A–1B; and see SI 2026/592 (n 3).

¹⁹ House of Lords Library, Ministerial Salaries (Amendment) Bill: HL Bill 179 of 2024–26 (LLN-2026-0007) <<https://lordslibrary.parliament.uk/research-briefings/lln-2026-0007/>> accessed 30 June 2026.

²⁰ Parts 1 to 4 of Schedule 1 were substituted by the Ministerial and Other Salaries Act 1975 (Amendment) Order 2011, SI 2011/1689; the cumulative limits are in Sch 1, Pt 5, para 2.

adding all of these together. The cumulative ministerial ceiling – 83 before the 2026 amendment, 94 after – together with the twenty-six salaries provided separately for the Lord Chancellor, the Law Officers and the whips and Household offices, came to 109, which the 2026 Act increases to 120.²¹ *salaries*, and not ministers. A minister who draws no salary (perhaps paid from party funds, in the case of the Chairman of the Conservative Party), or whose office is funded at a rank below the one they occupy, does not count against that ceiling.²²

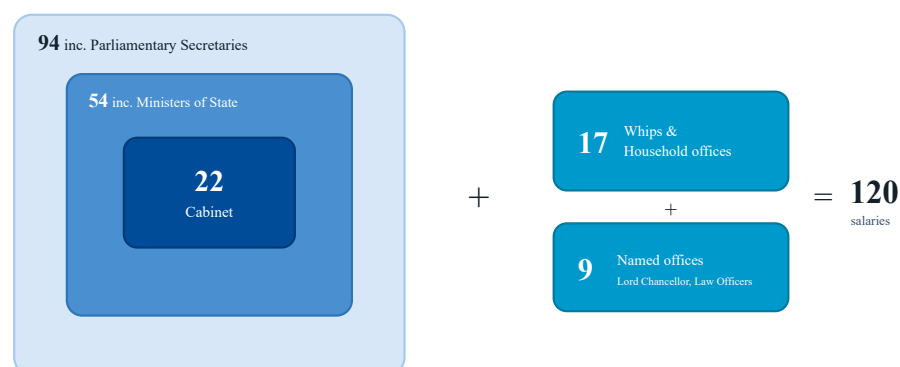


Figure 1: Structure of ministerial salary limits

Three categories of office sit outside this cumulative structure and are paid under separate provisions. The Lord Chancellor is salaried not from the Cabinet pot but under their own subsection – section 1(2) – which charges the salary on the Consolidated Fund rather than on money voted annually by Parliament. The Law Officers – the Attorney General, the Solicitor General and the Advocate General for Scotland – have their own Part of Schedule 1, Part 3, which the numerical limits in paragraph 2 of Part 5 do not affect. As such, an Attorney General who attends Cabinet consumes none of the twenty-two Secretary of State salaries to which Cabinet rank is pegged. The third category lies outside the ministerial scheme altogether – the ‘other salaries’: the Speakers of the two Houses are salaried under sections 1(3) and 1(3A), and the Leaders and Whips of the Opposition under section 1(1)(b) and Schedule 2. With the single exception of the Lords Speaker, these – like the Lord Chancellor – are charged on the Consolidated Fund.

The question of who is a member of the Cabinet? is significant under the 1975 Act. Certain offices, among them the Lord President of the Council, the Lord Privy Seal, the Chancellor of the Duchy of Lancaster, the Paymaster General, the Chief Secretary to the Treasury and the Parliamentary Secretary to the Treasury, draw a Cabinet-rank salary only ‘so long as the holder is a member of the Cabinet’. Whether the holder is or is not a member is, for the purposes of the Schedule, conclusively established by notification in the London Gazette.²³ ‘Member of the Cabinet’ is therefore not, under the 1975 Act, a question as to who attends meetings, but a statutory status evidenced by a Gazette notice. One such office, for example the Paymaster General, draws a Cabinet-rank salary if its holder is gazetted into Cabinet, but only a Minister of State salary if its holder merely attends.

²¹ The 1975 Act (n 1), Sch 1; on the increase in the total from 109 to 120, the Ministerial Salaries (Amendment) Act 2026 (n 2), s 1.

²² In 2014, Baroness Stowell of Beeston was paid as a Minister of State rather than as a member of the Cabinet. The Prime Minister, in a letter read into the record, accepted that the Leader should ‘as a general rule, always be a full member of the Cabinet’, but that it was ‘not possible on this occasion, owing to the provisions of the Ministerial and Other Salaries Act 1975’. A proposal to make up the shortfall from Conservative Party funds was withdrawn, on the objection that the office should be ‘remunerated wholly out of public funds’; the Leader took the second-tier salary alone. HL Deb 28 July 2014, vol 755, col 1492.

²³ The 1975 Act (n 1), Sch 1, para 1(2).

The widening gap

The arithmetic of the 1975 Act would be a matter of historical interest were it not for the simple fact that for the better part of two decades, governments have wanted more ministers than the Act will pay for. Every government since 2010 has appointed more ministers than the 1975 Act's salary ceiling permits, with the total ranging between roughly 118 and 123 and averaging around 120. The total number of ministers reached a record 125 at the end of Rishi Sunak's premiership.²⁴ The government formed after the 2024 general election numbered, by early 2026, some 122 ministers.²⁵

It is worth noting that such sustained bloat is a (relatively) recent practice. The last government to sit within the salary ceiling was John Major's in 1992. From 1997, the total crept just above it, so that a handful of ministers – two to four, almost all of them junior peers – went unpaid under Tony Blair and Gordon Brown. The decisive break came in 2010, when the Coalition's total leapt to 118 and the number serving unpaid rose into the low teens. While this might have been justified on the basis that an unprecedented sharing of power had swelled the ministerial ranks, the swelling never subsided. After winning an outright majority in 2015, David Cameron appointed a government of much the same size, as did every administration after it. A politically expedient arrangement in 2010 became the norm thereafter. This suggests that the enduring bloat is not a product of political necessity but the absence of any limit to push back against.

Faced with a ceiling lower than they would like, successive Prime Ministers have developed a repertoire of devices for exceeding the statutory limit without breaching it, principal among which is the unpaid minister. As the 1975 Act limits only salaried posts, a Prime Minister may appoint ministers who do not draw a ministerial salary, with this surplus being accommodated, for the most part, in the Lords. The explanation for this can be found in the 'other' 1975 Act, the House of Commons Disqualification Act, section 2 of which limits the number of members who may serve as ministers to ninety-five. There is no such limit, however, on peers being appointed ministers. The unpaid minister of the present day is, therefore, not necessarily a wealthy volunteer who declines a salary they could comfortably forgo, but a conscript of the statutory limit. For over a decade roughly a dozen departmental ministers have performed a full-time job for no pay because the statutory cap has been exceeded and, normally, the minister in question happens to be a peer. In limited instances, a minister is paid by their party rather than from public funds, such as where a Minister without Portfolio who also serves as party chair is remunerated by the party.

Perhaps the most visible gap in the framework can be seen in the distinction between membership of and attendance at Cabinet. As the Prime Minister determines who attends, ministers may be invited to sit in Cabinet without being made full members of it.²⁶ Cabinet meetings, therefore, have been larger for many years than the twenty-one salaried members the Act recognises, and the surplus attenders have been paid not as Cabinet ministers but at the more junior rank their substantive office attracts (or, in the case of Law Officers, separately).

The growth of ministers 'attending Cabinet' can be seen over time. Membership of the Cabinet has barely changed since 1979, held between twenty-one and twenty-three. The number of non-

²⁴ Institute for Government, *Ministers Database* <<https://www.instituteforgovernment.org.uk/ministers-database>> accessed 30 June 2026; and the Explanatory Notes to the Ministerial Salaries (Amendment) Bill (Cabinet Office, 2026). The total reached a record 125 at the end of Rishi Sunak's premiership.

²⁵ Explanatory Notes to the Ministerial Salaries (Amendment) Bill (n 24).

²⁶ On the Prime Minister's control of who attends Cabinet, and the distinction between membership of and attendance at it, see Cabinet Office, *The Cabinet Manual: A Guide to Laws, Conventions and Rules on the Operation of Government* (1st edn, 2011) ch 4 <<https://www.gov.uk/government/publications/cabinet-manual>> accessed 3 July 2026. The three tiers—full members, ministers attending by standing invitation, and ministers attending only when their own business is on the agenda—are recorded in the Cabinet Office's *List of Ministerial Responsibilities*, published periodically <<https://www.gov.uk/government/publications/government-ministers-and-responsibilities>> accessed 3 July 2026.

members enjoying a standing invitation to attend has grown considerably, reaching double figures under both David Cameron and Boris Johnson.²⁷

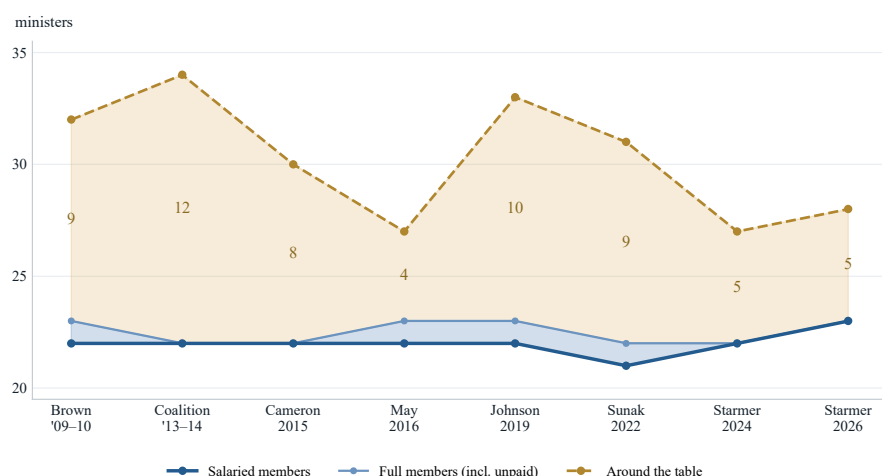


Figure 2: full Cabinet membership against total attendance, 2007–2026

It is worth noting that the historic trend has not been uniform. At the formation of his government in June 2007, Gordon Brown’s Cabinet had three tiers: twenty-two full members; five ministers attending by standing invitation, among them the Attorney General; and one – the Minister of State for Children, Young People and Families – attending when her brief was on the agenda.^{28,29} It is arguable that such a bulge could be explained by the necessities of power-sharing. The coalition agreement required ministerial posts to be distributed roughly in proportion to each party’s size,³⁰ but with the salaried Cabinet fixed at twenty-one the only way to give the Liberal Democrats a presence across departments was to inflate the unpaid attending tier, which is uncapped.³¹

The governments that followed the Coalition did not revert to the prior practice, but there was some variation. David Cameron’s majority government of 2015 retained eight attenders;³² Theresa May cut the number to four in 2016,³³ then Boris Johnson restored it to ten on taking

²⁷ Institute for Government, *Ministers Database* (n 24). Standing attendance at Cabinet is recorded systematically only from October 1998; earlier figures are inferred from Cabinet minutes.

²⁸ Institute for Government Ministers Database (n 24).

²⁹ For the formation figure, the Cabinet Office’s *List of Ministerial Responsibilities* (May 2010) and House of Commons Library, *Ministers in the 2010–15 Coalition Government* (SN06544) <<https://commonslibrary.parliament.uk/research-briefings/sn06544/>> accessed 3 July 2026; for the dissolution figure of 33 (22 members, 11 attending), Institute for Government, *Learning to Share: the Balance of Ministers, 2010–2015* <<https://www.instituteforgovernment.org.uk/article/comment/learning-share-balance-ministers-2010-2015>> accessed 3 July 2026.

³⁰ Cabinet Office, *Coalition Agreement for Stability and Reform* (May 2010)

<<https://www.gov.uk/government/publications/the-coalition-documentation>> accessed 3 July 2026, under which ‘the principle of balance’ was to govern the conduct of the Government’s business, including the allocation of responsibilities between the parties; and HM Government, *The Coalition: Our Programme for Government* (May 2010). The agreement fixed no numerical proportionality of posts; the balance principle is the governing text.

³¹ Institute for Government, *Learning to Share* (n 29).

³² Eight ministers attended Cabinet without full membership; the figure is drawn from the IfG Ministers Database (n 24) and from Prime Minister’s Office, ‘Her Majesty’s Government’ (12 May 2015).

³³ Prime Minister’s Office, ‘Full List of New Ministerial and Government Appointments: July 2016’ (*GOV.UK*, 13 July 2016) <<https://www.gov.uk/government/news/full-list-of-new-ministerial-and-government-appointments>> accessed 30 June 2026.

office in 2019³⁴ before slashing it to four in 2020,³⁵ before Sir Keir Starmer reduced the figure to five.³⁷ The size of the attending tier reflects the preferences of incumbent Prime Ministers rather than any rule. As the 1975 Act caps the number of paid Cabinet places but says nothing about who else may sit at the table, attendance is the only part of the Cabinet a Prime Minister can expand at will, and the only means of seating more ministers than the statute will fund.

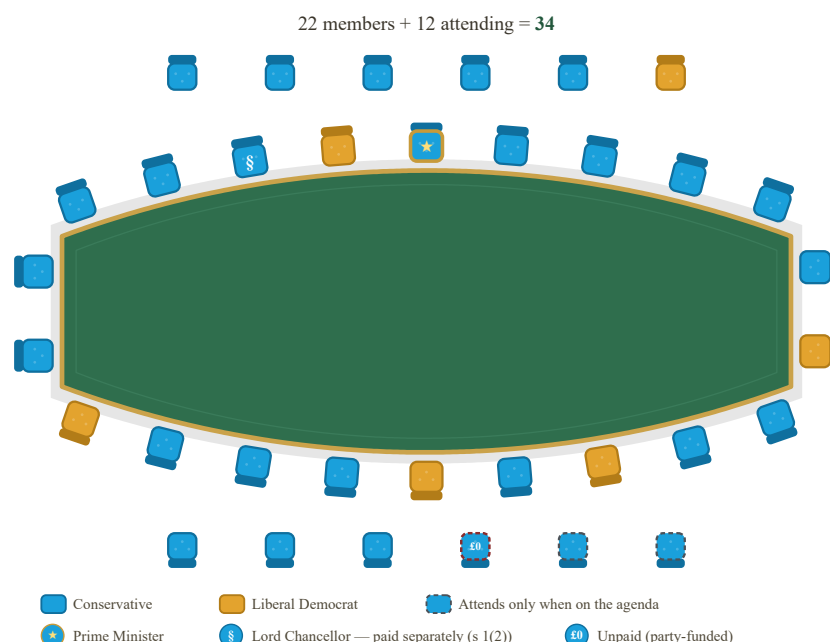


Figure 3: The Cabinet at its modern peak – the Coalition in 2013–14

This bloating has not gone unremarked. The Public Administration Select Committee returned to the question twice during the 2010–2015 Parliament. In *Too Many Ministers?* it warned that the ministerial side of government had grown too large, recommending both that the total be reduced, ultimately to eighty, and that the payroll vote be capped at 15 per cent of the House.³⁸ In its follow-up, *Smaller Government: What do Ministers do?*, it recommended that the 1975 Act be treated as a strict limit, that the Government should not appoint unpaid ministers where doing so would carry it over that limit, and that unpaid Parliamentary Private Secretaries be confined to one per department.³⁹ The Committee's concerns were not fiscal, but constitutional. Where the payroll vote grows while the House does not, it enlarges the bloc of members bound by collective responsibility to support the Government, and correspondingly weakens the capacity of Parliament to scrutinise it.⁴⁰ By 2025 the wider payroll vote had reached a record figure, well

³⁴ Prime Minister's Office, 'Full List of New Ministerial and Government Appointments: July 2019' (GOV.UK, 24 July 2019) <<https://www.gov.uk/government/news/full-list-of-new-ministerial-and-government-appointments-july-2019>> accessed 30 June 2026.

³⁵ Following the reshuffle of 13 February 2020; the figure is drawn from the IfG Ministers Database (n 24) and from Prime Minister's Office, 'Ministerial appointments: February 2020' (GOV.UK, 13 February 2020) <<https://www.gov.uk/government/news/latest-updates-on-ministerial-appointments-13-february-2020>> accessed 3 July 2026.

³⁶ Derived from the roster of the first Sunak ministry (formed 25 October 2022); Institute for Government, Ministers Database (n 24): nine ministers attended Cabinet without full membership, among them the unpaid Chief Secretary.

³⁷ Prime Minister's Office, 'Ministerial appointments: July 2024' (GOV.UK, 5 July 2024) <<https://www.gov.uk/government/news/ministerial-appointments-july-2024>> accessed 30 June 2026.

³⁸ Public Administration Select Committee, *Too Many Ministers?* (HC 2009–10, 457).

³⁹ Public Administration Select Committee, *Smaller Government: What do Ministers do?* (HC 2010–11, 530).

⁴⁰ A point which is sharper in its contemporary context. The Parliamentary Voting System and Constituencies Act 2011, s 11(1), substituted a new Schedule 2 to the Parliamentary Constituencies Act 1986, rule 1 of which fixed the number of constituencies at 600 (down from 650). The reduction was never brought into force, and the figure was restored to 650 by the Parliamentary Constituencies Act 2020, s 5.

over 170 members, approaching 27 per cent of the Commons, a long way from the sixty ministers who made up the whole of government at the turn of the twentieth century.⁴¹

The 2026 reforms

The Ministerial Salaries (Amendment) Act 2026 is a short statute with a single operative clause. It amends paragraph 2 of Part 5 of Schedule 1 so as to raise each of the three cumulative limits of the 1975 Act: Cabinet rank from 21 to 22; Cabinet and Minister of State rank combined from 50 to 54; and the three ranks combined from 83 to 94. The aggregate effect is to lift the total number of payable ministerial salaries from 109 to 120.⁴² Certified as a money bill, it passed its Commons stages without amendment and came into force on the day it was passed.

The new ceiling was set to reflect the average size of government since 2010, around 120, and was presented as a measure that would largely end the practice of appointing unpaid ministers.⁴³ The reform was, in many respects, a classic compromise. The problem it confronted – the unpaid minister – was long identified. One solution might have been that government should be made smaller. This is, arguably, politically infeasible because Prime Ministers are unlikely to accept that their government should be smaller than their predecessors. As such, the limit of 120 was chosen precisely to match the size government had already reached. Faced with a discipline it would not impose and a practice it would not reverse, the Government instead chose to lift the cap to reflect the political reality.

How the present settlement was arrived at is, in large part, a product of a related legislative process. The question of unpaid ministers had been pressed during the passage of the House of Lords (Hereditary Peers) Act 2026, when the Lords carried an amendment, moved by Lord True, that would have restricted the appointment of unsalaried ministers in that House.⁴⁴ The amendment was not retained, but the Government undertook to address the underlying grievance, that Lords ministers were disproportionately likely to serve unpaid, by separate legislation.

It is against this background that the ministerial changes of June 2026 acquire their significance. The Act raised the salaried ceilings on the Cabinet, Ministers of State and Parliamentary Secretaries; and, having taken effect on the date of Royal Assent – 29 April 2026 – it allowed the Prime Minister to draw on the additional headroom. The appointments included two further Ministers of State, four appointments at Parliamentary Secretary and Under-Secretary rank, four new whips,⁴⁵ as well as the elevation of the Lord President of the Council, Sir Alan Campbell, from attending to a full member of the Cabinet.⁴⁶

Sir Alan's elevation illustrates not only the effects of the cap but also the importance of 'membership' of the Cabinet as defined in the 1975 Act. The Lord President draws a Cabinet-rank salary under Schedule 1 only while its holder is a member of the Cabinet, so Sir Alan's

⁴¹ The "payroll vote" is conventionally taken to mean those Members who, by holding an office in or attached to the Government, are bound or expected to vote with it, whether the office is paid or unpaid. Its traditional core ministers together with their Parliamentary Private Secretaries (PPS). A PPS is not a member of the Government, and the office is unpaid, yet under the Ministerial Code a PPS is expected to support the Government in divisions, see Ministerial Code (Cabinet Office, 2025) paras 6.7 and 6.9. The wider payroll vote adds non-ministerial appointees such as unsalaried trade envoys whose loyalty is assumed rather than formally required. None of these posts is limited in number, so the bloc may grow without affecting the statutory ceiling on paid ministers and on Commons Members holding ministerial office. See Public Administration Select Committee, *Too Many Ministers?* (n 38); Institute for Government, 'Payroll Vote' (Institute for Government) <<https://www.instituteforgovernment.org.uk/explainer/payroll-vote>> accessed 3 July 2026.

⁴² Ministerial Salaries (Amendment) Act 2026, s 1, amending the 1975 Act (n 1), Sch 1, Pt 5, para 2.

⁴³ House of Lords Library (n 19).

⁴⁴ House of Lords (Hereditary Peers) Act 2026 (c 12); on the amendment moved by Lord True, HL Library (n 19).

⁴⁵ Prime Minister's Office (n 4). The same day brought two Ministers of State, three Parliamentary Under-Secretaries of State and one Parliamentary Secretary, and four Government Whips, besides the Lord President's admission to the Cabinet.

⁴⁶ Cabinet Office, *List of Ministerial Responsibilities* (June 2026); the operative record is the relevant notification in the *London Gazette*.

elevation is the event that paragraph 1(2) requires to be gazetted and treats as conclusive. This has the effect of converting the office, in salary terms, from a Minister of State post into one of the Cabinet-rank salaries. Immediately before his elevation the number of salaried Cabinet-rank ministers was twenty-one, the previous statutory maximum.⁴⁷ The 2026 Act raised the maximum to twenty-two, with Sir Alan's appointment taking the membership count to that new limit. What these appointments demonstrate is that the enlarged ceilings were not headroom held in reserve but capacity the Prime Minister spent at the first opportunity.

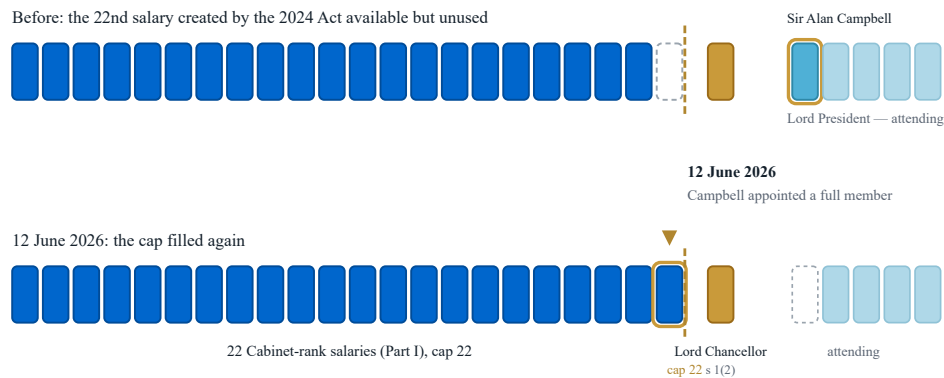


Figure 4: filling the cap

Fixing the symptom or the cause?

The 2026 settlement is both less and more than it seems. Less, in that it fails to address the root causes of the existence of unpaid ministers to begin with. More, insofar as it exemplifies an approach to constitutional reform which reaches well beyond ministerial pay.

The 1975 Act's numerical limits function as a soft constraint on the power of the Prime Minister to appoint however many ministers they wish. A genuine limit would discipline the conduct it governs, rather than a ceiling that has been seen as provisional, to be revised when it becomes inconvenient. This, of course, is the nature of all statutory constraints on governments with Parliamentary majorities.

The Public Administration Select Committee's suggestion that the 1975 Act be read as a strict limit assumed that the figure of 109 carried some normative weight.⁴⁸ The 2026 Act illustrates that this is not the case. When previously accepted practice and the statutory limit diverged, the Government's solution was simply to raise that limit. At the core of this disjinder is that the power to create ministers and the power to pay them are separately regulated.

The creation of Ministers of the Crown stems from the Royal Prerogative, while ministerial salaries are a creature of statute. Thus, the salary cap has not served to constrain the number of ministers, as we have seen. A Prime Minister who wants more ministers than 120 will appoint them unpaid, or seat them at the Cabinet table as attenders, exactly as governments did when the ceiling was 109. Thus, the 2026 Act buys a few years of tidier bookkeeping, and not a permanent fix.

A further question which has been kicked down the road is the appropriate size of the executive relative to the legislature. The 2026 Act raised the cap on paid ministers and the cap on Cabinet-rank salaries but left untouched the separate limit of ninety-five on the number of ministers who may sit and vote in the Commons. Arguably, the time to address this question has never been better, as the size of the House of Commons – against which that limit is measured – is now fixed. The ninety-five figure dates from 1975, when the Commons had 635 members. The figure was

⁴⁷ The Deputy Prime Minister at time of writing holds the office of Lord Chancellor, which is paid separately, and therefore falls outside the limit.

⁴⁸ Public Administration Select Committee, *Too Many Ministers?* (n 38) para 19; and, for the 109 figure, para 6.

an absolute one, though Brazier argues that it was intended to strike a balance between the size of the Government and the total membership of the House.⁴⁹ For most of the fifty years following the 1975 Act that balance was disturbed only by the House drifting larger as a consequence of boundary reviews – reaching a peak of 659 by 1997, which made ninety-five a smaller share. Since 2020 membership of the House of Commons has been fixed at 650.⁵⁰ Against a fixed denominator it becomes possible to calibrate the relationship with some care. If the intended policy is, indeed, to limit the size of the executive at fifteen per cent of the membership of the House, this Act was the perfect opportunity to do so. Fifteen per cent arguably makes a lot of sense. Assuming that Governments will have a parliamentary majority, or something close to it, fifteen per cent amounts to less than a third of the government's MPs.

Instead, the 2026 Act adjusted the cap on Cabinet membership, as well as the overall limit on the number of salaried ministers, while ignoring the number of MPs who may be appointed as ministers. The consequence is that these statutory limits now sit at figures chosen in different decades for different Houses.

The fundamental issue is not that the cap on the number of ministers is too soft, but rather that there is no cap on ministers at all – a Prime Minister could appoint a thousand if they so wished. Statute regulates only what they are paid, how many of them are paid, and where they may sit.

A more robust solution would be to place the creation of Ministers of the Crown on a statutory footing and remove it from the purview of the prerogative. If the question 'who is a minister' was a consequence of holding a salaried ministerial office provided for by statute, the existing ceiling on salaries would become redundant. Unpaid ministers, attenders paid at a junior rank, or the next quiet enlargement of the Government would all become impossible without primary legislation.

Such a reform would likely satisfy the recommendations of the Public Administration Select Committee, discussed above. Arguably this proposal provides a more robust solution than the committee asked for, by providing a legal mechanism rather than hoped-for restraint.⁵¹ Furthermore, at least some parts of the UK's constitutional architecture already legislate for this kind of limit. The Government of Wales Act 2006 caps the number of Welsh Ministers directly, in primary legislation, at seventeen; Northern Ireland likewise works to a statutory ceiling on the number of its Ministerial offices. Scotland, by contrast, imposes no numerical limit of its own.⁵²

⁴⁹ Brazier (n 8) 37 reads the ninety-five limits as striking a balance between the number of ministers in the Commons and the total membership of the House.

⁵⁰ House of Commons Disqualification Act 1975. On the size of the House, House of Commons Library, *Number of Seats in the House of Commons since 1801* (SN02384) <<https://commonslibrary.parliament.uk/research-briefings/sn02384/>> accessed 3 July 2026: 635 in 1975, rising to 659 by 1997. The number is now fixed at 650 by the Parliamentary Voting System and Constituencies Act 2011, as amended by the Parliamentary Constituencies Act 2020.

⁵¹ Public Administration Select Committee, *Smaller Government* (n 39).

⁵² Government of Wales Act 2006, s 51, as amended by the Senedd Cymru (Members and Elections) Act 2024, s 5 (in force 8 May 2026): the number of Welsh Ministers and Deputy Welsh Ministers is capped at seventeen (raised from twelve), the First Minister and the Counsel General falling outside the cap. For Northern Ireland, see the Northern Ireland Act 1998, s 17(4) (Ministerial offices 'shall not exceed 10 or such greater number as the Secretary of State may by order provide'). Scotland imposes no equivalent numerical limit: the Scotland Act 1998 provides for the appointment of Scottish Ministers (s 47) and junior Scottish Ministers (s 49) without capping their number.

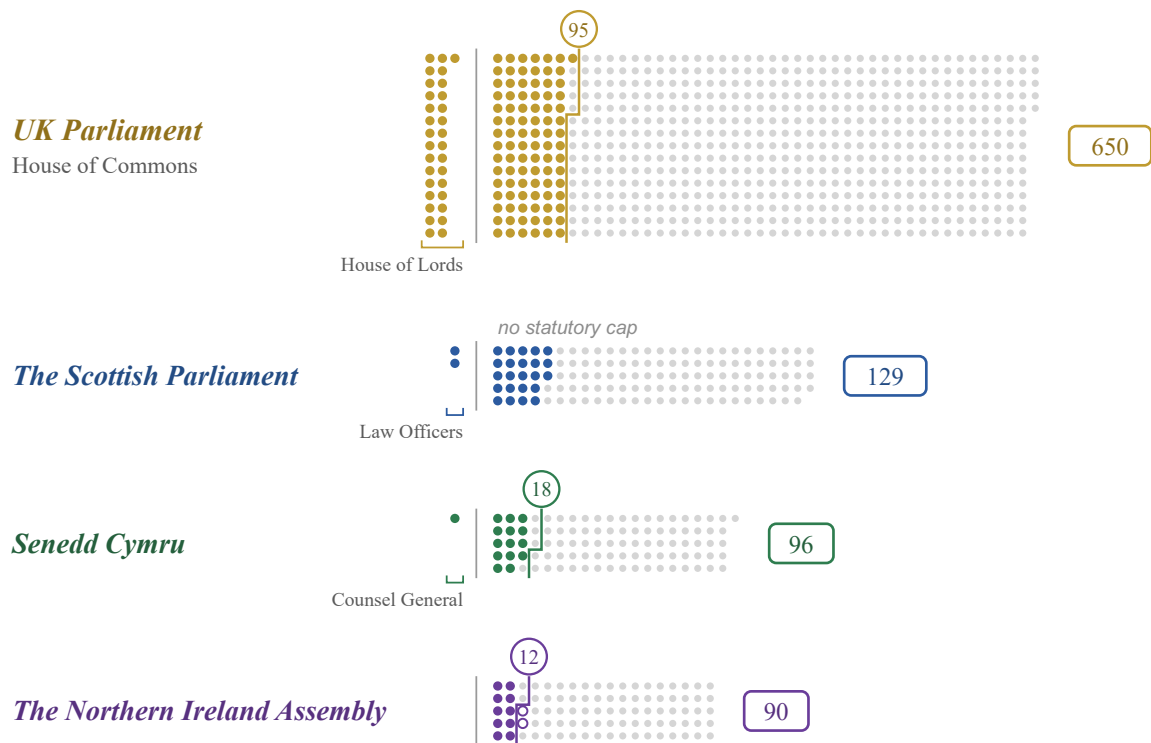


Figure 5: Ministerial salary caps in UK administrations

The fact that Parliament has seen fit to include such caps on ministers in some of the devolved legislatures, but accepts only soft, easily circumventable limits on the numbers of UK Government ministers leaves MPs open to charges of hypocrisy.

Placing the creation of Ministers of the Crown on a statutory basis would carry significant constitutional weight, by constraining a power of creation that is at present an open prerogative. While there is also a compelling case for regulating the *appointment* of ministers, and not just their creation – perhaps through parliamentary approval – such an argument is beyond the scope of this article. The objection that a statutory structure would deprive prime ministers of valued flexibility is not sustainable when that flexibility is the problem to begin with.

The 2026 Act reflects the present (but outgoing) Government’s broader approach to constitutional reform which is to address the symptoms of constitutional defects rather than their causes. For example, the Government’s reform of the House of Lords, enacted in the same months as reforms to ministerial salaries, took a similar approach. The House of Lords (Hereditary Peers) Act 2026 removed the remaining hereditary peers, which some scholars called the lowest-hanging fruit of Lords reform.⁵³ These Lords’ reforms abolished a prominent anomaly while leaving untouched the features the Government’s own manifesto had named as the real problems: an appointments process widely criticised as unprincipled; the patronage by which peers are created; and the size of the chamber.⁵⁴ A further example of this can be seen in the Government’s continued commitment to a mandatory retirement age for peers. Such a limit reduces the size of the House by removing the older members, rather than by constraining the power to fill it. The absurdity of such a solution would see a life peer created in her twenties – such as Baroness Owen

⁵³ Simon Karsunke, ‘What Comes Next? The Way Forward on UK House of Lords Reform’ (UK Constitutional Law Association Blog, 5 May 2026) <<https://ukconstitutionallaw.org/2026/05/05/simon-karsunke-what-comes-next-the-way-forward-on-uk-house-of-lords-reform/>> accessed 28 June 2026, describing the removal of the hereditary peers as the lowest-hanging fruit of Lords reform.

⁵⁴ House of Lords (Hereditary Peers) Act 2026 (n 45). On the appointments process and the size of the House as the problems the manifesto itself identified, Labour Party, *Change: Labour Party Manifesto 2024* (2024) 108.

of Alderley Edge – potentially serve for over fifty years, while Baroness Beckett and Lord Clarke of Nottingham, both relatively new peers, would be required to retire.⁵⁵

Reform of the regulation of ministerial salaries and House of Lords reform are not merely analogous. Indeed, the 2026 Act is a direct consequence of the House of Lords reform agenda. Both Acts adopt a similar approach insofar as they address the more visible problems rather than the discretionary power that produced them. Both reforms are symptomatic rather than structural and notably avoid affecting either the Crown's prerogative to create both ministers and peers.

None of this is to say that incremental reform is the wrong approach. Reform of the House of Lords has proved famously difficult for governments spanning more than a century. A government bill on the Lord's reform reaches the statute book only about once a generation,⁵⁶ and ending the hereditary principle after a century of trying is no small achievement. The Labour Party's manifesto does promise a second stage,⁵⁷ so it would be unfair to argue that nothing has been done. The criticism offered by this article is that each reform corrects the visible symptoms of these problems while leaving the underlying constitutional mechanism that produces it unchanged. The consequence is that the underlying problem is deferred, rather than resolved. This thesis will be proved the first time a future Prime Minister wants to appoint 121 ministers.

Recommendations and conclusions

It is easy to dismiss the Ministerial and Other Salaries Act 1975 as a technical footnote to our constitutional architecture. Such a dismissal, however, would ignore the fundamental balance between the executive and the legislature.

The 2026 reforms addressed a small but significant complaint which has existed for at least fifteen years. These reforms, however, arguably only addressed a symptom of a problem and not its underlying cause. The United Kingdom still has no statutory framework for the creation of ministers nor a legal limit. The law only sets the pay of a fixed number of ministers, the number that may be drawn from the Commons, and the numbers at each rank. The total number of ministers remains a question for the prerogative, while who is paid is a matter of statute. Until these two issues are addressed together the gap between them will reopen as soon as a Prime Minister finds it necessary.

What such a framework should contain need not be elaborate, and it could be approached in stages of ascending ambition. A modest approach would address not the number of ministers but the ease with which the limit upon them is raised. The 2026 Act moved from 109 to 120 by a money bill certified beyond the reach of the Lords, and the structure of salaries beneath it has previously been revised by statutory instrument.⁵⁸ A limit that may be lifted whenever it begins to bind is not much of a limit at all. To require that any increase be made by primary legislation, and exposed to ordinary scrutiny in both Houses of Parliament would significantly firm-up the cap.

A more substantive reform would be to place a statutory cap on the number of ministers, rather than the number who are paid. That Parliament already imposes such caps upon administrations it has itself created makes the UK government's arrangements difficult to defend. Whatever

⁵⁵ Labour Party, Change (n 54) 108 (retirement age); on the select committee, to report by 31 July 2026, House of Commons Library, *House of Lords (Hereditary Peers) Bill: Progress of the Bill* (CBP-10219) <<https://commonslibrary.parliament.uk/research-briefings/cbp-10219/>> accessed 3 July 2026. Baroness Owen of Alderley Edge (b 1993) was created a life peer in 2023; Baroness Beckett (b 1943) in 2024; Lord Clarke of Nottingham (b 1940) in 2020.

⁵⁶ For example, the Life Peerages Act 1958, the Peerage Act 1963, the House of Lords Act 1999, the Constitutional Reform Act 2005, the House of Lords Reform Act 2014 and the House of Lords (Hereditary Peers) Act 2026 (n 45).

⁵⁷ Labour Party, Change (n 54) 108, committing a future Labour government to replace the House of Lords with 'an alternative second chamber that is more representative of the regions and nations.'

⁵⁸ The 2026 Act was certified a money bill: House of Lords Library (n 19). The salary schedule has twice been revised by secondary legislation: SI 2011/1689 (n 20) and SI 2026/592 (n 3).

figure such a cap was set at, it ought to count every minister against it. The defect identified above is that the present limit applies to salaried ministers, so that unpaid and party-funded ministers may enlarge the government without hitting the ceiling.

The 2026 Act was a tentative first step in this direction by largely ending the appointment of unpaid ministers in the Lords. A second step would see the current number imposed as a firm cap on ministers, however they are paid and whether they are paid at all.

Arguably, the approach proposed by the Public Administration Select Committee to set the size of the payroll vote at fifteen per cent of the size of the Commons⁵⁹ satisfies complaints about both the floating size of the government as well as the potential for unpaid ministers to exist. A limit expressed as a ratio tied to the number of MPs would be more consistent with the principle of balancing the size of the executive relative to the legislature. It would also have the added advantage of buoyancy, meaning that future changes in the size of the Commons would automatically adjust the permitted size of the executive.

At a more fundamental level, these issues are not about ministerial pay at all. The salary cap is a fiscal answer to a constitutional question. It governs what the Government may spend on ministers, but not how many it may create, nor how many of them may sit and vote in parliament. To treat the size of the executive as a matter of remuneration fails to address the fundamental constitutional issues of the size of the executive relative to the legislature. It also explains why the figure behaves as a ratchet rather than a ceiling. Whenever the cap on salaries becomes inconvenient Prime Ministers resort to appointing unpaid ministers. Reform which corrects the visible symptom while leaving that power intact does not resolve the difficulty but postpones it. The question worth asking is not whether 120 proves more durable than 109 (a question which will likely be answered in the negative by a future Prime Minister), but whether Parliament will ever choose to limit the creation of ministers, rather than their cost. Until it does, each new ceiling is merely the next one waiting to be raised.

⁵⁹ Public Administration Select Committee, *Too Many Ministers?* (n 38), proposing that the payroll vote be limited to fifteen per cent of the House. On the abandonment of the reduction to 600 and the restoration of the 650-seat House, (n 40).

HUMAN RIGHTS

Prisoners' voting rights: a comparative perspective on prisoner disenfranchisement

Barath Vishnu Gunaa Shekaran Revathy*

Introduction

As prisoners' rights have improved around the world, so has the question of who can be disenfranchised. This is particularly evident in the voting rights of prisoners. At the international level, the problem of prisoners voting rights exposes a gap between states commitments and their electoral practices.¹ Across jurisdictions, legislators and courts have adopted different approaches to the question of whether and to what extent, people in prison should retain the right to vote. Some systems maintain near-blanket statutory bans, others impose carefully delimited, offence or sentence-based restrictions.² This gives rise to a basic question, does imprisonment suspend an individual's right to participate as a citizen of a democracy or should the right to participate as a citizen, particularly the right to vote, persist even if liberty is restricted by law?³

This article asks to what extent do legal systems justify the disenfranchisement of prisoners, particularly remand and undertrial detainees, within frameworks committed to democracy, equality and the presumption of innocence? In addressing this question, it examines whether existing legal regimes adequately protect the voting rights of those in custody and whether today's voting restrictions for prisoners align with our fundamental understanding of citizenship and political inclusion.

The United Kingdom, Germany, France and India are selected not merely for comparative contrast, but because they exhibit distinct approaches to prisoner enfranchisement.⁴ Germany and France reflect models of individualised disenfranchisement, in which the loss of voting rights is exceptional, offence-linked and imposed by judicial decision.⁵ The United Kingdom represents a model of formal inclusion coupled with practical exclusion.⁶ India, by contrast, illustrates a regime of civic suspension, which disenfranchises all persons in custody, irrespective of conviction.⁷ These divergent approaches provide a structured basis for assessing how far legal systems recognise individuals in custody, especially those not yet convicted, as continuing members of the political community.

At the centre of this article is the idea of a civic presumption: individuals in custody should continue to be treated as members of the political community, unless clear and proportionate reasons for exclusion are articulated.⁸ From this perspective, pre-trial detention alone should not justify disenfranchisement and any restriction following conviction should be limited and carefully justified.⁹ Alongside this, the article develops the concept of carceral citizenship, which captures the ways in which legal systems include or exclude prisoners from democratic participation, ranging from inclusive models through conditional inclusion to outright civic suspension.

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¹ Penal Reform International, *The Right of Prisoners to Vote: A Global Overview* (2016) 6–7.

² *Ibid.*

³ Cormac Behan, 'Citizen Convicts: Prisoners, Politics and the Vote' (Manchester UP 2014) ch 1.

⁴ Tommaso Pavone, 'Comparative Views on the Right to Vote in International Law: The Case of Prisoner Disenfranchisement' in Kevin Boyle (ed), 'New Democracies and the Rule of Law' (OUP 2018) 210–214.

⁵ Penal Reform International, *The Right of Prisoners to Vote: A Global Overview* (March 2016) 6–8.

⁶ *Ibid.*

⁷ Representation of the People Act 1951 (India), s 62(5).

⁸ See Subheading – Presumption of Innocence.

⁹ Penal Reform International, *The Right of Prisoners to Vote: A Global Overview* (March 2016) 11–14.

The presumption of innocence and prisoner disenfranchisement

Presumption of innocence is understood as a core fair-trial guarantee that no person is to be treated as guilty until a competent court so determines, at minimum, this presumption bars the state from imposing penal consequences before conviction.¹⁰ Yet, as Herzog-Evans and Thomas note in their comparative study of Prisoners' voting, the presumption also has a civic dimension, because it structures who is regarded as a full rights-bearing citizen in the period before trial is concluded.¹¹ Formally, most legal systems acknowledge that remand or undertrial detainees are not convicted and therefore remain, in law, innocent.¹² Nonetheless, once an individual is physically confined within a penal institution, legal regimes often slide into treating them as if they were already subject to the full range of collateral consequences that follow conviction.¹³ The core question, for present purposes, is whether disenfranchising unconvicted detainees amounts to an illegitimate erosion of the presumption of innocence, or a permissible regulatory consequence of their custodial status.

The continued disenfranchisement of prisoners particularly those who have not been convicted represents one of the most under-theorised contradictions in modern democracies.¹⁴ Universal and equal suffrage is guaranteed in Article 25 of the International Covenant on Civil and Political Rights (ICCPR) and elaborated in General Comment No. 25, which insists that any restriction on prisoners' voting rights must be objective, reasonable and compatible with the principles of non-discrimination and universal participation.¹⁵ The Human Rights Committee has, in concluding observations, specifically criticised blanket bans on convicted prisoners and urged states to amend such laws so that they comply with the obligation to reform and social rehabilitation in Article 10(3), when read together with Article 25.¹⁶ UN instruments on the treatment of prisoners go further, affirming that incarceration should only limit rights where this is demonstrably necessary, and that imprisonment is to be oriented towards reformation and social rehabilitation rather than civil death.¹⁷

Yet the legal regimes examined in this article show three distinct patterns of departure from the standards. In Germany and France, prisoners including those in pre-trial detention generally retain the franchise, with loss of political rights confined to narrow, individually ordered penalties; here, imprisonment rarely equates to civic degradation.¹⁸ The United Kingdom formally distinguish between convicted and unconvicted detainees, preserving the vote for remand prisoners and narrowing disenfranchisement for some categories of convicts, but in practice weak, prison-based voting arrangements produce de facto exclusions that sit uneasily

¹⁰ Martine Herzog-Evans and Jérôme Thomas (eds), *Prisoners' Vote: A Multidisciplinary and Comparative Perspective* (Routledge 2024).

¹¹ Martine Herzog-Evans and Jérôme Thomas (eds), *Prisoners' Vote: A Multidisciplinary and Comparative Perspective* (Routledge 2024).

¹² Penal Reform International 27–30 (on disenfranchisement as counter-productive to rehabilitation and democratic inclusion) (2019).

¹³ Clive Leroy Fernandes, 'Right to Vote for Undertrial and Pre-Trial Prisoners in India' (2024) *International Journal of Advanced Legal Research* (arguing that categorising undertrial prisoners in the same way as convicted offenders violates the presumption of innocence).

¹⁴ R Jago and J Marriott, 'Citizenship or civic death? Extending the franchise to convicted prisoners' (2007) 5 *Web Journal of Current Legal Issues*, accessed on March 13th 2026.

¹⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) UNTS 171, art 25; UN Human Rights Committee, 'General Comment No 25: The right to participate in public affairs, voting rights and the right of equal access to public service (art 25)' (1996) UN Doc CCPR/C/21/Rev.1/Add.7.

¹⁶ *Ibid.*

¹⁷ UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), GA Res 70/175 (17 December 2015) preamble, rules 1, 2, 4–5 (stating that prisoners retain all rights except those lawfully restricted by the fact of incarceration and that the purpose of imprisonment includes social rehabilitation and reintegration, not civil death).

¹⁸ Penal Reform International, *The Right of Prisoners to Vote: A Global Overview* (2016) 6–7.

with the demand for effective enjoyment of Article 25 rights.¹⁹ India represents the starkest case, it imposes a general, automatic and indiscriminate ban on all those in criminal custody.²⁰

To make this clear, this article develops a theory of “civic presumption” and “carceral citizenship” alongside the procedural presumption of innocence; there should be a presumption that those in custody remain full members of the political community unless there are specific, proportionate reasons to restrict their rights. Where National systems can then be located along a spectrum from inclusive carceral citizenship (Germany/France), through conditional carceral citizenship (UK, where formal rights are undermined in practice), to civic suspension (India, where custody itself triggers civic exclusion). It asks whether remand and undertrial prisoners are treated as presumptively innocent members of the community, consistent with civic presumption, or whether pre-trial detention is used as a *de facto* trigger for civic suspension.²¹

Remand and prisoners under trial as presumptively innocent citizens

If the presumption of innocence in its civic dimension is taken seriously, then legal rules should recognize remand and undertrial prisoners as members of the electorate, unless and until they are convicted.²² In Germany and France, remand prisoners are, in principle entitled to vote because disenfranchisement is tied to conviction and usually imposed only as an additional penalty for specific serious offences.²³ This corresponds with the civic dimension of the presumption of innocence outlined in this article in which remand and undertrial prisoners are considered members of the electorate, unless a decision to the contrary is made.²⁴ Germany and France, according to the framework outlined in this article, are examples of a model of inclusive carceral citizenship, in which imprisonment as such does not result in a loss of political membership, and the deprivation of voting rights occurs as an individual, offence-specific, and not a general consequence of imprisonment.

The United Kingdom disenfranchises persons serving a sentence of imprisonment, but it does not extend to those detained on remand, who therefore remain legally eligible to vote.²⁵ This may be an example of the presumption of innocence; however, a study on the voting rights of individuals within the United Kingdom found that the voting rate for eligible prisoners was extremely low.²⁶ Even where formal legal inclusion exists, practical barriers such as lack of registration support, delays in postal voting arrangements, inadequate information flows between prisons and electoral authorities, and tight election timetables frequently undermine the effective enjoyment of voting rights.²⁷ In practice, the combination of prison administration and limited support means that many legally eligible detainees do not vote. This is not only a matter of logistics, but also a matter of a broader attitude where the voting rights of individuals who are presumptively innocent are less important than the administration of the prison.²⁸ Therefore, the United Kingdom is an

¹⁹ Ibid.

²⁰ Representation of the People Act 1951 (India) s 62(5).

²¹ UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), GA Res 70/175 (17 December 2015) preamble, rules 1, 2, 4–5 (stating that prisoners retain all rights except those lawfully restricted by the fact of incarceration and that the purpose of imprisonment includes social rehabilitation and reintegration, not civil death).

²² Penal Reform International, *The Right of Prisoners to Vote: A Global Overview* (March 2016) 6–8.

²³ *ibid* 10–15 (describing German and French regimes tying disenfranchisement to conviction and specific offences).

²⁴ Martine Herzog-Evans and Jérôme Thomas (eds), *Prisoners' Vote: A Multidisciplinary and Comparative Perspective* (Routledge 2024)(n-6).

²⁵ Representation of the People Act 1983, s 3.

²⁶ Robert Jones and Gregory Davies, ‘Prisoner Voting in the United Kingdom: An Empirical Study of a Contested Prisoner Right’ (2023) 86 MLR 900, 903–905, 921–924 (finding that participation among eligible prisoners is ‘extremely low’ and identifying logistical and interpretive barriers including poor communication between prisons and electoral administrators, incomplete or erroneous applications, and uncertainty over remand and temporary-release prisoners.).

²⁷ Jones and Gregory Davies, ‘Prisoner Voting in the United Kingdom: An Empirical Study of a Contested Prisoner Right’ (2023) 86 MLR 900.

²⁸ Penal Reform International, *The Right of Prisoners to Vote: A Global Overview* (PRI 2016) 16–20

example of a system in which legal inclusion and practical exclusion coexist. This article will refer to this as “conditional carceral citizenship”.

India excludes every person who is confined in a prison or in the lawful custody of the police, with a narrow exception only for those in preventive detention.²⁹ The provision does not distinguish between convicted prisoners, undertrials and other pre-trial detainees; confinement alone is enough to trigger disenfranchisement, collapsing the distinction between accusation and guilt, subjecting undertrials, who remain under the presumption of innocence, to the same civic penalty as convicted prisoners.³⁰ Commentators such as Clive Leroy Fernandes and Chintan Chandrachud have pointed out the problematic nature of the provision by noting the fact that individuals who the Constitution and the Code of Criminal Procedure require to be treated as innocent are instead categorized under the same category as convicts and subjected to the same penalty.³¹

Recent public interest litigation before the Supreme Court of India, such as *Sunita Sharma v Union of India*³² has been subject to increased scrutiny for the fact that the majority of the prison population are undertrials, a large number of whom will be acquitted. With over 75 per cent of India’s prison population comprising undertrials, this regime amounts to a large-scale pre-judgment of civic worth based solely on accusation and detention.³³ On any understanding of the presumption of innocence, treating everyone in custody as unfit to vote is not acceptable. Under the model that has been proposed in this article, the Indian model does, support the idea of civic suspension, as the moment the individual is placed into custody, his/her political membership is automatically revoked, even if guilt has not been established.

Collectively, these different approaches to the issue of disenfranchisement illustrate that the presumption of innocence is subject to different translations across different jurisdictions. Germany, France, and to some extent the United Kingdom, maintain some level of connection between conviction and disenfranchisement, thereby upholding the civic presumption of innocence, although in practice this may be undermined by the practical realities of the electoral process.³⁴ The Indian model, by disenfranchising both prisoners and undertrials, completely disconnects the issue of conviction and disenfranchisement, thereby indicating that the moment the individual is accused and placed into custody, their civic suspension is justified.³⁵

Clearly, the implications of these approaches are significant, as the right to vote is not simply a procedural issue but rather a key indicator of the individual’s status as a member of the political community and the denial of this right, even if temporary, indicates that the individual is no longer a member of the political community.³⁶ For unconvicted detainees, this exclusion is particularly demeaning. Disenfranchisement whether de jure or de facto, reinforces the idea that prisoners are outsiders who do not belong in a democratic community.³⁷ The evidence of the

²⁹ Representation of the People Act 1951 (India), s 62(5).

³⁰ *Anukul Chandra Pradhan v Union of India* AIR 1997 SC 2814 (upholding s 62(5) and treating the right to vote as statutory).

³¹ Clive Leroy Fernandes, ‘Right to Vote for Undertrial and Pre-Trial Prisoners in India’ (2024) Indian Journal of Law and Legal Research; Chintan Chandrachud, ‘Prisoner Voting Rights in India’ (UK Constitutional Law Blog, 8 August 2013).

³² *Sunita Sharma v Union of India* Writ Petition (Civil) No 909 of 2025 (Supreme Court of India, pending).

³³ National Crime Records Bureau, Prison Statistics India 2023.

³⁴ Martina Prpić, ‘Prisoners’ Voting Rights in European Parliament Elections’ (European Parliamentary Research Service, Briefing PE 751.459, September 2023) [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/751459/EPRS_BRI\(2023\)751459_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/751459/EPRS_BRI(2023)751459_EN.pdf) accessed 10 March 2026.

³⁵ Clive Leroy Fernandes, ‘Right to Vote for Undertrial and Pre-Trial Prisoners in India’ (2024) Indian Journal of Law and Legal Research; Chintan Chandrachud, ‘Prisoner Voting Rights in India’ (UK Constitutional Law Blog, 8 August 2013).

³⁶ Cormac Behan, *Citizen Convicts: Prisoners, Politics and the Vote* (Manchester UP 2014) ch 1 (arguing that enfranchisement affirms prisoners’ citizenship and that exclusion from the vote signals that they are not full members of the political community).

³⁷ *Ibid.*

preceding section already suggests that translating the presumption of innocence from courtroom procedure to electoral citizenship remains an unresolved challenge across jurisdictions; it is further explored in the context of pre-trial detention and then taken up doctrinally in the below sections.

Exclusion, pre-trial detention and the protection of rights

Pre-trial detention occupies a unique position within criminal justice systems, serving functions such as ensuring the presence of the accused at trial, protecting evidence, preventing interference with witnesses, and preventing serious harm, as opposed to serving a punitive purpose, which is reserved for post-conviction.³⁸ The UN Basic Principles for the Treatment of Prisoners asserts that all prisoners shall have fundamental freedoms, except to the extent that the exercise of such rights conflicts with the sentence or the order of a prison authority. The deprivation of liberty shall have as its sole purpose the reformation and protection of prisoners and shall not aim at their civil exclusion.³⁹

Electoral systems, as discussed within the preceding section, clearly do not support this position. When unconvicted detainees face disenfranchisement whether through India's explicit section 62(5) RPA 1951 or through the practical exclusion in formally inclusive systems such as Germany, France and the UK, custody requires conviction-like consequences.⁴⁰ Losing the franchise transforms a temporary procedural measure into a marker of civic degradation, imposing a disproportionate penalty. The presumption of innocence, which bars formal punishment before conviction, thus loses force; accusation plus confinement becomes sufficient to justify exclusion from the voting.⁴¹

This punitive spillover also destabilises the normative foundations of pre-trial detention. If pre-trial detention routinely carries electoral exclusion, the distinction between detainee and convict erodes. Taken together, these patterns pose a deeper question: can such practices be reconciled with the state's obligations under the ICCPR and contemporary rehabilitative penal theory.⁴² These practices are at odds with international rehabilitative standards. Article 10(3) ICCPR states that imprisonment must be for the reformation and social rehabilitation of prisoners, which cannot be squared with the expulsion of presumptively innocent individuals from the political community.⁴³ General Comment 25 reinforces the requirement that restrictions on voting rights under Article 25 must be reasonable and objective, which cannot be met where voting rights are automatically revoked on the basis of custodial status.⁴⁴ The global overview of international practice by Penal Reform International states that a blanket disenfranchisement of prisoners can be difficult to square with international obligations, particularly where large numbers of unconvicted individuals are affected.⁴⁵

Considering these standards, the models set out earlier in this section reveal not merely a series of technical failings, but a deeper conceptual failing, misunderstanding of political membership as contingent on physical liberty, rather than on legal status as a citizen. Upholding the civic presumption in the context of pre-trial detention therefore requires that states accept that custodial

³⁸ *Anukul Chandra Pradhan v Union of India* AIR 1997 SC 2814.

³⁹ UNGA Res 45/111 (14 December 1990) Basic Principles for the Treatment of Prisoners principle 5(b).

⁴⁰ Penal Reform International the Right of Prisoners to Vote: A Global Overview (PRI 2016) 16–20.

⁴¹ UN Human Rights Committee, 'General Comment No 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial' (23 August 2007) UN Doc CCPR/C/GC/32, paras 30–32.

⁴² Christopher Behan *Citizen Convicts: Prisoners, Politics and the Vote* (Manchester UP 2014).

⁴³ ICCPR (n 2) art 10(3).

⁴⁴ UNHRC 'General Comment No 25: Article 25 (Participation in Public Affairs and the Right to Vote)' (12 July 1996) CCPR/C/21/Rev.1/Add.7 paras 4, 10.

⁴⁵ Penal Reform International (n 6) 27–29.

measures may legitimately restrict movement where strictly necessary, but not the fundamental recognition of individuals as citizens of a democratic state.⁴⁶

Establishing the doctrinal analysis

The patterns established in this article are at odds with the international framework on both pre-trial detention and political participation. The international frameworks such as ICCPR, among other treaties, provides that any form of pre-trial detention has to be exceptional and not punitive, and that any form of imprisonment has to be for reform and rehabilitation purposes.⁴⁷ At the same time, the international framework provides that any restriction on the right to vote has to be objective, reasonable, and proportionate.⁴⁸ The disenfranchisement of unconvicted detainees, whether explicit, as in the case of India, or implicit, as in the case of the UK, undermines these provisions of the international framework on the one hand, and suggests that individuals who are in pre-trial detention have a weaker claim to citizenship, notwithstanding the fact that they are citizens and presumed innocent and ought to be allowed to participate in the democratic process.

From this section, it is evident that a legitimate and realistic implementation of the presumption of innocence in modern democracies calls for a civic presumption whereby accused persons should still be regarded and treated as political members whose voices and opinions matter. Pre-trial detention should not be used to bar them from exercising their civic rights. Their movement and associational rights may be restricted while in custody to an extent necessary for their detention. However, their fundamental connection with democracy should not be severed.

The next section attempts to address this challenge. It moves from an analytical and conceptual discussion of carceral citizenship to an assessment of how domestic laws and regional human rights regimes have addressed prisoners voting rights with special attention to undertrial detainees or remand prisoners. It examines whether there is scope for using and developing existing legal doctrines to protect the civic presumption of unconvicted prisoners or whether there is a need to rethink and transform these regimes to ensure their full participation in democratic self-rule.

Legal frameworks governing prisoners' voting rights and the presumption of innocence

This section develops the civic presumption and carceral citizenship framework introduced in the previous section, by examining the legal norms that regulate Prisoners' voting rights in key jurisdictions. The question that this section seeks to answer is to what extent constitutional law, electoral law and human rights law recognize unconvicted detainees as presumptively innocent citizens for voting purposes, as opposed to regarding their detention as sufficient evidence of civic disqualification.

In this regard, the analysis will be structured into three parts: firstly, the European human rights law and its impact on the United Kingdom; secondly, the constitutional and electoral law of Germany and France; and thirdly, India, including recent constitutional case law. The question that this section seeks to answer is to what extent the current law can be amended to protect the

⁴⁶ UN Human Rights Committee, 'General Comment No 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (art 25)' (12 July 1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 14 ("Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote"; restrictions must be "objective and reasonable").

⁴⁷ UN Human Rights Committee, 'General Comment No 21: Humane treatment of persons deprived of their liberty (art 10)' (10 April 1992) paras 3,10.

⁴⁸ UN Human Rights Committee, 'General Comment No 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (art 25)' (12 July 1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 14 ("Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote"; restrictions must be "objective and reasonable").

civic presumption of innocence of remand and under-trial prisoners, and to what extent the law needs to be changed at the level of underlying norms and institutions.

European human rights law and the United Kingdom

Article 3 of Protocol No 1 ECHR and the essence of the right to vote

The European Court of Human Rights (ECtHR) has interpreted Article 3 of Protocol No 1 (A3P1) as protecting the right of individuals to vote and stand in elections under conditions that ensure the free expression of the opinion of the people in the choice of the legislature.⁴⁹ Though the ECtHR has acknowledged that states have a broad margin of appreciation in regulating the right to vote, it has also emphasized that any restriction must have a legitimate aim, be proportionate, and that the restriction should not touch upon the essence of the right.⁵⁰ In its general approach, the ECtHR has also refused to recognize both the absolute right to vote for all prisoners and the absolute discretion for states to deprive individuals of their voting rights, emphasizing that any restriction should have a rational connection with the conduct or status that is relied upon for justifying the restriction.⁵¹

Hirst and the critique of blanket disenfranchisement

In the case of *Hirst v United Kingdom*,⁵² the Grand Chamber held that the UK's blanket ban on voting for convicted prisoners pursuant to section 3 of the Representation of the People Act 1983 was in violation of A3P1. In reaching this decision, the Court highlighted the fact that the blanket ban on voting for convicted prisoners was general, automatic, and indiscriminate in nature, applying to all convicted prisoners in detention without regard to the length of sentence, nature of offence, or assessment of individual circumstances.⁵³ Although recognizing the protection of the rule of law and the functioning of democracy as legitimate reasons for a deprivation of voting rights, the Court held that the deprivation of voting rights for all detainees in the UK was not proportionate to these legitimate reasons because it did not maintain a discernible link between the restriction and the particular wrongdoing of the individuals concerned.⁵⁴

Although the case of *Hirst v United Kingdom* does not directly address remand prisoners, it is significant for the civic presumption in two ways. First, in its approach to the case, the Court's decision on the violation of A3P1 can be taken as a sign that the mere fact of custody does not justify the exclusion from voting.⁵⁵ Second, in its approach to proportionality, the Court's decision can be taken as a sign that the mere fact of physical confinement does not, in itself justify exclusion from voting.⁵⁶

Post-Hirst jurisprudence – Greens, Scoppola and Hora

Subsequent cases, such as *Greens & M.T. v. United Kingdom*⁵⁷ and *Scoppola v Italy*,⁵⁸ clarified but did not reverse *Hirst*. In *Greens*, the ECtHR again found a violation of A3P1 regarding voting rights for prisoners in the UK, but set a timetable for reform.⁵⁹ In *Scoppola*, it acknowledged that disenfranchising provisions, especially those related to the gravity of offense and individually ordered by courts, could be compatible with A3P1, provided they were not general or

⁴⁹ *Mathieu-Mohin and Clerfayt v Belgium* (1987) 10 EHRR 1.

⁵⁰ *Gitonas v Greece* (1997) 26 EHRR 691.

⁵¹ *Ibid.*

⁵² *Hirst v United Kingdom* (2006) 42 EHRR 41.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Hirst v United Kingdom* (2006) 42 EHRR 41.

⁵⁶ *Ibid.*

⁵⁷ *Greens and M.T. v United Kingdom* App no 60041/08 and 60054/08 (ECtHR, 23 November 2010).

⁵⁸ *Scoppola v Italy* (2013) 56 EHRR 19.

⁵⁹ *Greens and M.T. v United Kingdom* App no 60041/08 and 60054/08 (ECtHR, 23 November 2010).

indiscriminate.⁶⁰ It also continued to criticize general disenfranchising provisions, which lacked specific justification, thus continuing to pressure states with broad disenfranchising provisions.

A more recent judgment, *Hora v United Kingdom*,⁶¹ signals a shift in how the Court applies these principles. The applicant was an inmate serving an indeterminate sentence for multiple counts of rape and serious sexual offense. He claimed that section 3 of the RPA 1983 Act had deprived him of a vote in the 2019 general election.⁶² The Court held unanimously that there was no breach of A3P1. It was not considered justifiable to examine the Convention compatibility of the legislation in abstract and was instead restricted to examining this particular applicant in these particular circumstances. Given the severity of his crimes and his risk to public safety, and with a wide margin of appreciation, it held his disenfranchisement to be proportionate.⁶³

Hora does not overturn *Hirst*'s condemnation of "general, automatic and indiscriminate" bans, *Hora* appears to mark a change of approach by the Court by restricting their potential for remedy to an assessment of proportionality.⁶⁴ For present purposes, *Hora* and similar cases would appear to suggest that whilst section 3 of the RPA 1983 Act remains formally problematic in its blanket nature, prisoners entering the system in the future would be more likely to succeed by demonstrating that their disenfranchisement was disproportionate to their circumstances where their offense was of a lesser severity than in *Hora*.⁶⁵

The Lidington compromise and minimalist compliance

Like *Hirst* and *Greens*, the UK did not revise section 3 RPA 1983 in *Hora*, but eventually introduced some limited administrative reforms, also termed the Lidington compromise.⁶⁶ This allowed a very limited number of prisoners on temporary release and those on home detention curfew to vote outside prison, as well as clearer disenfranchisement notification either at or very close to the point of sentencing.⁶⁷ Commentators such as Andreas von Staden have termed this as an example of "minimalist compliance" since the very essence of section 3 RPA 1983 has remained unaffected, and the majority of convicted individuals continue to be disenfranchised.⁶⁸ From a point of view centered on civic presumption, this demonstrates the potential and limitations of supranational human rights adjudication, which, despite being able to override any ban, has shown itself to be ineffective in promoting adequate forms of carceral citizenship.⁶⁹

Remand prisoners and the limits of doctrinal protection

Formal distinctions between conviction and accusation are clearly drawn in the UK's electoral law and whilst section 3 of the RPA 1983 disenfranchises individuals who serve a sentence of imprisonment, no such disenfranchising provisions apply to remand prisoners, who are formally entitled to register and vote either by post or proxy.⁷⁰ In purely formal terms, the UK's electoral law thus appears to be in line with the presumption of innocence, since only individuals whose

⁶⁰ *Scoppola v Italy* (2013) 56 EHRR 19.

⁶¹ *Hora v United Kingdom* App no 1048/20 (ECtHR, 23 September 2025) HUDOC 001-228802. For a commentary on the case and its impact, see S. Foster, (2026) 2 *European Human Rights Law Review*, 234.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ European Rights Court Backs UK Ban as Man Convicted of Rape Loses Voting Case' *The Guardian* (London, 7 December 2017) <https://www.theguardian.com/politics/2017/dec/07/council-of-europe-accepts-uk-compromise-on-prisoner-voting-rights> accessed 17 March 2026.

⁶⁷ *Ibid.*

⁶⁸ Andreas von Staden, 'Minimalist Compliance in the UK Prisoner Voting Rights Cases' (ECHR Blog, 16 November 2018)

⁶⁹ *Ibid.*

⁷⁰ Representation of the People Act 1983, s 3, as amended by the Representation of the People Act 2000.

guilt has been determined by the courts are disenfranchised, whilst individuals who have not been convicted of a crime are not.⁷¹

However, empirical research suggests that this formal distinction is often not reflected in reality. Jones and Davies argue that the extent of prisoner disenfranchisement is perhaps even greater than was previously supposed, and that without strong administrative systems, the reality is that prisoners' voting rights will be purely theoretical.⁷² From a doctrinal perspective, the failure of the ECtHR or domestic courts to address these practical barriers shows the limits of A3P1. In *Hirst*, *Greens* and *Hora*, the Court accepts the distinction between remand and convicted prisoners in section 3 but does not ask whether remand prisoners are in practice able to exercise the right that is formally available to them.⁷³

The position of remand prisoners therefore illustrates the limits of existing doctrine. A3P1 has helped condemn blanket bans in principle, but it has done little to secure the civic presumption in practice for those who are formally included in the electorate yet effectively excluded by institutional arrangements.⁷⁴

Germany and France: individualised disenfranchisement and inclusive carceral citizenship

Both Germany and France locate the right to vote at the core of democratic citizenship and are generally reluctant to equate imprisonment with civic degradation.⁷⁵ In both regimes, the starting point is that a custodial sentence should not terminate the political membership of the prisoner; any restriction on the electoral rights of prisoners should be specifically provided for in statute law and imposed by a criminal court as a distinct penalty.⁷⁶

In Germany, under the Basic Law's constitutional guarantee of democracy and universal suffrage, the Federal Elections Act provides that prisoners retain their electoral rights unless convicted of a criminal offence targeting the democratic order or the state; in that event, a criminal court may impose loss of voting rights as a penalty for a specified period.⁷⁷ Under the French regime, loss of civic rights, including the electoral franchise, is a *peine complémentaire* that may be imposed by a criminal court for a specified period for a serious offence; however, there is no loss of electoral rights merely because of a custodial sentence.⁷⁸

These regimes are consistent with a baseline commitment to inclusive carceral citizenship; that is, imprisonment does not entail loss of electoral rights, and a distinction is drawn between the merely accused and the convicted of particular offences.⁷⁹ From the perspective of civic

⁷¹ UK Ministry of Justice, 'Restrictions on Prisoner Voting: Policy Framework' (2020); Committee of Ministers, Resolution CM/ResDH (2018) 467, 'Execution of the judgments of the European Court of Human Rights in 101 cases against the United Kingdom (Prisoners' Right to Vote)' (6 December 2018).

⁷² Robert Jones and Gregory Davies, 'Prisoner Voting in the United Kingdom: An Empirical Study of a Contested Prisoner Right' (2023) 86 MLR 900, 903–905, 920–928.

⁷³ *Hora v United Kingdom* App no 1048/20 (ECtHR, 23 September 2025) HUDOC 001-228802; *Greens and M.T. v United Kingdom* App nos 60041/08 and 60054/08 (ECtHR, 23 November 2010); *Hirst v United Kingdom* (2006) 42 EHRR 41.

⁷⁴ Susan Easton, *Prisoners' Rights: Principles and Practice* (Routledge 2011) 7–10.

⁷⁵ Penal Reform International, *The Right of Prisoners to Vote: A Global Overview* (March 2016) 6–8.

⁷⁶ Tommaso Pavone, 'Comparative Views on the Right to Vote in International Law: The Case of Prisoner Disenfranchisement' in Kevin Boyle (ed), *New Democracies and the Rule of Law* (OUP 2018) 210–212 (noting that in Germany only offenders convicted of crimes against the democratic order or state institutions may be disenfranchised, and then only by judicial decision).

⁷⁷ Federal Elections Act, s 12.

⁷⁸ *peine complémentaire*: describing French rules under which courts may impose loss of civic rights, including voting, as an additional penalty for specified serious offences and for a limited time.

⁷⁹ European Parliamentary Research Service, 'Prisoners' Voting Rights in European Parliament Elections' (Briefing, September 2023) 3–5 (classifying Germany and France as systems where disenfranchisement is an ancillary, offence-linked penalty, not an automatic effect of imprisonment).

presumption, both Germany and France provide a comparatively high level of doctrinal protection for the electoral rights of unconvicted detainees.

Statutory rules on prisoners' voting rights

Under the German legal system, loss of electoral rights is a collateral consequence that may flow from conviction for certain serious offenses, but not automatically, nor is there a direct link with imprisonment.⁸⁰ A person who has been sentenced under section 45(5) of German Criminal Code, the court may, in addition, for a period of two to five years, deprive the convicted person of the right to participate in any election or vote on public matters, but only if the provisions regarding the offense in question specifically provide for this as a possible sanction.⁸¹ The Federal Elections Act (Bundeswahlgesetz) then connects the eligibility to vote in Bundestag elections with these criminal law consequences by stating that a person loses eligibility to vote in Bundestag elections if a court has deprived them of the right to vote by a final court judgment.⁸²

Commentaries on German law report that the use of section 45(5) orders is extremely rare, affecting only a handful of individuals annually, so that the vast majority of convicted prisoners in Germany still possess voting rights and can vote from prison.⁸³ Prison inmates, including remand prisoners, are specifically entitled to vote in Bundestag and European Parliament elections as long as they are eligible in general and have not been deprived of the vote by a court judgment as described above, and can vote either in special voting districts or by postal vote.⁸⁴ Remand prisoners, who have not yet been convicted, are completely included in the voting franchise and are not affected by the deprivation of rights.

French law has undergone a similar evolution from automatic civic degradation to individualised, court-ordered disenfranchisement. However, with recent changes to the Criminal Code and Code of Criminal Procedure of France, there is an additional penalty of disenfranchisement.⁸⁵ The point of departure is demonstrated by *Delvigne v Commune de Lesparre-Medoc*.⁸⁶ A French citizen was found guilty of a serious offense in 1988 and was given a 12-year prison sentence with permanent and automatic loss of civic rights as an ancillary penalty. However, when Delvigne sought to be included on the electoral roll for European Parliament elections, he invoked the jurisdiction of the Bordeaux court, who in turn referred a number of questions to the Court of Justice to determine whether this permanent and automatic disenfranchisement was compatible with Article 39 of the EU Charter of Fundamental Rights.⁸⁷

In its Grand Chamber judgment, it was acknowledged that the French provisions did restrict the applicant's Charter right to vote in European Parliament elections but, having regard to the reforms of 1992 and 1994.⁸⁸ It was also acknowledged that the French system, which deprives certain offenders of civic rights for a period, subject to review, could satisfy the requirements of legality, proportionality, and respect for the essence of the right.⁸⁹ Significantly, it was noted that under the previous system of civic degradation, this was permanent and automatic, but under the new system, taking into account the nature and gravity of the criminal offence committed, as well

⁸⁰ German Criminal Code (Strafgesetzbuch), ss 45, 45(5), 45a (loss of public electoral rights and judicial power to deprive the right to vote on public matters).

⁸¹ Ibid.

⁸² Federal Elections Act (Bundeswahlgesetz) s 13(1) no 2.

⁸³ European Parliamentary Research Service, 'Prisoners' Voting Rights in European Parliament Elections' (Briefing, September 2023) 5–6.

⁸⁴ Federal Returning Officer, 'Prison Inmates' (explaining that prisoners, including those in pre-trial detention, may vote by post or in special polling districts if otherwise eligible).

⁸⁵ Penal Reform International, *The Right of Prisoners to Vote: A Global Overview* (March 2016) 6–8.

⁸⁶ Case C-650/13 *Delvigne v Commune de Lesparre-Médoc*.

⁸⁷ Ibid.

⁸⁸ Hanneke van Eijken and Jan Willem van Rossem, 'Prisoner Disenfranchisement and the Right to Vote in Elections to the European Parliament: Universal Suffrage Key to Unlocking Political Citizenship?' (2016) 12118–119 (describing Mr Delvigne's 1988 conviction and automatic loss of voting rights under the old Code).

⁸⁹ Case C-650/13 *Delvigne v Commune de Lesparre-Médoc* paras 39–45, 52–54.

as the duration of the penalty, it is subject to review, thus again highlighting the shift towards individualized disenfranchisement.⁹⁰

In the case of *Delvigne*, the Court of Justice of the European Union acknowledged that such a system, in which loss of the vote results from a criminal conviction, with temporal limitations and possibilities of review, could be compatible with EU law on universal suffrage, as long as the restriction on voting rights was proportionate.⁹¹ Therefore, disenfranchisement is now understood as a *peine complémentaire* under Article 131-26 Code pénal, which must be specifically pronounced and in principle, it is also characterized by its temporary nature and reversibility, rather than a civil consequence of imprisonment.⁹²

At the level of the electoral process, in Germany as well as in France, prisoners who have a vote, including those in pre-trial detention, are permitted to vote either by postal or proxy vote or by temporary release.⁹³ Recent EU and national documentation confirms that neither Germany nor France currently has a statutory bar on voting by prisoners as such, and that remand prisoners are, in principle, included in the electorate.⁹⁴ From a doctrinal perspective, these practices reinforce the picture presented in the previous section, in which loss of the vote was characterized as an exceptional, offence-based sanction requiring judicial intervention, rather than as a civil consequence of imprisonment, and in which pre-trial detention does not trigger disenfranchisement.

India: civic suspension and the constitutional challenge to section 62(5) of the Representation of People Act 1951

The Representation of People Act 1951 of India section 62(5) disenfranchises every person who is confined in a prison or in lawful custody of the police with a limited exception for those in preventive detention.⁹⁵ No differentiation is made between those who have been convicted, those who have not been convicted, and those who are in custody; it is not conviction but rather confinement or custody by itself that triggers disenfranchisement under section 62(5).⁹⁶ When Parliament enacted s62(5) during India's first general elections in 1951, the explicit aim was to exclude persons in custody from voting to maintain the purity of the electoral process.⁹⁷ The provision responded to issues about criminal elements influencing elections, particularly given widespread custodial detention during the partition-era violence and political arrests.⁹⁸ This model thus prioritised electoral administration and symbolic purity over assessment of individual guilt or rehabilitation potential.

This has very significant consequences. In India, over three-quarters of those in prison are undertrials; moreover, many of these undertrials will be acquitted. This provision, therefore, results in a large-scale pre-judgmental disenfranchisement of citizens on the sole ground of their detention.⁹⁹ The broad scope of disenfranchisement under section 62(5) is also evident from the

⁹⁰ Ibid.

⁹¹ Case C-650/13 *Delvigne v Commune de Lesparre-Médoc* paras 51-54.

⁹² Code pénal, art 131-26, *peine complémentaire*: describing French rules under which courts may impose loss of civic rights, including voting, as an additional penalty for specified serious offences and for a limited time.

⁹³ European Parliamentary Research Service, 'Prisoners' Voting Rights in European Parliament Elections' (Briefing, September 2023) 3–5 (reporting that in EU states where prisoners retain the vote, participation is often facilitated by postal votes, proxy votes or special polling stations, including in Germany and France).

⁹⁴ Ibid (classifying Germany and France as Member States where disenfranchisement is an ancillary, offence-linked penalty and remand prisoners remain entitled to vote).

⁹⁵ Representation of the People Act 1951 (India), s 62(5).

⁹⁶ Ibid; see also Bar & Bench, 'Plea in Supreme Court Seeks Right to Vote for Undertrial Prisoners' (9 October 2025) <https://www.barandbench.com> accessed 17 March 2026 (summarising that the provision applies to all persons in prison or police custody, save those in preventive detention).

⁹⁷ Representation of the People Act 1951 (India), s 62(5).

⁹⁸ Ibid.

⁹⁹ India Spend, 'Half a Million Indians Behind Bars, 74% Still Awaiting Trial' (13 October 2025); <https://www.indiaspend.com> accessed 22 March 2026.

fact that this provision operates without regard to the nature of the offense for which an undertrial is held, without regard to the potential length of sentence for an offense for which an undertrial is held, and without regard to whether a court has assessed the need for disenfranchisement.¹⁰⁰

As discussed in earlier in this article, this model ignores the line between accusation and guilt and imposes on undertrial prisoners who remain under the presumption of innocence the civic penalty of disenfranchisement.¹⁰¹ Unlike Germany and France, where disenfranchisement is restricted to those who have committed particular serious offenses and where there is a court order to do so, and unlike the UK, where there is at least a residual qualification of voting rights for remand prisoners, in India all prisoners of detention are disenfranchised by virtue of their status.¹⁰² Under the civic presumption model, section 62(5) of RPA 1951 therefore represents a model of civic suspension, where once an individual enters criminal custody, their political membership is immediately revoked despite their guilt not being established.

Constitutional framework: Democracy, Equality and the presumption of innocence; Litigation & criticism of section 62(5)

The Indian Constitution provides for a democratic government based on universal adult franchise and equality before the law and equal protection of the laws under Articles 14 and 326.¹⁰³ In the case of *Kuldip Nayar v Union of India*,¹⁰⁴ the right to vote has been held by the Supreme Court of India to be a statutory right rather than a fundamental right, but the Court has also held that this right is an integral part of the democratic process and an essential ingredient for the enforcement of the provisions of the Constitution. However, the jurisprudence on criminal procedure pulls in the opposite direction from s. 62(5). In the landmark case of *State of Rajasthan v Balchand*,¹⁰⁵ the Supreme Court famously stated the principle that “bail is the rule, jail an exception,” and justified this on the presumption of innocence and the need to be careful not to allow pre-trial detention to become a form of anticipatory punishment. These decisions present pre-trial detention as an exceptional, tightly controlled measure, and insist that the state may not treat detainees as if they were already convicts for punitive purposes.

In this context, section 62(5) of the RPA 1951, appears to be problematic from a constitutional point of view, since it effectively disenfranchises all persons in prison or in police custody, without any differentiation between the guilty and the innocent, without any assessment of the duration of the sentence, and without any regard for the constitutional presumption of innocence of all persons, including undertrials, or the principle of criminal procedure that pre-trial detention is not punitive.¹⁰⁶ The Supreme Court, in the case of *Anukul Chandra Pradhan v Union of India*,¹⁰⁷ upheld the validity of section 62(5) of the RPA, 1951, on the ground that the disenfranchisement of all prisoners was a logical consequence of their detention, which was necessary for maintaining the purity of the electoral process. However, the judgment did not address the implications of its own prior decisions on bail, nor did it address the issue of the differential treatment of undertrials and accused persons on bail.

The most recent public interest litigation, *Sunita Sharma v Union of India*,¹⁰⁸ has once again brought section 62(5) into the public eye and directly challenged its validity within the

¹⁰⁰ Bar & Bench, ‘Plea in Supreme Court Seeks Right to Vote for Undertrial Prisoners’ (9 October 2025) <https://www.barandbench.com> accessed 17 March 2026.

¹⁰¹ See Chapter 2 above.

¹⁰² Tommaso Pavone, ‘Comparative Views on the Right to Vote in International Law: The Case of Prisoner Disenfranchisement’ in Kevin Boyle (ed), *New Democracies and the Rule of Law* (OUP 2018) 210–212.

¹⁰³ The Constitution of India 1950, art 14 and 326.

¹⁰⁴ *Kuldip Nayar v Union of India* (2006) 7 SCC 1 (Constitution Bench) (reaffirming that the right to vote is statutory but central to the operation of representative democracy under the Constitution).

¹⁰⁵ *State of Rajasthan v Balchand* (1977) 4 SCC 308.

¹⁰⁶ Representation of the People Act 1951 (India), s 62(5).

¹⁰⁷ *Anukul Chandra Pradhan v Union of India* (1997) 6 SCC 1 – (upholding s 62(5) as a reasonable restriction intended to maintain the purity of elections and holding that prisoners as a class may be excluded from voting).

¹⁰⁸ *Sunita Sharma v Union of India* Writ Petition (Civil) No 909 of 2025 (Supreme Court of India, pending).

constitutional framework of India. The petitioner contends that the whole disenfranchisement of prisoners, particularly those who are under trial, violates the equality principle of Article 14 by making a distinction between those who are incarcerated and those who are not.¹⁰⁹ The petitioner also contends that it violates the presumption of innocence by penalising those who have yet to be convicted of a crime and putting them on the same footing as those who have been convicted. Furthermore, the petitioner contends that it disproportionately affects minorities and the poor, as they are overrepresented as pre-trial detainees in India.¹¹⁰

Therefore, this issue raises the question whether the Court should consider section 62(5) as a constitutional issue and address it as such. Indeed, academic commentators have written on this issue and have termed section 62(5) as “an exemplary case of civic suspension, whereby one’s legal status as a prisoner negates one’s legal status as a citizen”.¹¹¹ The commentators have also pointed out the “irony of being required by the Constitution to be treated as innocent until such time as one is convicted by a court of law, yet being treated as a convict and denied a vote by virtue of allegations of a crime of which one has yet to be convicted”.¹¹²

When viewed through the lens of the civic presumption, a system that is in compliance with constitutional and international law would require a minimum repeal or substantial amendment of section 62(5) to restore the right to vote for undertrial detainees and a more nuanced, rather than a wholesale, ban on the right to vote for convicts, depending on the offences for which they have been convicted and the length of sentence imposed.¹¹³

Evaluating India against the civic presumption

When assessed against the grounded minimum standard articulated in earlier, India’s framework falls at the most restrictive end of the spectrum.¹¹⁴ The model of carceral citizenship is one of comprehensive civic suspension, in which the presumption of innocence is of little practical value in the electoral sphere.

In practice, this would entail distinguishing between categories of offences, limiting disenfranchisement to the most serious crimes, ensuring that any loss of voting rights is time-limited and imposed only by a court through a reasoned order, and recognising a pathway to restoration.¹¹⁵ This would require, for instance, differentiating between offences, restricting disenfranchisement to more serious offences, making it time-limited and subject to a court order, and providing for the restoration of voting rights.¹¹⁶ It would also require establishing administrative systems capable of delivering voting rights for detainees, so that conditionality does not lead to a re-emergence of de facto disenfranchisement.¹¹⁷ This would place India more in line with offence-based models of disenfranchisement, like Germany and France, but would also allow for a more nuanced approach in respect of domestic electoral integrity concern

A comparative assessment across the jurisdictions

As can be seen from the various jurisdictions discussed above, several tools have been developed by the courts and statutory bodies, such as the proportionality test under A3P1, which can be utilized for the protection of the civic presumption for unconvicted detainees. The critical

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Clive Leroy Fernandes, ‘Prisoner Disenfranchisement and the Indian Constitution’ (2020) 5 NUJS L Rev 1, see also Chintan Chandrachud, ‘Voting Rights of Prisoners and the Indian Constitution’ (2019) 31 National Law School of India Review 45.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ See subheading – Presumption of innocence.

¹¹⁵ Penal Reform International (n 23) 42–45.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

perspective of *Hirst* regarding broad, automatic, and indiscriminate bans,¹¹⁸ combined with *Scoppola*'s positive focus on specific restrictions tied to particular offences,¹¹⁹ and *Hora*'s emphasis on individual proportionality,¹²⁰ creates a framework for contesting both sweeping statutory bans and the enforcement of general measures that render rights effectively illusory. The approach by constitutional courts in Germany and France to linking the right to participate in the democratic process to serious offenses and to individual judicial decisions provide a basis for the presumption of continued civic membership even for convicted prisoners.¹²¹ In the UK, the legislative response to the issue has been minimalist and the weak administrative response, resulting in a system of conditional carceral citizenship.¹²² In the case of India, the wide-reaching statutory ban has been upheld by the constitutional courts, providing a model of civic suspension incompatible with the presumption of innocence and the right to participate in the democratic process.¹²³

This discussion has highlighted the need for a change of approach by courts and legislatures to imprisonment, and for a shift from merely using existing tools to protect the civic presumption for unconvicted detainees towards actively designing and implementing reform proposals that secure their voting rights in practice. This is the subject matter of the next section.

Possible reforms and practical possibilities

The preceding sections of this article show that custody, particularly pre-trial detention, is often treated as a *de facto* trigger for civic exclusion even where the presumption of innocence is formally preserved. This section turns from doctrine to reform and asks what a legally grounded model of carceral citizenship, consistent with civic presumption, would look like in practice. It does so by outlining a universal model that states could adapt to their own constitutional and political settings.

The model rests on the understanding that disenfranchisement should be exceptional, not routine. Voting rights should not be forfeited because of pre-trial detention or because a person is awaiting sentence, since such a restriction is difficult to justify as reasonable and serves no rehabilitative purpose.¹²⁴ Reports from human rights organisations show that in most countries voting rights are never or rarely withdrawn following criminal conviction, and that the prevailing trend is toward time-limited, offence-specific disenfranchisement.¹²⁵ The CJEU's endorsement of a narrowly defined civic disability in *Delvigne* is therefore consistent with universal suffrage only when the restriction is individually ordered for a specific period; it sits uneasily with automatic, indiscriminate disenfranchisement.¹²⁶

Research on prisoner enfranchisement has shown that, through participation in the electoral process, a prisoner can retain a sense of ongoing citizenship rather than remain a permanent outsider and can imagine a law-abiding future in which they have a voice and a responsibility.¹²⁷ Behan's interviews with serving prisoners, for example, show that being able to vote can

¹¹⁸ *Hirst v United Kingdom* (No 2) (2006) 42 EHRR 41.

¹¹⁹ *Scoppola v Italy* (No 3) (2013) 56 EHRR 19.

¹²⁰ *Hora v United Kingdom* App no 1048/20 (ECtHR, 23 September 2025) HUDOC 001-228802.

¹²¹ Bundesverfassungsgericht Federal Constitutional Court, BVerfGE 33, 1 (1972) (upholding narrow, offence-linked disenfranchisement compatible with Art 38 GG); Code pénal, art 131-26 (peine complémentaire of deprivation of civic rights, including the vote); Case C-650/13 *Delvigne v Commune de Lesparre-Médoc* EU:C:2015:648.

¹²² Andreas von Staden, 'Minimalist Compliance in the UK Prisoner Voting Rights Cases' (ECHR Blog, 16 November 2018)

¹²³ Chintan Chandrachud, 'Voting Rights of Prisoners and the Indian Constitution' (2019) 31 National Law School of India Review 45.

¹²⁴ International Covenant on Civil and Political Rights 1966, art 25.

¹²⁵ Penal Reform International, *The Right of Prisoners to Vote: A Global Overview* (2016) 3–5 (reporting that most countries permit pre-trial detainees to vote and noting that automatic disenfranchisement following conviction remains contested).

¹²⁶ Case C-650/13 *Delvigne v Commune de Lesparre-Médoc* EU:C:2015:648.

¹²⁷ Cormac Behan and Ian O'Donnell, 'Prisoners, Politics and the Polls: Enfranchisement and the Burden of Responsibility' (2007) 47 British Journal of Criminology 371.

encourage reflection on political issues, reinforce pro-social identities and modestly strengthen ties to the outside world.¹²⁸ The denial of the right to vote, on the other hand, sends a very different message, that of civic death, that the relationship between the prisoner and the state is a purely coercive one, and that rehabilitation is not possible.¹²⁹ In that sense, prisoner voting is not a reward for good behaviour but a normal incident of rehabilitation.

Evidence from the UK shows that even where individuals are formally included, they may be effectively excluded through administrative disenfranchisement: lack of information, poor coordination between prison and electoral services, limited time, and inadequate voting infrastructure.¹³⁰ This undermines the rehabilitative value of enfranchisement, because rights that cannot practically be exercised lose much of their meaning.¹³¹ A credible reform agenda must therefore impose positive obligations on both prison and electoral authorities.¹³² International standards support this shift toward positive obligations. General Comment No. 25 makes clear that states must take steps to ensure equal opportunities to exercise the right to vote, which requires more than avoiding unjustified restrictions; it also requires the removal of practical obstacles that disproportionately affect detainees.¹³³

The Nelson Mandela Rules, although they do not specifically address voting rights, state that imprisonment should promote rehabilitation and social reintegration, with prison life approximating life outside prison walls.¹³⁴ Read together with General Comment No. 25, these standards suggest that continued electoral participation, especially for unconvicted detainees, should be treated as a normal feature of carceral citizenship rather than a privilege that may be withdrawn whenever a person is in custody.

The universal model proposed here therefore offers both a normative framework and a practical basis for reform. It would ensure that pre-trial detention is never used, explicitly or implicitly, to trigger civic exclusion. If implemented in this way, prisoner voting would help avoid civic exclusion and support the broader rehabilitative aim of preparing prisoners for responsible participation in democratic life.¹³⁵

Conclusion

This article has argued that prisoners' voting rights cannot be fully understood without taking both the presumption of innocence and the concept of carceral citizenship seriously.¹³⁶ Beginning with remand and undertrial detainees, it has shown that legal systems often collapse the distinction between accusation and guilt, allowing custody, especially pre-trial detention, to operate as a *de facto* trigger for civic exclusion even where the accused are formally presumed innocent.¹³⁷ Across the four jurisdictions examined, this pattern recurs in different doctrinal forms but with similar practical effects.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Robert Jones and Gregory Davies, 'The Administrative Disenfranchisement of Prisoners in England and Wales' (2023) 270 *Prison Service Journal* 3, 8–11.

¹³¹ Robert Jones and Gregory Davies, 'The Administrative Disenfranchisement of Prisoners in England and Wales' (2023) 270 *Prison Service Journal* 3, 8–11.

¹³² Penal Reform International, *The Right of Prisoners to Vote: A Global Overview* (PRI 2016).

¹³³ UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), GA Res 70/175 (17 December 2015) preamble, rules 1, 2, 4–5 (stating that prisoners retain all rights except those lawfully restricted by the fact of incarceration and that the purpose of imprisonment includes social rehabilitation and reintegration, not civil death).

¹³⁵ Cormac Behan and Ian O'Donnell, 'Prisoners, Politics and the Polls: Enfranchisement and the Burden of Responsibility' (2007) 47 *British Journal of Criminology* 371.

¹³⁶ 'Presumption of Innocence.'

¹³⁷ Ibid.

At the international level, there is not universally recognised right of incarcerated prisoners to vote.¹³⁸ Treaties such as the ICCPR and the European Convention on Human Rights (ECHR) recognise the rights to participate in public affairs, hold free elections, and exercise freedom of expression. Prisoners are included under these provisions.¹³⁹ However, there has been an absence of an explicit recognition of prisoner enfranchisement and so it has fallen to regional and domestic courts to assess the validity of each state's regulation of prisoner enfranchisement. This has led to a frequently inconsistent recognition and implementation of prisoner enfranchisement rights, even within the UK and Europe.

Germany and France show that disenfranchisement can be linked to serious offences and imposed by individual judicial decision, thereby preserving a strong presumption of continued political membership even for convicted prisoners.¹⁴⁰ The United Kingdom is an example of administrative disenfranchisement, despite reforms following *Hirst* and related judgments, many formally eligible detainees remain unable to vote because of poor administration.¹⁴¹ India lies at the other end of the spectrum. Section 62(5) of the Representation of the People Act 1951 disenfranchises all persons in custody except preventive detainees, creating a regime of civic suspension that sits uneasily with equality, the presumption of innocence, and Article 25 ICCPR and General Comment No. 25.¹⁴² Research on prisoner voting also suggests that participation can support rehabilitation by preserving citizenship, public engagement, and ties to the wider community.¹⁴³

The comparative and theoretical analysis in this article supports a clear normative conclusion: prisoner enfranchisement should begin from a presumption of innocence and voting should be treated as a core incident of citizenship, not a privilege lost through incarceration, and may be restricted only in narrow circumstances that are proportionate, justified, and consistent with the presumption of innocence.

¹³⁸ Penal Reform International, *The Right of Prisoners to Vote: A Global Overview* (PRI 2016).

¹³⁹ *Ibid.*

¹⁴⁰ 'Germany and France: Individualised Disenfranchisement and Inclusive Carceral Citizenship.'

¹⁴¹ 'European Human Rights Law and the United Kingdom.'

¹⁴² 'India: Civic Suspension and the Constitutional Challenge to Section 62(5).'

¹⁴³ 'Presumption of Innocence.'

ASYLUM AND REFUGEE LAW

From responsibility-sharing to responsibility-shifting: the UK's safe third country regime and the erosion of refugee protection

Mohammed Sulaymaan Jamil*

Introduction: the UK's asylum policy

The United Kingdom's asylum policy since 2020 has been defined by a growing legislative commitment to deterrence that increasingly relies on safe third country (STC) frameworks as the primary mechanism for managing irregular arrivals. An STC framework allows a state to declare an asylum claim inadmissible on the basis that the claimant could, or should, have sought protection in another safe jurisdiction. The asylum seeker is sent to a third country where they can apply for asylum and still be safe. While the broader landscape of UK asylum policy since 2020 includes various enforcement and border security measures, including those introduced by the subsequent Labour administration, this article focuses specifically on the STC architecture codified in ss.80A-80C of the Nationality and Borders Act 2022,¹ and ss.2 and 4 of the Illegal Migration Act (IMA) 2023.² By isolating the STC model, this article examines whether these specific frameworks represent a legitimate exercise of 'responsibility-sharing'³ as envisaged by the Preamble of the 1951 Refugee Convention's drafters, or whether they constitute a systematic 'responsibility-shifting'⁴ designed to delegate and evade protection obligations under the 1951 Refugee Convention.⁵

The central argument put forward by this article is that the UK's approach creates a condition in which asylum seekers are rendered legally invisible through inadmissibility regimes that deny them procedural rights without guaranteeing protection elsewhere. This represents not a legitimate exercise of sovereignty but, arguably, a breach of treaty obligations and the principle of good faith – *pacta sunt servanda*.⁶ The 1951 Refugee Convention presupposes cooperative burden-sharing, which is a principle intended by the drafters to ensure that front-line states were not overwhelmed and that refugees received a 'satisfactory solution'⁷ through international cooperation. Originally, STC arrangements were conceived as mechanisms to facilitate this sharing by allowing states to transfer claims to countries with which asylum seekers had meaningful connections, such as family ties or previous residency.⁸ However, modern STC policies have distorted this logic. Rather than sharing responsibility for protection, states now seek to shift it entirely by using bilateral agreements to deflect asylum seekers without ensuring substantive protection will be secured elsewhere, evidenced in the UK-Rwanda partnership⁹ and formally proven in the case of *AAA*.¹⁰

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¹ Nationality and Borders Act 2022, ss 80A–80C.

² Illegal Migration Act 2023, ss 2, 4.

³ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) Preamble, recital 4; Michelle Foster, 'Responsibility Sharing or Shifting? "Safe" Third Countries and International Law' (2008) 25(2) *Refugee* 64.

⁴ Foster (n 3) 65

⁵ Refugee Convention (n 3).

⁶ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 26.

⁷ Refugee Convention (n 3) Preamble, recital 4.

⁸ UNHCR Executive Committee, 'Conclusion No. 15 (XXX) on Refugees without an Asylum Country' (1979) UN Doc A/AC.96/572, para (h)(iv).

⁹ Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the Provision of an Asylum Partnership Agreement (signed 14 April 2022).

¹⁰ *R (AAA (Syria)) v Secretary of State for the Home Department* [2023] UKSC 42.

This transformation constitutes a breach of the ‘object and purpose’¹¹ of the 1951 Convention. The Refugee Law Initiative’s 2022 Declaration on Safe Third Countries¹² articulates this critique, noting that STC policies that deflect or obstruct access to asylum procedures violate states’ obligations. When states declare claims inadmissible without ensuring another state will examine those claims substantively, they engage in a form of ‘constructive refoulement’¹³. This creates conditions so untenable that they effectively compel self-deportation. This shift reflects a broader trend toward presumptive safety over individual assessment, seen in various international contexts beyond Europe, such as Australia’s offshore processing model.¹⁴ The UNHCR’s 2017 Legal Considerations establish the authoritative standard that STC arrangements must ensure a meaningful connection between the asylum seeker and the proposed third country, as well as the availability of durable solutions.¹⁵ Current state practices fail both tests systematically, often operating in a murky legal area where the ‘duty to remove’¹⁶ overrides the ‘duty to protect.’¹⁷

The Israel-Rwanda ‘voluntary departure’ scheme, operational between 2013 and 2018, provides significant empirical evidence of the failures inherent in responsibility-shifting. Israeli authorities offered asylum seekers a choice between indefinite detention or departure to Rwanda with financial incentives. However, studies revealed that the vast majority left Rwanda within weeks of arrival.¹⁸ This ‘revolving door’ effect occurred because Rwanda lacked the legal infrastructure to provide status or work rights, forcing individuals to use Israeli funds to pay smugglers for onward journeys to Europe. This demonstrates that transferring individuals to states with which they have no meaningful connection, defined by the UNHCR as ties that facilitate integration¹⁹, fails to produce durable protection²⁰. While states argue that such transfers are necessary to disrupt the business model of people smugglers, a central justification provided by the UK government, the Israeli precedent suggests that without meaningful connection, the policy merely fuels secondary displacement.²¹

The UK Supreme Court in *AAA v Secretary of State*²² reinforced this by holding that the practical capacity of a third country to fulfil safety assurances must be scrutinised, rather than relying on the ‘good faith’,²³ of political commitments. Despite the government’s argument that Rwanda’s diplomatic assurances were sufficient to mitigate risk, the Court found the lack of a functioning asylum system created an objective risk of non-refoulement. This judgment highlighted the ‘capacity fallacy’ ‘in modern STC arrangements that safety cannot be legislated or bought; it must be a demonstrable fact.’²⁴

¹¹ VCLT (n 6) art 31(1).

¹² Refugee Law Initiative, ‘Declaration on Externalisation and Safe Third Country Arrangements’ (2022) <https://rli.sas.ac.uk/declaration-on-externalisation> accessed 10 March 2026.

¹³ Tilman Rodenhäuser and Padmaja Menon, ‘Does international law prohibit “constructive refoulement”?’ (EJIL: Talk!, 20 June 2024) <https://www.ejiltalk.org/does-international-law-prohibit-constructive-refoulement/> accessed 11 April 2026.

¹⁴ UNHCR, ‘UNHCR Monitoring Visit to Manus Island, Papua New Guinea 23 to 25 October 2013’ (2013); see also Madeline Gleeson, *Offshore: Behind the Wire on Manus and Nauru* (UNSW Press 2016).

¹⁵ UNHCR, ‘Legal Considerations on the Return of Asylum-Seekers and Refugees to Safe Third Countries’ (2017) paras 5–7.

¹⁶ Illegal Migration Act 2023 (n 2) s 2(1).

¹⁷ Refugee Convention (n 3) arts 1(A)(2) and 33(1).

¹⁸ International Refugee Rights Initiative, ‘“I was forced to leave”: The “voluntary” departure of African asylum seekers from Israel to Rwanda and Uganda’ (IRRI, September 2015) 12–15

¹⁹ UNHCR (n 15) paras 5–7

²⁰ UNHCR Conclusion No. 15 (n 8) para (h)

²¹ Shahar Shoham, Liat Bolzman and Lior Birger, ‘Moving under Threats: The Treacherous Journeys of Refugees who “Voluntary” Departed from Israel to Rwanda and Uganda and Reached Europe’ (Oxford Law Blogs, 12 October 2018) <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/10/moving-under> accessed 3 April 2026.

²² *AAA* (n 10) [56]–[60].

²³ VCLT (n 6) art 26.

²⁴ *AAA* (n 10) [74]–[76].

This article is set out in three sections, structured to demonstrate that current STC frameworks prioritise state convenience over the humanitarian purpose of the 1951 Convention. The first section establishes the normative framework by defining the concepts of safe third countries, non-refoulement, and ‘constructive refoulement.’²⁵ This assesses the legality of STC policies under Article 31 and the principle of good faith to prove that modern deflection tactics are fundamentally incompatible with the Convention’s intended spirit of international cooperation. It delves into the history of ‘refugees in orbit’²⁶ and the safeguards required to make a transfer lawful. The term ‘refugees in orbit’ refers to a legal and humanitarian phenomenon where asylum seekers are shuttled between jurisdictions because no single state acknowledges responsibility for examining their protection claims and we will explore how it fits in with the line of argument.

The next section evaluates the practical effectiveness of this responsibility-shifting model. Using a dual framework, it examines whether STC arrangements successfully resolve backlogs or deter future arrivals, scrutinising the empirical record of the Israel-Rwanda arrangement alongside the UK’s legislative framework. This includes an analysis of the ‘zombie framework’ created by the Illegal Migration Act 2023, where claims are rendered inadmissible without a functioning destination for removal. The term ‘zombie framework’ can be defined in this article as a state of statutory paralysis where the law mandates the host state to remove an individual and declare their claim inadmissible, yet the framework remains functionally ‘dead’ because there is no viable or lawful destination (safe third country) to facilitate that removal.²⁷ The final section contextualises the UK’s approach within a broader international trend of ‘externalisation.’²⁸ By examining the Italy-Albania processing centres, the EU’s New Pact on Migration and Asylum, and recent US coercive removal policies, this section identifies a global shift away from individualised assessment toward categorical exclusion. Through this three-part analysis, the article demonstrates that STC policies, as currently constituted, represent not a legitimate exercise of state sovereignty but an impermissible erosion of the international legal protections upon which refugee law depends.

This article contends that the UK’s contemporary STC model represents a fundamental departure from the humanitarian underpinnings of the 1951 Convention. By prioritising administrative deflection over substantive protection, the ‘zombie framework’ of the IMA 2023 does not merely manage migration; it risks dismantling the very international legal standards designed to prevent the human suffering of those seeking refuge. To understand the depth of this erosion, it is first necessary to dissect the legal bedrock upon which these policies sit. Accordingly, Section One will follow by establishing the normative framework of STC arrangements, exploring the evolution of the non-refoulement principle and the legal safeguards intended to ensure that international cooperation remains a tool for protection rather than a mechanism for exclusion.

The normative framework

This section establishes the normative benchmarks against which the United Kingdom’s Safe Third Country (STC) architecture must be measured. It begins by dissecting the foundational pillars of international refugee law to illustrate the intended spirit of collective responsibility. The analysis then transitions to the evolution of protective safeguards, specifically examining the ‘meaningful connection’ requirement and the legal mechanisms designed to prevent the creation of ‘refugees in orbit.’ By grounding this study in the intersection of the 1951 Convention and the

²⁵ Rodenhäuser and Menon (n 13).

²⁶ Rossella Pulvirenti, ‘From Solidarity to Exclusion: The “Safe Country” Concept in UK Asylum Law and the Irony of Borders’ (2025) 14(5) *Laws* 63, s.2.2.

²⁷ Eva Doerr and Isaac Ricca-Richardson, ‘Immigration Blog: Section 2 of the Illegal Migration Act – Duty to Remove’ (Garden Court Chambers, 3 January 2024) <https://www.gardencourtchambers.co.uk/news/immigration-blog-section-2-of-the-illegal-migration-act-duty-to-remove> accessed 4 April 2026.

²⁸ Bill Frelick, Ian M Kysel and Jennifer Podkul, ‘The Ethical and Legal Implications of Externalizing Asylum’ (2016) 4 *Journal on Migration and Human Security* 190, 193

Vienna Convention on the Law of Treaties (VCLT), this section provides the legal basis for the critique of ‘constructive refoulement’²⁹ that informs the remainder of this article.

Foundational pillars: non-refoulement and the preamble

To evaluate the legality of modern asylum policies, it is necessary to first establish the fundamental legal standards that govern the protection of refugees. The 1951 Refugee Convention was designed to ensure that individuals fleeing persecution are not left in a state of legal exclusion or bounced between jurisdictions without a determination of their status. This protection system stands on two foundational pillars: the principle of non-refoulement under Article 33³⁰ and the prohibition of penalties under Article 31³¹. Article 33(1) of the 1951 Convention provides the primary legal barrier to the forced return of refugees, stating:

“No Contracting State shall expel or return (‘refouler’) a refugee to ...territories where
his life or freedom would be threatened on account of his race, religion, nationality,
membership of a particular social group or political opinion.”³²

The interpretative debate regarding Article 33(1) centres on whether non-refoulement is a functional or purely territorial obligation. Proponents of the broad view argue that the duty is status-based and customary, applying wherever a state exercises ‘effective control’³³, thereby prohibiting extraterritorial repulsion.³⁴ Conversely, a restrictive reading of the article asserts that states only owe the duty to those who have attained a physical or legal presence within their sovereign territory, a view often used to justify offshore migration control policies.³⁵ While the restrictive view frequently dictates state practice (as will be demonstrated below), the broad interpretation is legally more prevalent, underpinned by the consensus of international tribunals and the UNHCR that the principle follows the exercise of state power rather than geographical borders.³⁶

The UK Supreme Court in *R (AAA (Syria)) v Secretary of State for the Home Department*³⁷ reinforced that non-refoulement is a ‘multifaceted legal foundation.’ The Court emphasised that this is a core rule of international law, reinforced not only by the 1951 Convention but by Article 3 of the European Convention on Human Rights (ECHR),³⁸ and the UN Convention Against Torture (UNCAT).³⁹ In its judgment, the Court did not merely look at the political promises made between the UK and Rwanda; it scrutinised the objective capacity of the Rwandan asylum system to process claims without the risk of ‘chain non-refoulement.’⁴⁰ Which is the risk of a refugee being sent from Rwanda back to their original state of persecution. The Court found that the Rwandan system suffered from systemic deficiencies, including a history of returning refugees

²⁹ Rodenhäuser and Menon (n 13).

³⁰ Refugee Convention (n 3) art 33(1).

³¹ *ibid* art 31(1).

³² *ibid* art 31(1).

³³ Sir Elihu Lauterpacht and Daniel Bethlehem, ‘The Scope and Content of the Principle of Non-Refoulement: Opinion’ in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law* (CUP 2003) 140–164.

³⁴ *Ibid*.

³⁵ Ellen F D’Angelo, ‘Non-Refoulement: The Search for a Consistent Interpretation of Article 33’ (2009) 42 *Vanderbilt Journal of Transnational Law* 279, 281.

³⁶ UNHCR, ‘Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under Article 33 of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol’ (26 January 2007) paras 14–15.

³⁷ *AAA* (n 10) [9].

³⁸ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 3.

³⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (UNCAT) art 3.

⁴⁰ *AAA* (n 10) [22]

to countries where they faced ill-treatment.⁴¹ This established a high legal threshold that safety cannot be a political promise; it must be an observable, evidence-based reality.

Furthermore, the Preamble of the 1951 Convention acknowledges that providing safety is a collective duty. Recital 4 specifically states that a “satisfactory solution” for the problem of refugees ‘cannot... be achieved without international cooperation.’⁴² The placement of this language in the Preamble was a deliberate political compromise among the 1951 delegates. Claire Inder notes that while some delegates argued for a binding obligation to share the burden of asylum, others resisted a rigid quota system. Placing this duty in the Preamble served as a structural anchor, ensuring the entire treaty is interpreted through a lens of international solidarity.⁴³ Under Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT), a treaty must be interpreted in light of its ‘object and purpose,’⁴⁴ for which the Preamble is the primary source. Consequently, when a government implements a safe third country regime that ignores the necessity of cooperation, it undermines the humanitarian objective that gives the Convention its legal effect. By attempting to handle arrivals in isolation, the state fails the test of *pacta sunt servanda* (good faith),⁴⁵ performing its duties in a way that defeats the treaty’s core spirit.

Article 31 and the Judicial Shield: Adimi and B010

Article 31(1) of the Convention provides a shield against the penalisation of refugees:

“The Contracting States shall not impose penalties... on refugees who... enter or are present in their territory without authorisation.”⁴⁶

The legality of the UK’s current policy hinges on whether inadmissibility architecture functions as an unlawful administrative penalty by targeting the mode of arrival. In the landmark case of *R v Secretary of State for the Home Department, ex parte Adimi*,⁴⁷ the High Court dealt with refugees who were prosecuted for using false travel documents. The Crown argued that they were not protected by Article 31 because they had stayed in transit countries such as Italy and France for several days before reaching the UK and thus had not ‘come directly’⁴⁸ from a state of persecution. Simon Brown LJ dismissed this narrow view, ruling that the Convention requires a broad construction that acknowledges the ‘special situation’⁴⁹ of asylum seekers, whose quest for sanctuary reasonably involved breaching domestic law. The Court held that ‘short term stopovers’⁵⁰ are permissible, particularly where a refugee is travelling to a destination where they have meaningful connections, such as family or linguistic ties. Ultimately the court concluded that to prosecute refugees for their mode of arrival would be to ignore the very circumstances that made them refugees in the first place, as irregular travel, often characterised as ‘subterfuge.’⁵¹ is often the only means of escape.⁵²

This principle was further expanded by the Canadian Supreme Court in *B010 v Canada*.⁵³ This case involved individuals who arrived on the ship *Sun Sea* and assisted each other during the

⁴¹ *R (on the application of AAA (Syria) and others) v Secretary of State for the Home Department* [2023] UKSC 42, [50], [102]–[105].

⁴² Refugee Convention (n 3) Preamble, recital 4.

⁴³ Claire Inder, ‘The Origins of “Burden Sharing” in the Contemporary Refugee Protection Regime’ (2017) 29(4) *International Journal of Refugee Law* 523, 532.

⁴⁴ VCLT (n 6) art 31(1).

⁴⁵ *Ibid* art 26.

⁴⁶ Refugee Convention (n 3) art 31(1).

⁴⁷ *R v Secretary of State for the Home Department, ex parte Adimi* [2001] QB 667.

⁴⁸ *Ibid* 677–678.

⁴⁹ *Ibid* 679.

⁵⁰ *Ibid* 667, 679.

⁵¹ *Ibid* 667, 673.

⁵² *Ibid* 667, 678.

⁵³ *B010 v Canada (Citizenship and Immigration)* 2015 SCC 58, [2015] 3 SCR 704.

voyage. The government sought to classify this mutual assistance as ‘people smuggling’⁵⁴ to trigger inadmissibility. However, the Court held that ‘penalties’⁵⁵ are not restricted to criminal fines or imprisonment but include any procedural detriment that targets a refugee’s mode of arrival. Crucially, the Court determined that losing the right to have an asylum claim heard on its merits constitutes an administrative penalty.⁵⁶ When ss.2 and 4 of the Illegal Migration Act 2023 render a claim inadmissible solely based on the route of travel, it strips the individual of the right to have rights. This weaponisation of procedure acts as a de facto penalty designed to deter future arrivals, which is fundamentally incompatible with the shield provided by Article 31. This view is supported by Professor Goodwin-Gill, who argues that a ‘decision on the merits’⁵⁷ is essential to avoid breaching Article 31, and by the UNHCR, which classifies the denial of such a hearing as a prohibited ‘procedural detriment’.⁵⁸

The history of refugees in orbit and the evolution of responsibility

The safe third country concept was not originally designed as a tool for exclusion. It emerged in the 1980s to solve the problem of ‘refugees in orbit’⁵⁹. The term referred to individuals who were physically present in Europe but were being shunted from one state to another because no country would take responsibility for their claim.⁶⁰ The original logic was rooted in UNHCR Executive Committee Conclusion No. 15 (1979),⁶¹ a primary source which aimed to ensure that every refugee had access to at least one state that would process their claim and provide a ‘durable solution.’⁶² The goal was responsibility-allocation, intended to prevent individuals from being trapped in a cycle of displacement without legal status.⁶³

This cooperative ideal led to the 1990 Dublin Convention, the predecessor to the current Dublin Regulations. The Dublin system was designed as a mechanism based on a hierarchy of criteria: first, family reunification; second, the possession of a visa; and third, the first country of entry.⁶⁴ While the system was intended to streamline asylum, it became a source of systemic tension between EU member states because the ‘first country of entry’ rule placed a disproportionate administrative and financial burden on frontier states like Greece and Italy.⁶⁵ However, as Michelle Foster argues, modern STC policies have inverted the original logic of international cooperation; instead of ensuring a claim is heard somewhere, states now use the STC label to facilitate ‘responsibility shifting’, ensuring the claim is not heard within their own jurisdiction.⁶⁶ This transformation from a protection tool into a deflection tool represents a breach of the ‘object and purpose’ of the 1951 Convention.⁶⁷ The ‘object’ of the treaty is protection; when the STC concept is used to obstruct that protection, it is a bad-faith application of international law.⁶⁸

⁵⁴ *ibid* [5].

⁵⁵ *ibid* [57], [63].

⁵⁶ *ibid* [102]-[103].

⁵⁷ Guy S Goodwin-Gill, ‘Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection’ (2003) UNHCR Refworld 11.

⁵⁸ UNHCR, ‘Guidelines on International Protection No 14: Non-penalization of refugees on account of their irregular entry or presence and restrictions on their movements in accordance with Article 31 of the 1951 Convention relating to the Status of Refugees’ (2024) HCR/GIP/24/14, para 28.

⁵⁹ Pulvirenti (n 26).

⁶⁰ *ibid*.

⁶¹ UNHCR Conclusion No. 15 (n 8) para (h).

⁶² *Ibid*.

⁶³ *Ibid*

⁶⁴ European Parliament, ‘Report on the implementation of the Dublin III Regulation’ (2020) A9-0245/2020, Explanatory Statement s 2.1.2.

⁶⁵ European Parliament, ‘Report on the implementation of the Dublin III Regulation’ (2020) A9-0245/2020, Motion for a Resolution para 1; Explanatory Statement s 1.6.

⁶⁶ Foster (n 3) 64, 65, 67.

⁶⁷ VCLT (n 6) art 31(1).

⁶⁸ UNHCR Conclusion No. 15 (n 8) para (h).

The strain on mutual trust and due diligence

The STC model relies on the principle of ‘mutual trust’⁶⁹, an assumption that all participating states provide an equivalent level of human rights protection. This principle is the foundation of the EU’s Dublin system, where it is treated as immaterial which Member State processes a claim because all are presumed to respect fundamental rights.⁷⁰ This creates what Ciara Smyth describes as a ‘conclusive presumption of safety,’⁷¹ which mandates that the transferring state must assume the receiving country is safe, removing any requirement to verify the actual conditions before a transfer is made. However, this trust is increasingly strained when states prioritise administrative speed over the certainty of safety. This is evidenced when the European Court of Human Rights (ECtHR) intervened in *MSS v Belgium and Greece*,⁷² holding that Belgium violated Article 3 of the ECHR by returning an asylum seeker to Greece. The Court found that Belgium could not rely on ‘mutual trust’⁷³ as a blind legal fiction when there was objective evidence that the Greek asylum system was so deficient that it exposed the individual to inhuman and degrading treatment.

This case proved that states have a ‘positive obligation’⁷⁴ to conduct their own due diligence. They cannot simply point to safe lists or political assurances compiled by the executive; they must prove that the individual will have access to a fair procedure in the third country. As Sílvia Morgades-Gil notes, once a state prioritises the speed of removal over the certainty of safety, ‘the presumption of safety is weakened, and the entire system of shared responsibility ceases to be justified’.⁷⁵ The reliance on safeguards that exist only on paper, without investigating the murky reality of the third country’s capacity, constitutes a failure of the state’s international obligations.

Legislative weaponisation: sections 2 and 4 of the IMA 2023

To see this tension in practice, one must look at the specific wording of the Illegal Migration Act 2023. Section 2(1) of the Act places the Home Secretary under a mandatory duty:

“The Secretary of State must make arrangements for the removal of a person from the United Kingdom if... the person entered or arrived in the United Kingdom in breach of immigration control.”⁷⁶ This is coupled with Section 4(2), which mandates: “Any [asylum] claim... must be declared inadmissible”⁷⁷

By quoting these sections, it becomes clear that the Act does not merely allow for removal; it mandates it regardless of the individual’s protection needs. This duty to remove represents a radical departure from the 1951 Convention’s focus on individual assessment. It attempts to use domestic legislation to extinguish an international right. As Professor Jeff King has argued, by legislating that a country is safe (as seen in the Safety of Rwanda Act 2024), the government attempted to legislate a fact to bypass the factual findings of the Supreme Court.⁷⁸ This creates a

⁶⁹ *Opinion 2/13 (Accession of the Union to the ECHR)* [2014] ECR I-000, [191]

⁷⁰ Ciara Smyth, ‘The Dublin Regulation, mutual trust and fundamental rights: No exceptionality for children?’ (2023) 28(4-6) *European Law Journal* 242, 242.

⁷¹ *Ibid* 243.

⁷² *MSS v Belgium and Greece* (2011) 53 EHRR 2.

⁷³ *Opinion 2/13* (n 69) [191].

⁷⁴ Vladislava Stoyanova, ‘Framing Positive Obligations under the European Convention on Human Rights Law: Mediating between the Abstract and the Concrete’ (2023) 23(3) *Human Rights Law Review* ngad010.

⁷⁵ Sílvia Morgades-Gil, ‘The “Internal” Dimension of the Safe Country Concept: the Interpretation of the Safe Third Country Concept in the Dublin System by International and Internal Courts’ (2020) 22(1) *European Journal of Migration and Law* 82, 113.

⁷⁶ Illegal Migration Act 2023, s 2(1).

⁷⁷ *Ibid* s 4(2).

⁷⁸ Jeff King, ‘The Safety of Rwanda Bill and the Rule of Law’ (UK Constitutional Law Association, 22 January 2024) <https://ukconstitutionallaw.org/2024/01/22/jeff-king-the-safety-of-rwanda-bill-and-the-rule-of-law/> accessed 23 March 2026.

murky constitutional space where the executive uses its legislative majority to override evidence-based judicial oversight, fundamentally undermining the principle of good faith.

Constitutional tension: sovereignty versus international obligations

The UK's approach highlights a profound tension between Parliamentary Sovereignty and international law. While the UK Parliament has the domestic power to pass any law, including those that breach treaties, the state remains bound by those treaties on the international stage. Under Article 27 of the VCLT, a state may not invoke the provisions of its internal law as justification for its failure to perform a treaty.⁷⁹ When a national law is used to ignore objective evidence of systemic risk, it breaches the principle of good faith.

By prioritising the duty to remove over the duty to assess, the UK's inadmissibility architecture attempts to use domestic sovereignty to extinguish international rights. This use of 'ouster clauses'⁸⁰ to prevent judicial review of safety assurances represents a departure from the rule of law. Paul Linden-Retek suggests that by seeking to truncate the agency of the refugee through these mechanisms, states also inhibit the integrity of their own democratic judgment.⁸¹ Human rights, in this view, are not just about protecting the individual but about preserving the democratic polity's own vision of a responsible political life.

The 1951 Convention is built upon a mandatory foundation of good faith and international cooperation. The evolution of the STC concept from a protection-allocation tool into a tool of exclusion represents a hollowing out of these protections. When a state achieves through administrative misery, what it is prohibited from doing through direct deportation, it engages in 'constructive refoulement,'⁸² by denying rights, work, and status. By rendering individuals invisible through inadmissibility, the state creates a state of permanent 'limbo.'⁸³ This weaponisation of time and uncertainty is the ultimate evidence of a move from responsibility-sharing to a bad-faith model of responsibility-shifting. It demonstrates that the current UK model prioritises political optics over the practical reality of international protection obligations. Having defined these legal standards, Section Two will move to evaluate the practical effectiveness of this model by scrutinising the empirical records of previous STC arrangements, such as the Israel-Rwanda scheme.

The practical effectiveness of responsibility-shifting models

Following the examination of the international legal standards in Section One, the section below evaluates the practical effectiveness of the responsibility-shifting model. Using a dual framework, it examines whether Safe Third Country arrangements successfully resolve backlogs or deter future arrivals by scrutinising the empirical record of the Israel-Rwanda arrangement alongside the UK's current legislative framework. Central to this analysis is the 'zombie framework' created by the Illegal Migration Act 2023. The term 'zombie framework' is defined in this article as a state of statutory paralysis where the law mandates the host state to remove an individual and declare their claim inadmissible, yet the framework remains functionally 'dead' because there is no viable or lawful destination for that removal.⁸⁴ By evaluating the National Audit Office (NAO) data and the loss of the Dublin Regulation infrastructure, this section argues that the shift toward inadmissibility has not managed migration, but has instead institutionalised a state of legal limbo.

⁷⁹ VCLT (n 6) art 27.

⁸⁰ Safety of Rwanda (Asylum and Immigration) Act 2024, s 2(3)-(5).

⁸¹ Paul Linden-Retek, 'The Refugee's Right to Have Rights: Post-Nationalism and the Ethics of Asylum' (2023) 24(1) *German Law Journal* 1, 14.

⁸² Rodenhäuser and Menon (n 13).

⁸³ Anne-Sophie Inno and others, 'The psychology of the "limbo" of asylum seeking: A systematic review and meta-synthesis of the qualitative evidence' (2022) 14(4) *Applied Psychology: Around the World* 544.

⁸⁴ Doerr and Ricca-Richardson (n 27).

The deterrence fallacy and the reality of unauthorised routes

The primary political and legislative justification for the United Kingdom's shift toward an inadmissibility architecture is the perceived necessity of 'breaking the business model of people smugglers.'⁸⁵ The government's core hypothesis posits that by removing the prospect of a domestic asylum determination and replacing it with a mandatory removal to a third country, the pull factor of the UK is neutralised.⁸⁶ However, a rigorous analysis of empirical data and migration patterns suggests that this deterrent logic is fundamentally flawed. Deterrence theory in the context of international protection assumes a 'rational actor' model; an assumption that individuals fleeing persecution perform a calculated cost-benefit analysis of destination state laws before departing.⁸⁷

As research from the Refugee Law Initiative (RLI),⁸⁸ and the Oxford Migration Observatory,⁸⁹ demonstrates, this model fails to account for the desperation inherent in the refugee experience. The deterrence argument ignores the reality that 'push factors' such as active conflict in Sudan, systemic repression in Eritrea, or the collapse of state protection in Afghanistan.⁹⁰ These push factors consistently outweigh the perceived legislative risks of the destination state. Between 2022 and 2024, despite the passage of the Nationality and Borders Act and the Illegal Migration Act, the number of individuals arriving via unauthorised boat crossings reached record highs (28,526 in 2021 to 45,774 in 2022). This suggests that rather than acting as a deterrent, the threat of third-country removal merely encourages individuals to attempt the journey before new barriers are fully operational. By focusing on shifting responsibility to a third country rather than sharing it through safe, legal routes, the state inadvertently strengthens the smuggling networks it seeks to disrupt.⁹¹ When legal pathways are extinguished, the demand for irregular and dangerous transit increases, proving that inadmissibility is a failed administrative tool for border management.

The Israel-Rwanda precedent

To understand the practical consequences of responsibility-shifting, one must examine the Israel-Rwanda Voluntary Departure scheme (2013–2018). This serves as the primary empirical precursor to the UK's policy. The scheme was a secret bilateral arrangement where the Israeli government sought to remove thousands of Eritrean and Sudanese asylum seekers. Israeli authorities presented these individuals with a coercive choice: indefinite detention in the Saharonim prison or voluntary departure to Rwanda (or Uganda) accompanied by a \$3,500 grant.⁹²

The scheme was a humanitarian and administrative disaster. As the arrangement was 'informal,'⁹³ the Rwandan government consistently denied the existence of a binding agreement to provide

⁸⁵ Illegal Migration Act 2023 (Explanatory Notes) para 1.

⁸⁶ Home Office, 'Policy Paper: Illegal Migration Bill: Overarching Factsheet' (Updated 11 July 2023) <https://www.gov.uk/government/publications/illegal-migration-bill-overarching-documents/illegal-migration-bill-overarching-factsheet> accessed 4 April 2026.

⁸⁷ European Asylum Support Office, *The Push and Pull Factors of Asylum-Related Migration: A Literature Review* (EASO 2016) 11–13.

⁸⁸ David Cantor, 'Why the Safety of Rwanda Bill Should be Concerning for us All' (Refugee Law Initiative Blog, 17 January 2024) <https://rli.sas.ac.uk/blog/why-safety-rwanda-bill-should-be-concerning-us-all> accessed 4 April 2026.

⁸⁹ Peter William Walsh and Madeleine Sumption, 'UK policies to deter people from claiming asylum' (The Migration Observatory, 2024) <https://migrationobservatory.ox.ac.uk/resources/commentaries/uk-policies-to-deter-people-from-claiming-asylum/> accessed 10 April 2026.

⁹⁰ *ibid.*

⁹¹ Chatham House, 'What is Externalization and Why is it a Threat to Refugees?' (2020) <https://www.chathamhouse.org/2020/10/what-externalization-and-why-it-threat-refugees> accessed 10 April 2026.

⁹² Global Detention Project, 'The "Voluntary" Departure Scheme for African Asylum Seekers in Israel' (GDP Special Report, 2018) 12–15.

⁹³ Amnesty International UK, 'Israel: Secret deal over deporting African migrants reckless and illegal' (Amnesty.org.uk, 2 February 2018) <https://www.amnesty.org.uk/knowledge-hub/all-resources/israel-secret-deal-over-deporting-african-migrants-reckless-and-illegal/> accessed 4 April 2026.

protection. Consequently, upon arrival, refugees were provided with no legal status, no work permits, and none of the integration safeguards promised by Israeli officials.⁹⁴ Research by Dirk Kohnert revealed a revolving door effect: of the approximately 4,000 individuals sent to Rwanda, the vast majority left the country within days or weeks.⁹⁵ Lacking any durable solution or legal security, they used their Israeli grant money to pay smugglers for a secondary irregular journey through Libya and across the Mediterranean toward Europe.⁹⁶ This proves that transferring individuals to states with which they have no meaningful connection does not manage migration; it simply fuels secondary displacement. The Israeli experience serves as a direct rebuttal to the claim that STC arrangements provide a satisfactory solution, highlighting the reality that safety cannot be purchased through political assurances alone.

The UK's Zombie Framework: analysing the IMA 2023

The UK's current landscape is defined by what this article terms a 'zombie framework', a statutory engine for removal that lacks a functioning destination. This architecture is codified in the Illegal Migration Act 2023 (IMA). Section 2(1) of the IMA 2023 places the Home Secretary under a mandatory duty to 'make arrangements for the removal' of any person who arrived unlawfully after the Act's passing and failed to arrive 'directly... from a country in which their life and liberty were threatened.'⁹⁷

This is coupled with s.4(2),⁹⁸ which mandates that any asylum or human rights claim made by a person falling within s.2 'must be declared inadmissible.'⁹⁹ By examining the text of the legislation, it is clear that the Act attempts to automate exclusion. It removes the executive's discretion to assess the merits of a claim, replacing it with a duty to remove. However, following the 2024/2025 political shifts and the Supreme Court's ruling in *AAA*, the UK found itself with a statutory duty to remove but no safe third country willing to accept those arrivals.

As the Institute for Public Policy Research (IPPR) has warned, the UK has effectively created a 'perma-backlog' of individuals stuck in legal limbo.¹⁰⁰ Between January 2021 and December 2023, Home Office statistics reveal that over 77,000 individuals were identified for potential consideration on inadmissibility grounds.¹⁰¹ Yet as the Oxford Migration Observatory notes, only a negligible fraction have actually been removed,¹⁰² leaving the vast majority trapped in the 'zombie framework' of the British asylum system. This is because there are no LARGE functioning return agreements with European neighbours. While a small formal 'one-in, one-out' returns agreement with France was established in August 2025,¹⁰³ its practical impact has been negligible; as of February 2026, only 305 individuals had been returned under the scheme, representing less than 1 per cent of the total small boat arrivals for 2025.¹⁰⁴ And the Rwanda

⁹⁴ International Refugee Rights Initiative, "I Was Left with Nothing": "Voluntary" departures of asylum seekers from Israel to Rwanda and Uganda' (IRRI 2015) 3, 20-21.

⁹⁵ Dirk Kohnert, 'The impact of Israel's Sub-Saharan relations on African migrants in Israel' (2023) MPRA Paper No 118992, 22 <https://mpra.ub.uni-muenchen.de/118992/> accessed 4 April 2026.

⁹⁶ Global Detention Project, 'Rwanda: Covid-19 and Detention' (Global Detention Project, 25 May 2020) <https://www.globaldetentionproject.org/countries/africa/rwanda#covid-19-and-detention> accessed 23 March 2026.

⁹⁷ Illegal Migration Act 2023 (n 2) s 2(1).

⁹⁸ Ibid s.4(2).

⁹⁹ Ibid s.2(1).

¹⁰⁰ Marley Morris, 'The asylum backlog: Job done?' (IPPR, 28 February 2024) <https://www.ippr.org/articles/the-asylum-backlog-job-done> accessed 23 March 2026.

¹⁰¹ Home Office, 'How many people do we grant protection to?' (Statistical Release, 29 February 2024) <https://www.gov.uk/government/statistics/immigration-system-statistics-year-ending-december-2023/how-many-people-do-we-grant-protection-to> accessed 23 March 2026.

¹⁰² Peter Walsh, 'The UK's asylum backlog' (The Migration Observatory, 28 April 2025) <https://migrationobservatory.ox.ac.uk/resources/briefings/the-uks-asylum-backlog/> accessed 23 March 2026.

¹⁰³ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic on the Prevention of Dangerous Journeys (signed 30 July 2025, entered into force 6 August 2025) CP 1377.

¹⁰⁴ Melanie Gower, 'Unauthorised migration: UK-France border cooperation' (Research Briefing CBP-9681, House of Commons Library 2026) 4.

scheme was cancelled so these individuals are trapped in a legal vacuum. Hence, they cannot pursue their asylum claim in the UK because of the statutory bar in Section 4, which dictates that the Secretary of State ‘must declare an asylum claim or a human rights claim... inadmissible’¹⁰⁵ if a person meets the removal criteria, further specifying that such a claim ‘must not be considered’¹⁰⁶ by the government. Yet, they cannot be removed. This represents the ultimate failure of responsibility-shifting; the state has extinguished the refugee’s right to have rights while keeping them indefinitely present in its own territory.

Scrutinising the National Audit Office (NAO) data

The responsibility-shifting model is not only legally questionable but fiscally extravagant. A March 2024 National Audit Office (NAO) report provided the first detailed breakdown of the costs associated with the UK-Rwanda partnership. The report revealed that the government had already paid £220 million to the Economic Transformation and Integration Fund (ETIF) before a single flight had departed. Furthermore, the NAO estimated that sending the first 300 asylum seekers would cost the taxpayer over £500 million.¹⁰⁷ The breakdown of these costs is staggering: £370 million in fixed payments to Rwanda over five years, plus £151,000 per individual for integration and processing, and approximately £11,000 per person for flight costs.¹⁰⁸ When compared to the cost of domestic asylum processing estimated by the IPPR,¹⁰⁹ and the Home Office,¹¹⁰ to be between £26,000 and £79,000 per person. The STC model is revealed as a form of performative governance.¹¹¹ The government was willing to pay a hefty premium to avoid its protection duties. As Jacqueline Lewis argues, wealthy states are effectively ‘buying their way out of the Convention,’¹¹² yet the NAO figures prove that this is a poor investment. The policy could only be cost-effective if it produced a significant deterrent effect, yet as established in section 2.1, arrivals continued to rise despite the spending. It remains a matter of debate whether the STC model could have achieved its goal of deterrence, as the policy was never fully operationalised. It can be argued that the deterrent effect cannot be conclusively judged as a failure because the mechanism was never allowed to function as intended. However, while the UK’s specific model remains untested in practice, the failure of the Israel-Rwanda precursor provides a compelling basis to infer that the UK’s model would have struggled with similar structural ineffectiveness and secondary displacement. The STC model thus diverts limited resources away from the domestic asylum infrastructure and into a high-cost, low-yield mechanism of exclusion.

The efficiency gap: Dublin regulation versus post-Brexit returns

A critical measure of the UK’s current failure is the loss of the Dublin Regulation infrastructure. Prior to Brexit, the UK was a party to the Dublin system, which was a responsibility-allocation mechanism based on a hierarchy of criteria: first, family reunification; second, the possession of a visa; and third, the ‘first country of entry.’¹¹³ While the Dublin system was criticised for placing an unfair burden on border states like Greece and Italy, it was built on a foundation of reciprocal readmission

¹⁰⁵ Illegal Migration Act 2023 (n 2) s 5(2).

¹⁰⁶ *ibid* s 5(3)(a).

¹⁰⁷ National Audit Office, *Investigation into the costs of the UK–Rwanda Partnership* (HC 2023-24, 577) 7–9.

¹⁰⁸ *Ibid* 6–7.

¹⁰⁹ Marley Morris, ‘Costing the Rwanda plan’ (IPPR, 18 March 2024) <https://www.ippr.org/articles/costing-the-rwanda-plan> accessed 23 March 2026.

¹¹⁰ Home Office, ‘Illegal Migration Bill: Economic Impact Assessment’ (26 June 2023) 24–26.

¹¹¹ Michael Collyer and Uttara Shahani, ‘The Rwanda–UK Migration and Economic Development Partnership as a colonial power play’ (2023) 12(8) *Social Sciences* 443.

¹¹² Jacqueline Lewis, ‘Buying Your Way Out of the Convention: Examining Three Decades of Safe Third Country Agreements in Practice’ (2021) 35 *Georgetown Immigration Law Journal* 881.

¹¹³ Melanie Gower and CJ McKinney, ‘The UK’s exit from the EU and the Dublin Regulation’ (House of Commons Library Research Briefing 9031, 16 October 2020) 7.

Since leaving the EU, the UK has lost the legal power to return asylum seekers to the member states they transited through. The ‘inadmissibility’ rules in the Nationality and Borders Act 2022 and the IMA 2023 are an attempt to replicate Dublin outcomes without the Dublin infrastructure. However, without any big formal readmission treaties, these notices of ‘inadmissibility’ are functionally toothless. Data from the Oxford Migration Observatory shows that between 2021 and 2024, only a tiny fraction (less than 1 per cent) of those served with inadmissibility notices were actually returned to a third country.¹¹⁴ This administrative dead end is the direct result of prioritising the appearance of border sovereignty over the practical necessity of international cooperation. By declaring claims inadmissible without a removal destination, the UK has not managed its backlog; it has merely frozen it in a state of permanent uncertainty.

The humanitarian toll: mental health and constructive refoulement

The most profound impact of the responsibility-shifting model is the humanitarian toll on the individuals caught in the ‘limbo’ of inadmissibility. By rendering individuals legally ‘invisible,’ the state inflicts a form of administrative trauma that destroys the possibility of future integration. Recent studies by King’s College London¹¹⁵ and the Refugee Council highlight that asylum seekers trapped in legal uncertainty are five times more likely to suffer from severe mental health conditions, including PTSD and depression.¹¹⁶

The condition of ‘living in limbo,’¹¹⁷ denied the right to work, restricted to contingency accommodation like hotels, and stripped of the security of a determination functions as a form of constructive refoulement.¹¹⁸ As Tilman Rodenhäuser and Padmaja Menon argue, such conditions create a ‘coercive environment’¹¹⁹ through material destitution, effectively forcing individuals to abandon their claims and return to danger.¹²⁰ The state creates domestic conditions so untenable that they effectively compel the individual to self-deport back to a country of danger. This weaponisation of time and uncertainty is the ultimate evidence of a move from responsibility-sharing to a bad-faith model of responsibility-shifting. The humanitarian cost is not merely a byproduct of the policy; it is the intended mechanism of deterrence, representing a fundamental breach of the 1951 Convention’s spirit.

The empirical evidence, from the ‘revolving door’ of the Israel-Rwanda scheme to the zombie framework of the UK’s 2023 Illegal Migration Act, demonstrates that these policies fail to stop arrivals or resolve backlogs. Instead, they create a cycle of secondary displacement, legal invisibility, and administrative stagnation, supported by staggering financial costs and a profound humanitarian toll. The ‘capacity fallacy’ identified in the *AAA* judgment exposes the core flaw; safety and responsibility cannot be legislated or bought; they must be practiced through cooperation. Having established that these frameworks are both legally questionable and practically ineffective, the next section will move to contextualise the UK’s trajectory within a broader international trend of externalisation, examining how other states attempt to bypass their human rights obligations through similar mechanisms of categorical exclusion.

Externalisation and the global erosion of individualised assessment

The UK’s STC architecture does not exist in isolation; rather, it is a prominent symptom of a global trend toward ‘externalisation’. This section contextualises the British experience within a

¹¹⁴ Walsh, ‘The UK’s asylum backlog’ (n 102).

¹¹⁵ Hanna Kienzler and others, ‘The importance of meaningful integration for the mental health of asylum seekers and refugees’ (King’s College London, 20 June 2023) <https://www.kcl.ac.uk/the-importance-of-meaningful-integration-for-the-mental-health-of-asylum-seekers-and-refugees> accessed 23 March 2026.

¹¹⁶ Refugee Council, *Living in Limbo: A decade of delays in the UK asylum system* (July 2021) 12; see also Refugee Council, ‘The Truth About Asylum’ (July 2022).

¹¹⁷ Refugee Council, *Living in Limbo* (n 116) <https://www.refugeecouncil.org.uk/documents/221/Living-in-Limbo-A-decade-of-delays-in-the-UK-Asylum-system-July-2021.pdf> accessed 23 March 2026.

¹¹⁸ Rodenhäuser and Menon (n 13).

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

broad international movement to shift border controls and asylum processing beyond the territorial frontiers of the state. By examining the Italy-Albania Protocol, the EU's New Pact on Migration and Asylum, and the United States' safe third country detours, this part demonstrates that the erosion of individual assessment in favour of categorical exclusion is a parallel effort by Western states to circumvent the obligations that arise from an asylum seeker's presence. Through this comparative analysis, it becomes evident that the UK's zombie framework is not an isolated policy failure, but part of a wider systemic shift that prioritises transactional containment over the spirit of international responsibility-sharing.

The concept of externalisation: shifting jurisdictional responsibility

Externalisation refers to a suite of legal and administrative measures designed to shift border controls and asylum processing outside the state's domestic jurisdiction.¹²¹ By moving the physical site of migration management beyond its territorial limits, the state seeks to pre-empt the legal obligations that are usually triggered upon an asylum seeker's arrival. Bill Frelick, Ian Kysel, and Jennifer Podkul define this as 'extraterritorial state actions' intended to prevent migrants from entering a state's legal jurisdiction or rendering them 'legally inadmissible' without an individual consideration of their claims.¹²²

The primary objective of externalisation is to bypass the territoriality principle: the established legal concept that a state's obligations under the 1951 Convention are fully engaged once a person is within its territory or at its borders.¹²³ By establishing processing sites in third countries, the host state creates a buffer zone between the refugee and its own domestic legal infrastructure. As Moreno-Lax identifies, the evolution from 'contactless control'¹²⁴, such as visa restrictions, to coercive removal through third-country processing sites creates a deliberate 'buffer zone'¹²⁵ between the refugee and domestic legal infrastructure. This shift is not merely a policy change but a fundamental challenge to the principle of 'pacta sunt servanda',¹²⁶ as it represents a strategic attempt to circumvent the 'object and purpose' of the 1951 Convention.¹²⁷

The Italy-Albania protocol: extraterritorial administrative hubs

The 2023 Italy-Albania Protocol represents a technically sophisticated evolution of the externalisation model. Unlike the UK's attempt under the IMA 2023 to transfer protection responsibility entirely to a third state, the Italian model involves Italy maintaining jurisdictional responsibility while physically relocating the asylum procedure to Albanian soil. As noted by legal analysts at EU Law Analysis (2025), the selection of migrants for this procedure is conducted via a 'hub vessel,' with processing occurring at centres in Shengjin and Gjader.¹²⁸ This creates a jurisdictional arrangement where, as Gammeltoft-Hansen identifies, the host state's sovereign prerogative to control entry may be asserted 'without the constraints ordinarily posed by refugee and human rights law.'¹²⁹

By establishing Italian-run centres in Albania, the state attempts to decouple its duty to process claims from the territorial presence of the asylum seeker. This mirrors the logic of the UK's framework by prioritising administrative convenience over individual assessment. As argued

¹²¹ Frelick, Kysel and Podkul (n 28) 193.

¹²² *ibid.*

¹²³ UNHCR Advisory Opinion (n 36) para 9.

¹²⁴ Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control-On Public Powers, S.S. and Others v Italy' (2020) 21(3) *German Law Journal* 385.

¹²⁵ Thomas Gammeltoft-Hansen, 'Access to Asylum: International Refugee Law and the Offshoring and Outsourcing of Migration Control' (PhD thesis, Aarhus University 2009) 163.

¹²⁶ VCLT (n 6) art 26.

¹²⁷ Refugee Convention (n 3) Preamble, recitals 2 and 4.

¹²⁸ 'The Italy-Albania protocol before the Court of Justice of the European Union – hearing of the CJEU' (EU Law Analysis, 19 March 2025) <http://eulawanalysis.blogspot.com/2025/03/the-italy-albania-protocol-before-court.html> accessed 5 April 2026.

¹²⁹ Gammeltoft-Hansen (n 125) 177.

before the CJEU in 2025, such arrangements trigger an ‘accelerated procedure’ that may bear critical consequences for the right to an effective remedy.¹³⁰ In practice, this model functions as a parallel, yet distinct version of the UK model, seeking to fulfil the letter of the law through an extraterritorial detour while avoiding the long-term settlement obligations that usually follow arrival on sovereign soil.

According to scholars like Sergio Carrera and Giuseppe Campesi, the Italy-Albania deal is a ‘worst practice.’¹³¹ Their main academic argument is the idea of ‘portable justice.’ They argue that when a country like Italy manages a migration centre in another country like Albania, its legal responsibilities do not disappear at the border. Instead, those responsibilities are ‘portable’, they travel with the state’s power. Because Italian officials have ‘effective control’ over the people in the centres, they are still legally ‘on the hook’ for any human rights violations. They call this a ‘nationalistic and unilateral arrangement’ because it ignores shared European standards in favour of a solo political move.¹³²

Alice Lacchei and Chiara Scissa focus on the human rights cost and the logic of the centres. They argue that the Protocol leads to ‘automatic detention.’ In a normal system, detention is supposed to be a last resort, but in Albania, it is the only option. They also argue that the policy is more about propaganda than real management. They point out that the centres can only hold 3,000 people, which is a tiny fraction (approximately 2 per cent) of the people arriving in Italy. Because it costs €500 per day to hold someone in Albania compared to €35 in Italy, they view it as an ‘unreasonable expense’ designed to look tough rather than to work effectively.¹³³

The EU new pact on migration and asylum: a regulated buffer zone

While the UK has moved toward a system of absolute statutory paralysis, the European Union’s New Pact on Migration and Asylum (specifically the Asylum Procedure Regulation 2024)¹³⁴ represents a different, more regulated form of externalisation. This section argues that while the EU Pact utilises similar tools of ‘non-entry’¹³⁵ to those seen in the UK, it operates under a more rigid judicial framework that, at least in theory, prevents the creation of a permanent legal zombie framework.

A central pillar of the New Pact is the Mandatory Border Procedure, which relies on the ‘fiction of non-entry.’¹³⁶ Under this rule, individuals arriving at the EU’s external borders are physically present on the territory but are legally considered to have not yet entered the Member State. As Thomas Gammeltoft-Hansen observes, such intermediate spaces are attractive to states because they allow for the exercise of sovereign power ‘without the constraints ordinarily posed by refugee and human rights law.’¹³⁷ In the EU context, this fiction is used to conduct rapid admissibility screenings, specifically to see if a person can be deflected to a safe third country before they can access the full procedural rights of a ‘legally entered’ applicant.¹³⁸

¹³⁰ EU Law Analysis (n 128).

¹³¹ Sergio Carrera, Giuseppe Campesi and Davide Colombi, ‘The 2023 Italy-Albania Protocol on Extraterritorial Migration Management: A Worst Practice in Migration and Asylum Policies’ (CEPS Paper on Liberty and Security in Europe, 2023) 2.

¹³² Ibid.

¹³³ Alice Lacchei and Chiara Scissa, ‘The Italy-Albania Protocol: Curbing Migration At All Costs’ (Refugee Law Initiative Blog, 19 November 2024) <https://rli.blogs.sas.ac.uk/2024/11/19/the-italy-albania-protocol-curbing-migration-at-all-costs/> accessed 6 April 2026.

¹³⁴ Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU [2024] OJ L 2024/1348.

¹³⁵ Anja Radjenovic, ‘Legal fiction of non-entry in EU asylum policy’ (EPRS Briefing, European Parliament 2024) [https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/760347/EPRS_BRI\(2024\)760347_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/760347/EPRS_BRI(2024)760347_EN.pdf) accessed 5 April 2026.

¹³⁶ Ibid.

¹³⁷ Gammeltoft-Hansen (n 125) 177.

¹³⁸ Radjenovic (n 135) 2.

However, the EU model differs from the UK's zombie framework in one critical respect: it includes a mandatory return to the regular procedure if removal fails. In the UK, the IMA 2023 creates a state of permanent statutory paralysis where a claim is inadmissible regardless of whether the person can actually be removed. By contrast, the CJEU has established that a Member State cannot reject an application as inadmissible under the STC rule if it is already clear that the third country in question will not actually (re)admit the person.¹³⁹

Consequently, the EU Pact functions not as a permanent dead-end, but as a mechanism to ensure applicants are eventually 'channelled into the regular procedure'¹⁴⁰ if externalisation fails. Under Article 59(9), where a third country does not admit or readmit an individual, the applicant 'shall have access to the procedure'¹⁴¹ within the Member State, effectively ending the 'non-entry'¹⁴² fiction and requiring an assessment on the merits. This represents a parallel yet distinct evolution from the British experience: while the UK model risks creating a growing population of legal ghosts, the EU model attempts to use externalisation as a front-end filter, while maintaining a safety valve that triggers domestic responsibility if the external detour fails.

Despite these judicial safeguards, the Pact still moves toward what critics call 'categorical exclusion.'¹⁴³ By introducing accelerated border procedures for anyone originating from a country with a statistical asylum success rate of 20 per cent or lower, the Union is moving away from purely individualised assessment. The European Council on Refugees and Exiles (ECRE) notes that this statistical 'blunt tool'¹⁴⁴ risks ignoring personal vulnerabilities in favour of administrative speed. While the EU system avoids the total paralysis of the UK's zombie framework, it nonetheless replicates the same underlying shift: prioritising the categorical deflection of arrivals over the spirit of individualised protection intended by the 1951 Convention.

United States detours: the expansion of safe third country barriers

The global trend toward externalisation is further demonstrated by the United States' reliance on bilateral cooperation to prevent asylum seekers from accessing its domestic legal infrastructure. A primary example of this is the Safe Third Country Agreement (STCA) between the United States and Canada. In March 2023, this agreement was expanded to apply not only at official ports of entry but across the entire 5,500-mile land border, including internal waterways. This expansion represents a move toward what legal scholars identify as 'remote border control,'¹⁴⁵ a system designed to select or deflect migrants before they can reach a space where they might trigger full constitutional or statutory protections.

The logic of the STCA mirrors the UK's STC architecture by prioritising categorical exclusion over individualised assessment. Under this framework, the US and Canada essentially treat one another as an 'appropriate partner with which the responsibility for considering refugee claims can be shared.'¹⁴⁶ However, this assumption of safety is often applied as a blanket rule that ignores the specific risks an individual might face. Amnesty International argues that the US system frequently fails victims of gender-based persecution and subjects returnees to detention conditions that violate international standards, including 'staggering rates of sexual assault' and

¹³⁹ Commission, 'Review of the safe third country concept' (Staff Working Document) SWD (2025) 600 final.

¹⁴⁰ Regulation (EU) 2024/1348 (n 134) recital 58.

¹⁴¹ *ibid* art 59(9)

¹⁴² Radjenovic (n 135).

¹⁴³ 'Relying on a Fiction: New Amendments to the Asylum Procedures Regulation' (ECRE Policy Note 29, 2020) 2 <https://ecre.org/wp-content/uploads/2020/12/Policy-Note-29.pdf> accessed 6 April 2026.

¹⁴⁴ *ibid*.

¹⁴⁵ David Scott FitzGerald, 'Remote Control of Asylum Seekers' (Public Seminar, 17 December 2019) <https://publicseminar.org/essays/remote-control-of-asylum-seekers/> accessed 6 April 2026.

¹⁴⁶ Supreme Court of Canada, 'Case in Brief: Canadian Council for Refugees v Canada (Citizenship and Immigration)' (16 June 2023) <https://www.scc-csc.ca/judgments-jugements/cb/2023/39749/> accessed 6 April 2026.

solitary confinement.¹⁴⁷ Furthermore, Amala Karri notes that procedural requirements like the US ‘one-year’ bar effectively disqualify many claimants before they can even present their case.¹⁴⁸ Consequently, the STCA prioritises transactional border control over the individualised assessment required to ensure genuine safety.

In its 2023 ruling on the agreement in *Canadian Council for Refugees v Canada*,¹⁴⁹ the Supreme Court of Canada acknowledged that while the agreement was technically valid, it created significant risks for those turned back. The Court specifically highlighted the ‘risk of detention upon being returned’¹⁵⁰ to the United States, where asylum seekers often face conditions that may threaten their liberty and security. By expanding this agreement, the US has effectively moved the territorial trigger of the 1951 Convention away from the physical act of crossing the border and into a transactional arrangement with a neighbouring state. This North American detour confirms that the UK’s commitment to transactional containment is part of a convergent trend among Western states. As Gammeltoft-Hansen (2009) argues, states find it attractive to shift migration control into these cooperative frameworks because it allows them to assert their sovereign power while seeking to ‘shift or deconstruct legal responsibilities otherwise owed by reference to law itself.’¹⁵¹ Just as the UK uses the STC model to render claims inadmissible, the US uses the STCA to ensure that the responsibility for a refugee’s protection is shifted before a claim is ever formally lodged in its system. While the US does not currently face the same zombie paralysis as the UK (because Canada, unlike Rwanda, is a willing and functional recipient), the underlying motive is identical: to create a geographical and legal buffer that prevents the asylum seeker from ever encountering the domestic legal infrastructure of the host state.

This demonstrates that the UK’s STC architecture is not an isolated policy experiment, but a prominent symptom of a global shift toward externalised exclusion. Whether through Italy’s extraterritorial hubs in Albania, the EU’s ‘fiction of non-entry,’¹⁵² or the United States’ expanded safe third country barriers, the objective remains consistent across jurisdictions: to decouple the ‘duty to process’¹⁵³ from the ‘territorial presence’¹⁵⁴ of the asylum seeker. These frameworks prioritise administrative efficiency and categorical rejection over the humanitarian spirit of individualised assessment intended by the 1951 Convention. As Thomas Gammeltoft-Hansen concludes, these strategies represent a form of ‘politics through law,’¹⁵⁵ where states strategically use the structures of international law to avoid the responsibilities that law imposes. By replacing individual human stories with statistical or geographical categories, Western states have created a parallel system of exclusion that risks rendering the most vulnerable people legally invisible at the very moment they seek protection.

Conclusions

This article sought to evaluate the transformative shift within the United Kingdom’s asylum policy, specifically moving from a traditional understanding of international responsibility-sharing toward a modern architecture of responsibility-shifting. By examining the legislative frameworks of the Nationality and Borders Act 2022 and the Illegal Migration Act 2023, this study has demonstrated that the UK’s safe third country model does not merely refine existing border controls but fundamentally reconfigures the state’s relationship with the 1951 Refugee

¹⁴⁷ Amnesty International, ‘Canada: Human Rights in Peril’ (Submission to the 44th Session of the UPR, November 2023) 8.

¹⁴⁸ Amala Karri, ‘The U.S.-Canada Safe Third Country Agreement & Gender-Based Discrimination’ (Refugee Law Initiative Blog, 8 November 2023) <https://rli.blogs.sas.ac.uk/2023/11/08/the-u-s-canada-safe-third-country-agreement-gender-based-discrimination/> accessed 4 April 2026.

¹⁴⁹ *Canadian Council for Refugees v Canada (Citizenship and Immigration)* 2023 SCC 17.

¹⁵⁰ *Ibid* [101].

¹⁵¹ Gammeltoft-Hansen (n 125) 317.

¹⁵² Radjenovic (n 135).

¹⁵³ Gammeltoft-Hansen (n 125) 12, 177.

¹⁵⁴ *Ibid* 12.

¹⁵⁵ *Ibid*.

Convention.¹⁵⁶ The central argument throughout this work has been that by prioritising administrative inadmissibility and categorical exclusion, the UK has created a system where the asylum seeker is rendered legally invisible, effectively hollowing out the substantive protections intended by international law.

The normative findings of this research suggest a profound erosion of the humanitarian spirit that originally informed the 1951 Convention,¹⁵⁷ While the government often justifies these measures as a necessary exercise of state sovereignty to discourage irregular entry, a close analysis of Article 31¹⁵⁸ and Article 33¹⁵⁹ reveals a significant legal disconnect. The Convention is built upon a foundation of positive duties and merit-based assessments¹⁶⁰, yet the current system replaces it with a two-step block designed to shut the door on asylum seekers. It does this by passing laws¹⁶¹ that force the courts to pretend a country is safe even when it isn't, and by setting rules that automatically reject a person's claim before it can even be looked at.¹⁶² This process allows the state to legislate a factual conclusion of safety, most notably seen in the Rwanda policy,¹⁶³ without requiring a demonstrated, individualised reality of protection. By decoupling the legal duty to process from the physical act of arrival, the UK is engaging in what has been termed 'constructive refoulement',¹⁶⁴ where the procedural act of shifting a claimant becomes more important than the validity of their protection claim.

Building upon these normative concerns, the empirical evidence gathered in this study highlights the recurring failure of the deterrence-based logic that underpins the STC architecture. The examination of the Israel-Rwanda precursor provided a stark warning of the revolving door effect,¹⁶⁵ where externalisation does not stop migration but instead fuels secondary displacement and undocumented vulnerability.¹⁶⁶ In the UK context, this has manifested as a zombie framework, a state of legislative paralysis where the duty to remove is mandatory, but the ability to do so is legally and practically impossible. The result is not a more efficient system, but a state of 'limbo' for thousands of individuals who are trapped in a legal vacuum, denied both the right to a claim and the certainty of a destination.¹⁶⁷ This reality directly contradicts the government's stated aim of 'breaking the business model'¹⁶⁸ of smugglers, as it fails to account for the powerful global push factors that consistently outweigh the perceived risks of restrictive domestic legislation.¹⁶⁹

In a broader global context, the UK's trajectory is reflective of a wider trend toward externalised exclusion. The comparative analysis of Italy's extraterritorial hubs in Albania and the US-Canada Safe Third Country Agreement reveals a shared objective among Western states to move the 'territorial trigger',¹⁷⁰ of protection duties. Scholars such as Thomas Gammeltoft-Hansen correctly identify this as a strategic effort to ensure that a state's legal responsibilities are never

¹⁵⁶ Refugee Convention (n 3).

¹⁵⁷ Ibid.

¹⁵⁸ Ibid art 31.

¹⁵⁹ Ibid, art 33.

¹⁶⁰ Ibid.

¹⁶¹ Safety of Rwanda (Asylum and Immigration) Act 2024, s 2.

¹⁶² Nationality and Borders Act 2022, s 80B, Illegal Migration Act 2023, s.4.

¹⁶³ Safety of Rwanda Act 2024 (n 161) s 2.

¹⁶⁴ Rodenhäuser and Menon (n 13).

¹⁶⁵ Kohnert (n 95).

¹⁶⁶ Global Detention Project (n 96).

¹⁶⁷ Refugee Council, *Living in Limbo* (n 116).

¹⁶⁸ IMA 2023 (n 2) (Explanatory Notes) para 1.

¹⁶⁹ Peter William Walsh and Madeleine Sumption, 'UK policies to deter people from claiming asylum' (The Migration Observatory, 2024) <https://migrationobservatory.ox.ac.uk/resources/commentaries/uk-policies-to-deter-people-from-claiming-asylum/> accessed 10 April 2026.

¹⁷⁰ Dana Schmalz, 'The Role of Proximity for States' Obligations toward Persons Seeking Protection' in Seyla Benhabib and Ayelet Shachar (eds), *Lawless Zones, Rightless Subjects: Migration, Asylum, and Shifting Borders* (CUP 2025) 75.

officially activated by physical arrival.¹⁷¹ However, as the critiques from Amnesty International and academic observers like Amala Karri show, these transactional arrangements often mask deep systemic risks. Whether through the ‘procedural traps’ of the US one-year bar¹⁷² or the ‘staggering rates of sexual assault’ documented in American detention centres,¹⁷³ the assumption of safety is frequently a political fiction that ignores the specific, individualised dangers faced by vulnerable groups, particularly survivors of gender-based persecution.

Ultimately, the UK’s inadmissibility architecture represents a definitive shift toward the evasion of international duties. The answer to the primary research question is that these frameworks constitute responsibility-shifting rather than a legitimate exercise of sharing. By replacing individual human stories with geographical categories and transactional detours, the state has prioritised the closure of its borders over the survival of the protection regime. To continue on this path is to institutionalise the crisis of ‘refugees in orbit’¹⁷⁴ and to dismantle the very legal infrastructure that was built to ensure no human being is ever again rendered invisible in their search for sanctuary. The integrity of the international asylum system depends not on how effectively states can shift their burdens, but on how faithfully they adhere to the principle of ‘pacta sunt servanda,’¹⁷⁵ and the shared responsibility of providing genuine refuge.

¹⁷¹ Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (CUP 2011).

¹⁷² Karri (n 148).

¹⁷³ Amnesty International, ‘Human Rights in Peril’ (n 147).

¹⁷⁴ Pulvirenti (n 26).

¹⁷⁵ VCLT (n 6) art 26.

TECHNOLOGY LAW

Technological innovation and the transformation of dispute resolution paradigms from alternative dispute resolution to online dispute resolution

Francis Ekene Ikebundu *

Introduction

Dispute resolution refers to the various methods through which conflicts and disagreements are settled. Traditionally, this has been achieved through litigation, which involves a formal judicial process before a court of law. However, over the past few decades, there has been an increasing shift towards Alternative Dispute Resolution (ADR) mechanisms, which include arbitration, mediation, and conciliation. ADR offered a flexible and cost-effective alternative to court proceedings. In recent years, a newer paradigm has emerged known as Online Dispute Resolution (ODR). ODR leverages digital platforms and technology to resolve disputes, often without requiring physical presence in the courtroom. It encompasses a wide array of tools such as video conferencing, e-filing systems, AI-based negotiation systems, and digital documentation to facilitate mediation, arbitration, and negotiation over the internet. The shift to ODR was accelerated by the demands of the digital economy and further intensified by the inadequacies of the traditional method of dispute resolution such as litigation, particularly its lengthy processes and high costs. Apalando noted that “many reasons are responsible for the adoption of online dispute resolution (ODR) but chief among them is the ease with which disputes can be resolved between parties who may be separated in time and space.”¹ Hall calls this transition to better avenues and tools, including technology for addressing disputes ‘a turn’ in our thinking about conflict resolution.²

The emergence of ODR has attracted considerable attention from scholars around the world. Yet, the existing literature on the state of ODR in Nigeria is very scarce. A contribution by Ayinla and Oniyide³ focuses on the regulation of ODR within Nigeria’s legal framework and explores the current absence of specific legislation regulating ODR in Nigeria. Adeleke and Saludeen discuss the role of ODR as an important mechanism during the COVID-19 pandemic in Nigeria and its potential to enhance the overall arbitration landscape in Nigeria.⁴ A more recent study by Adelodun and Nurudeen discusses how ODR has transformed access to justice in Nigeria in the aftermath of the COVID-19 pandemic and discusses the evolving legal and institutional landscape needed to support the integration of ODR into the Nigerian justice system.⁵ These studies, though valuable, focus on the absence of explicit legislation and regulatory frameworks tailored specifically for ODR in Nigeria and overlook the institutional and policy developments in ODR, as an alternative and complement to traditional dispute resolution mechanisms, across different jurisdictions. This oversight defines the critical research gap this study addresses.

This article argues that ODR represents the next frontier in the evolution of dispute resolution—an inevitable response to the demands of a digital economy. By conducting a comparative

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¹ Ishaq Obashola Apalando, *Legal Tech in Nigeria: Applications and Implications* (An Independent Report, August 2019) 20–21.

² Stuart Hall, ‘Stuart Hall and Sarat Maharaj: Modernity and Difference’ in S Campbell and G Tawadros (eds), *IV Annotations 6* (Institute of International Visual Arts, London 2001) 9.

³ LA Ayinla and T Oniyide, ‘Juridical Perspective on the Regulation of Online Dispute Resolution in Nigeria’ (2020) 7(2) *Islamic University Multidisciplinary Journal* 71–79.

⁴ Lateef A Adeleke and Suliati O Saludeen, ‘Online Dispute Resolution: Another Voice In’ (2023) 13(1) *University of Ibadan Law Journal* 255–282.

⁵ Yunus Adelodun and Mubarak Nurudeen, ‘Navigating the New Normal: Exploring the Impact of Online Dispute Resolution on Access to Justice in Post-COVID Nigeria’ (2024) 20(2) *Ohio State Technology Law Journal* 387–404.

analysis of ODR models in developed and developing jurisdictions, this study situates Nigeria's experience within the global discourse on digital justice transformation, identifying best practices and contextual challenges. The research adopts a doctrinal and methodology, examining legal frameworks, judicial reforms, and international policy instruments governing ODR. This study contributes to the ongoing discourse on Nigeria's judicial reform, particularly in light of the accelerating digital transformation in justice delivery precipitated by the COVID-19 pandemic.

A technological transition in dispute resolution

Nowadays, litigation which has hitherto been the traditional and principal method of resolving disputes is now being complemented by other methods of dispute resolution. Over time, litigation has become more time consuming, expensive, and an increase in the number of cases in courts have led to congestion and delay in the resolution of disputes. All these together with increasing globalisation have led to the development of more flexible means of resolving disputes which provide alternatives to court-based litigation: Alternative Dispute Resolution (ADR) and Online Dispute Resolution (ODR).

ADR refers to a set of practices, techniques, methods, or mechanisms utilised to resolve disputes without resort to costly adversarial litigation. According to Mnookin,⁶ It encompasses mediation, arbitration, and a variety of 'hybrid' processes by which a neutral facilitates the resolution of legal disputes without formal adjudication. Generally, ADR are methods and procedures used to resolve disputes either as alternatives to the traditional dispute resolution mechanism of the court or in some cases, as supplementary to such mechanism.⁷ In *Hasley v Milton Keynes General NHS Trust*,⁸ ADR was defined as a collective description of the methods of resolving disputes other than the normal trial process. These methods include negotiation, conciliation, mediation, arbitration, neutral evaluation, mini-trial, expert determination, and mediation-arbitration, otherwise known as Med-Arb. Each of these methods has its own specific procedural and enforcement regulations. In Nigeria, ADR enjoys constitutional backing as a means of settlement of disputes. The Constitution of the Federal Republic of Nigeria 1999 (as amended)⁹ provides for the settlement of international disputes by arbitration, mediation, conciliation, negotiation, and adjudication. The key statute governing ADR in Nigeria is the Arbitration and Mediation Act 2023 which repealed the Arbitration and Conciliation Act.¹⁰ This Act provides legal effect to arbitration agreements, sets rules for arbitration procedures, and ensures enforceability of arbitral awards. There is also the National Policy on Arbitration and Alternative Dispute Resolution 2024, which promotes the growth and practice of mediation, conciliation, and other ADR methods as viable alternatives to litigation in Nigeria. Furthermore, the Court Civil Procedure Rules in some jurisdictions now require parties to resort to some type of ADR, usually in the form of mediation, before permitting the parties' cases to be tried. The High Court (Civil Procedure) Rules of various Nigerian states also provide for reference of cases to ADR.¹¹ More so, the Rules of Professional Conduct for Legal Practitioners¹² mandates lawyers to attempt ADR before bringing any matter before the court for hearing. It suffices to mention that dispute resolution outside of courts is not new; traditional societies world-over have long used non-judicial, indigenous methods to resolve conflicts. What is new is the extensive promotion and proliferation of ADR models, wider use of

⁶ Robert H Mnookin, 'Alternative Dispute Resolution' (1998) *Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series*, Paper 232, 1.

⁷ OJ Orojo and AM Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (Mbeyi & Associates (Nigeria) Limited 1999) 4.

⁸ (2004) EWCA Civ 576 (CA).

⁹ Constitution of the Federal Republic of Nigeria 1999 (as amended) s 19(d).

¹⁰ Cap A18, Laws of the Federation of Nigeria 2004.

¹¹ See High Court of the Federal Capital Territory (Civil Procedure) Rules 2018, Order 19; Lagos State High Court (Civil Procedure) Rules 2019, Order 28; and Imo State High Court (Civil Procedure) Rules 2017, Order 3 Rule 12; Order 25 Rule 6.

¹² Rules of Professional Conduct for Legal Practitioners 2023, r 15(3) (d).

court-connected ADR, and the increasing use of ADR as a tool to realise goals broader than the settlement of specific disputes.¹³

Although ADR is popular and has typically been the preferred alternative to litigation, ODR is a fast-emerging dispute resolution option. A virtual world where people interact and transact without meeting physically has been made possible by the internet and this led to the emergence of ODR. ODR has been explained as the link between the traditional ADR mechanisms such as arbitration, mediation, negotiation etc. and technology.¹⁴ The Organisation for Economic Co-operation and Development (OECD) Online Dispute Resolution Framework defines ODR as the use of digital technologies and data to support dispute settlement within and beyond the court system.¹⁵ In other words, ODR refers to all methods of resolving disputes using internet technologies without the need for the parties to be present for in-person court proceedings, effectively eliminating geographical and spatial barriers. To Arun, ODR involves the use of information technology to facilitate the application of traditional alternative dispute resolution mechanisms in cyberspace.¹⁶ In other words, it is ADR in an online format. However, the goal of ODR is not to create new ADR methods, but to transfer traditional approaches such as negotiation, mediation, and arbitration to a virtual environment.¹⁷ Thus, it is a modernised form of ADR and, as Mishra *et al* noted, may be considered to be the developed stage of ADR processes that involves technology to settle disagreements between disputants.¹⁸ Explaining this, Valchuk noted that a characteristic feature of ODR is the inclusion of a ‘fourth party’ in the resolution of the dispute: technology.¹⁹ One of the main advantages of ODR is that it encourages the use of recently developed technology, such as artificial intelligence (AI), in the legal sector, which could eventually help us to decrease the backlog of pending cases in our courts.²⁰

The role of technology in mediating communication between parties is seen as the main difference between ODR and other methods of dispute resolution. Thus, the idea of ODR emerged from the synergy involving ADR and ICT as a method of resolving disputes arising online and for which the traditional physical means of dispute resolution were inefficient or unavailable.²¹ It is important to note that ODR was not developed for the specific purpose of challenging or replacing an existing legal process; rather it began as a response to a growing number of disputes that originated in the online space and the subsequent need for a mechanism by which to resolve these disputes.²² ODR was initially used in commercial settings, such as disagreements between buyers and sellers on websites like eBay. In recent years, however, it has been adopted by courts to assist in processing cases.²³ Today ODR is being used in both the private and the public spheres, resolving diverse conflicts. It is being used to resolve consumer complaints, family law disputes, tax law matters, and insurance claims, with different

¹³ Scott Brown, Christine Cervenak and David Fairman, *Alternative Dispute Resolution: Practitioners Guide* (Center for Democracy and Governance March 1998) 5.

¹⁴ Aashit Shah, ‘Using ADR to Resolve Online Disputes’ (2004) 10(3) *Richmond Journal of Law and Technology* 1-14, 8.

¹⁵ OECD, *OECD Online Dispute Resolution Framework* (2024) 10.

¹⁶ Arun Raghu, ‘The Legal Challenges Facing Online Dispute Resolution: An Overview’ *Galexia* (August 2006) <http://www.galexia.com/public/research/articles/research_articles-art42.html> accessed 3 November 2025.

¹⁷ Nazarii Valchuk, *Potential and Challenges of Online Dispute Resolution for Courts* (An unpublished master’s Thesis, Department of Private Law, Vilnius University Faculty of Law 2023) 8.

¹⁸ Ashutosh Mishra, Madhuri Kharat, Ajay Sonawane, Shruti Shukla and Suraj Kumar Maurya, ‘Online Dispute Resolution: A Modern Art of Adjudication’ (2024) 5(1) *ShodhKosh: Journal of Visual and Performing Arts* 2236–2242, 2237.

¹⁹ Nazarii Valchuk (n 17) 8.

²⁰ Muhammad Sohail Asghar, Hafsa Naz, Hamid Mukhtar and Kashif Mahmood Saqib, ‘Online Dispute Resolution (ODR) in Pakistan’ (2023) XI (4) *Russian Law Journal* 787-793, 788.

²¹ Ethan Katsh, ‘The Online Ombuds Office: Adapting Dispute Resolution to Cyberspace’ <<https://www.umass.edu/dispute/ncair/katsh.htm>> accessed 3 November 2025.

²² Ethan Katsh, ‘Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace’ (2007) 21(2) *International Review of Law, Computers & Technology* 97-107, 97.

²³ American Bar Association, ‘Online Dispute Resolution in the United States’ <https://www.americanbar.org/groups/centers_commissions/center-for-innovation/online-dispute-resolution-in-us/> accessed 3 November 2025.

jurisdictions choosing to use it in different ways. ODR is finding use in private and public institutions, being recognised by companies, governments and international organisations.²⁴ Importantly, ODR covers a multiplicity of techniques. Lipsky and Avgar²⁵ noted that “ODR is not a single phenomenon but in fact an umbrella term for a wide array of dispute resolution procedures and technological tools.”

Evolution and integration of online dispute resolution into formal legal systems

The history of online dispute resolution can be traced back to the early 1990s, with the rise of e-commerce and the increased use of the internet for communication and transactions. As more and more people began to interact and conduct business online, disputes inevitably arose. Traditional dispute resolution mechanisms, such as courts and arbitration, were often slow, expensive, and complex, and were not well-suited to resolving low-value and cross-border disputes.²⁶ In the first few years of ODR, platforms, such as eBay and PayPal, learned to utilise forms or structured templates to collect cases from users, and then developed software to process the data and manage the conversation as the dispute progressed.²⁷

The first-ever ODR platform was introduced by eBay (originally called Auction Web) in March 1999. eBay was founded in 1995 as an online marketplace. As soon as the company began operating, complaints began to come in about the transactions and eBay founder Pierre Omidyar was unwilling to resolve these disputes on his own. When receiving complaints via email, Omidyar himself responded to the buyer and seller, encouraging them to figure it out on their own. This approach, as Serhii noted, was very primitive and did not meet the needs of the participants in trade relations.²⁸ Due to the lapses, a ‘feedback rating’ system was created, where the parties to the transaction could leave positive feedback or criticise each other. This allowed users to gain a reputation by establishing a level of trust in the use of this online platform, reducing the risk of unfair and fraudulent trading transactions and, as an effort, reducing the number of disputed transactions.²⁹ Unfortunately, these actions did not lead to the desired result. In response to the growing number of disputes between vendors and purchasers, eBay, which already had 700,000 users and 1.5 million products, developed a simplistic ODR platform in mid-March 1999. A link was posted on eBay’s customer service page informing users that they could get help with transaction-related disputes by clicking on the link and filling out a complaint form that was sent to an experienced mediator.³⁰ The ODR platform was an early form of online mediation which involved one party filling in text boxes, selecting choices from drop-down menus, and ranking options generated by the system, which was then emailed to the other party for that party to do the same.³¹ If the dispute was not resolved automatically through the choices selected and the ranking of the options, the dispute was referred to a human mediator who would use typical mediation techniques via asynchronous email to attempt to resolve the conflict.³² Thus, the initial form of ODR adopted by eBay was a hybrid ODR system which used a mixture

²⁴ Robin Cupido, ‘Online Dispute Resolution as Legal Disruption: What Effect Could It Have on the South African Dispute Resolution Landscape?’ (2024) 27 *PER / PELJ* 1–33, 17.

²⁵ David B Lipsky and Ariel C Avgar, ‘Online Dispute Resolution through the Lens of Bargaining and Negotiation Theory: Toward an Integrated Model’ (2006) 38 *University of Toledo Law Review* 47–88, 48.

²⁶ Unnaty & Aaryushi Goyal, ‘The Evolution and Effectiveness of Online Dispute Resolution (ODR) Platforms: A Comprehensive Analysis of ADR in the Digital Age’ (2023) 3(5) *Indian Journal of Integrated Research in Law* 1–26, 3.

²⁷ Darin Thompson, ‘The Growth of Online Dispute Resolution and Its Use in British Columbia’ <<http://darinthompson.ca/about/the-growth-of-online-dispute-resolution-and-its-use-in-british-columbia/>> accessed 5 November 2025.

²⁸ Kravtsov Serhii, ‘Online Dispute Resolution—From Origins to the Present’, (2024) 14(2) *Juridical Tribune – Review of Comparative and International Law* 243–259, 246.

²⁹ Adam Cohen, *The Perfect Store: Inside eBay* (Back Bay Books 2003) 27.

³⁰ Ethan Katsh, Janet Rifkin and Alan Gaitenby, ‘E-commerce, e-disputes, and e-dispute resolution: in the shadow of “eBay Law”’ (2000) 15 *Ohio State Journal on Dispute Resolution* 705–735, 705. <<http://www.umass.edu/cyber/katsh.pdf>> accessed 5 November 2025.

³¹ Robert J Condlin, ‘Online Dispute Resolution: Stinky, Repugnant, or Drab’ (2016) *Francis King Carey School of Law Legal Studies Research Paper No 2016–40*, University of Maryland 8.

³² *Ibid.*

of text-based mediation and blind bidding designed to resolve online disputes.³³ The eBay system allows buyers and sellers to resolve their disputes online, without having to go to court. Through ODR, eBay successfully resolved 50 per cent of their registered consumers' disputes. According to a study,³⁴ eBay's ODR service now settles approximately 60 million disputes per year. Inspired by the success of eBay's ODR, many other tech-driven companies such as Alibaba, PayPal, and Amazon also took such initiatives.

These early forms of ODR were relatively simplistic, largely constrained by the limited abilities of artificial intelligence (AI), technological capability, and human familiarity with the internet. The early ODR systems can be said to be 'first generation' systems, with technology merely used as equipment, without having autonomy or a major role in the dispute resolution process.³⁵ As technological capabilities increased, ODR also expanded in ability and reach.³⁶ Second generation ODR systems moved beyond primarily using the internet as a communication tool, and towards using ODR as a method of dispute resolution that uses a virtual location, and proactively assists parties to resolve disputes in ways that goes beyond facilitating the exchange of information.³⁷ Second generation ODR can go beyond solving disputes that arose online to address disputes that originated offline. In the initial stages of the development of ODR, the main emphasis was placed on online ADR, but in modern times online litigation is also gaining importance. Today, we are witnessing the emergence of second-generation online courts, which do not just adapt the traditional court process to the online environment, but create innovative, hybrid dispute resolution systems.³⁸ For clarity, the term 'online courts' do not refer to traditional courts which integrate technology such as video witness reports or e-discovery into their usual court processes, but rather courts which operate fully online, without a physical presence.

With the growth of internet technologies, online courts have grown. Australia, for instance, has had an e-Courtroom system since 2001, which allowed parties to send documents and exchange information online. In Great Britain, the 'Money Claim Online' service was launched, which allowed online filing of lawsuits for the collection of monetary debts. One of the pioneering initiatives in this direction is Canada's Civil Resolution Tribunal (CRT), a fully online tribunal for low-value civil claims, launched in 2015 and regulated under the Civil Resolution Tribunal Act 2012.³⁹ The tribunal has jurisdiction over claims under 25,000 Canadian dollars related to debt, damages, and recovery of personal property, and uses a three-tier ODR service from negotiation, through to mediation and finally adjudication. The main purpose of the CRT is to facilitate the peaceful resolution of the dispute by the parties at the early stages; but if this is not achieved, the court enters to consider the case.⁴⁰ The CRT has been described as "the first full integration of ODR into a formal court system."⁴¹

Initially used for resolving e-commerce disputes on platforms like eBay, ODR has evolved into a sophisticated ecosystem, capable of handling commercial, consumer, family, and even civil disputes. Today, countries are integrating ODR into formal legal systems, a move accelerated by

³³ Charlotte Austin, *Online Dispute Resolution: An Introduction to Online Dispute Resolution (ODR), and Its Benefits and Drawbacks* (Report for the Government Centre for Dispute Resolution, Victoria University of Wellington, New Zealand, February 2017) 4.

³⁴ Online Dispute Resolution Advisory Group, *Online Dispute Resolution for Low Value Civil Claims* (Report by the UK Civil Justice Council, February 2015) 11.

³⁵ Davide Carneiro, Paulo Novais, Francisco Andrade, John Zeleznikow, and José Neves, 'Online Dispute Resolution: An Artificial Intelligence Perspective' (2014) 41(2) *Artificial Intelligence Review* 211-240, 215.

³⁶ Charlotte Austin (n 33) 5.

³⁷ Davide Carneiro, Paulo Novais, Francisco Andrade, John Zeleznikow, and José Neves, 'Using Case-Based Reasoning and Principled Negotiation to Provide Decision Support for Dispute Resolution' (2013) 36(3) *Knowledge and Information Systems* 789-826, 814.

³⁸ Nazarii Valchuk (n 17) 9.

³⁹ Online Dispute Resolution Advisory Group (n34) 12

⁴⁰ Nazarii Valchuk (n 17) 10.

⁴¹ Noam Ebner and John Zeleznikow, 'No Sheriff in Town: Governance for Online Dispute Resolution' (2016) 32(4) *Negotiation Journal* 297-323, 300.

the COVID-19 pandemic.⁴² Following the outbreak of COVID-19, one of the measures put in place to reduce the widespread of the disease was a full lockdown, which led to the closure of public places, including churches, hospitals, schools, markets, and ultimately, the courts—only urgent matters were heard. The pandemic, however, served as a catalyst for the digital transformation of justice delivery. For instance, in response to the COVID-19 pandemic, the Chief Judge of Lagos State, Justice Kazeem Alogba introduced the Lagos State Judiciary Remote Hearing of Cases (COVID-19 Pandemic Period) Practice Direction, which took effect on 4 May 2020. This directive enabled the remote hearing of urgent and time-sensitive cases via electronic platforms such as Zoom, Skype, Google Meet, or other approved video conferencing tools. The growing reliance on technology in justice delivery has inspired international recognition and regulation of ODR. The United Nations Commission on International Trade Law (UNCITRAL), in its 49th session in 2017, adopted the Technical Notes on Online Dispute Resolution. This model involves three stages with the use of the ODR platform: negotiation, settlement, and the final verdict on the dispute by a neutral arbitrator. Similarly, the Association of Southeast Asian Nations (ASEAN) has encouraged member nations to introduce ODR platforms to resolve e-commerce related disputes among member nations that could be resolved more efficiently and quickly.⁴³ In Latin America, Brazil developed an ODR platform as part of its effort to modernise dispute resolution.⁴⁴ Likewise, the American Arbitration Association (AAA), the largest organisation in the United States for business-to-business dispute resolution, has established its Electronic Commerce Group project to provide dispute resolution in online marketplaces globally in response to the expansion of ODR and e-commerce disputes. China is the latest to unveil a fully online ‘cyberspace court’ with three locations in Beijing, Hangzhou, and Guangzhou. These courts use technology for virtual proceedings to resolve a range of internet-based disputes, such as those involving e-commerce, online contracts, and copyright infringement. The jurisdiction of the internet courts has been expanded to include data ownership, privacy protection, virtual property infringement, and unfair competition in cyberspace.⁴⁵ These internet courts leverage technology for virtual hearings and to process cases entirely online, from filing to judgment.

Mechanisms and modalities of online dispute resolution

ODR mechanisms are digital versions of traditional ADR methods, adapted to use information and communication technology. While ODR uses the traditional methods of ADR, it modifies this with the needs of the present times thereby making them more effective.⁴⁶ ODR mechanisms consist of the following:

Online negotiation

Online negotiation is the first and simplest form of ODR where parties use electronic means to negotiate directly without face-to-face interaction, saving time and costs. It involves parties communicating via e-mail or other online platforms to reach a settlement themselves. It basically covers an exchange of views and proposals regarding the dispute, when parties want to settle disputes outside the court.⁴⁷ The process is informal, and there is no need or intervention of the third party unless the negotiation fails. Instead of the third-party role played by a human, it is technology that plays an important role in the resolution of disputes among the parties. The technology helps by asking the parties various questions and also suggesting answers and sends reminders as well.⁴⁸ E-commerce platforms like eBay and Amazon use automated negotiation

⁴² Tejas Gupta, ‘Dispute Resolution in a Digital Age: Challenges and Opportunities’ (2025) *Social Science Research Network*, 2 <<https://ssrn.com/abstract=5339274>> accessed 5 November 2025.

⁴³ ASEAN, *ASEAN Strategic Action Plan on Consumer Protection (ASAPCP) 2016-2025* (2025).

⁴⁴ <https://consumidor.gov.br>.

⁴⁵ Cao Yin, ‘New Regulation Adjusts Jurisdiction of Internet Courts’, *China Daily* (October 2025)) <https://www.chinadaily.com.cn/a/202510/11/WS68ea1b16a310f735438b46c5.html> accessed 7 November 2025.

⁴⁶ Dev Sareen, ‘Online Dispute Resolution: Application and Challenges’ (2018) 1(5) *International Journal of Law Management & Humanities* 1-6, 2.

⁴⁷ Ashutosh Mishra (n18).

⁴⁸ Dev Sareen (n46).

systems that help buyers and sellers resolve complaints such as non-delivery or defective goods. Negotiation is fast, inexpensive, and convenient. However, it may fail if parties are not cooperative or lack negotiation skills, leading to escalation into mediation or arbitration.

Online mediation: Online mediation or facilitated settlement is a voluntary mediation proceeding conducted over the internet with the assistance of a human third party. Online mediation has similarities and differences with conventional mediation. For instance, as in traditional forms of mediation, the online mediator is a neutral, impartial third party who works with the disputants facilitating communication between them and assists them in reaching an amicable settlement. The mediator has no decision-making power but acts only as a facilitator for the dispute resolution. In ODR, the process is conducted entirely or partially online. Parties need not meet physically which makes the process very fast, and they have no link with the mediator personally or physically which ensures that the mediator remains neutral and impartial.⁴⁹ Online mediation may be synchronous (e.g. real-time video conferencing) or asynchronous (e.g. email exchanges over time). Presently, mediation services are rendered by a number of online service providers globally. Square Trade, the world's leading service provider has solved a number of disputes through e-mediation across 120 countries and conducted procedures in five different languages.⁵⁰ This has led to online mediation becoming a headway in all countries of the world. Some notable online mediation platforms for dispute resolution include eBRAM Online Mediation Platform,⁵¹ JAMS Virtual Mediation Services,⁵² and Immediation.⁵³ Similarly, many national ODR centres, such as the Singapore Mediation Centre and ODReurope, conduct online mediation sessions for commercial and consumer disputes. Over and above the advantages of ODR like convenience, cost-effectiveness, and time efficiency, online mediation offers a number of unique benefits. One significant advantage is that parties can easily engage the services of mediators or experts from any part of the world who possess specialised knowledge relevant to their dispute. This global accessibility is rarely possible in traditional, face-to-face mediation. It is more dynamic and flexible, aligning with the demands of the digital age. A major drawback of this method is technological disruptions like poor internet connectivity, which can disrupt communication, and potential breaches of confidentiality due to the challenges in controlling the remote environment. These factors can reduce the effectiveness of the mediation compared to in-person sessions.

Online arbitration

Arbitration is a process in which a matter is referred to an arbitrator or tribunal, which gives a decision after hearing the parties' case and examining evidence produced by parties to support their case. Online arbitration is the most formal type of ODR, closely resembling traditional arbitration but with the additional feature that all communications and procedures are conducted electronically. In other words, it is an arbitration proceeding conducted over the internet with the assistance of a human third party. In ODR, the focus is how to utilise the ICT in arbitration, replacing physical presence with digital communication. During online arbitration, evidence, submissions, and hearings are exchanged and conducted through secure electronic platforms. As with traditional arbitration, the parties must have an express agreement to arbitrate, and the online arbitrator must be a neutral, impartial third party in order to direct the proceedings and settle the dispute by delivering an award, which is binding on the parties. Online arbitration is gaining prominence. The AAA and International Chamber of Commerce now provide online arbitration services for commercial and cross-border disputes. Mishra *et al*⁵⁴ provided two major reasons online arbitration remains promising. The first is due to the ineffectiveness of offline arbitration. Secondly, because adjudication in court systems is not often operative because of the clash between the territoriality of courts and the global nature of cyberspace. Yet, its limitation lies in

⁴⁹ Ashutosh Mishra (n18) 2238.

⁵⁰ Ibid.

⁵¹ eBRAM Online Mediation Platform: <https://www.ebram.org/>.

⁵² JAMS Virtual Mediation Services: <https://www.jamsadr.com/>.

⁵³ Immediation: <https://www.immediation.com/>.

⁵⁴ Ashutosh Mishra (n 18) 2239.

the fact that it may be costly compared to other ODR forms, and confidentiality or enforcement of the award may raise jurisdictional questions.

Online dispute resolution mechanisms generally fall into three main types discussed above. However, these methods are sometimes combined in a hybrid approach, where disputes proceed from negotiation to mediation and then to arbitration if it remains unresolved.

International policy instruments governing online dispute resolution

International policy instruments governing ODR are legal and regulatory frameworks designed to provide legitimacy, enforceability, and procedural clarity for resolving disputes online. The key international frameworks are discussed below.

OECD guidelines for consumer protection in the context of electronic commerce

The Organisation for Economic Cooperation and Development (OECD) published the *Guidelines for Consumer Protection in the Context of Electronic Commerce* in 1999. The Guidelines were developed by the OECD Committee on Consumer Policy to protect consumers engaged in electronic commerce. They provide a comprehensive framework to assist bodies such as governments, businesses, consumer groups, and self-regulatory bodies in promoting effective consumer protection in electronic commerce.⁵⁵ These Guidelines encourage businesses, consumer representatives and governments to work together to provide consumers with meaningful access to fair and timely alternative dispute resolution and redress, without undue cost or burden.⁵⁶ Special attention is given to cross-border transactions and to the innovative use of information technologies in implementing ADR systems. The OECD's Guidelines were later adopted by the G8 in the Okinawa Charter on the Global Information Society, 2000, which says that extra-judicial dispute resolution mechanisms are a way of solving problems related to consumer recourse in cyberspace. Additionally, the European Union and the United States renewed their support for the OECD's Guidelines at the 2000 Summit.⁵⁷

The OECD Guidelines were officially updated and replaced by the *Recommendation of the Council on Consumer Protection in E-commerce* published in 2016 to reflect developments and new challenges in e-commerce since 1999. Special emphasis was placed on out-of-court dispute resolution mechanisms to ensure meaningful access to fair, easy-to-use, transparent and effective mechanisms to resolve domestic and cross-border e-commerce disputes in a timely manner and obtain redress, as appropriate, without incurring unnecessary cost or burden.⁵⁸ The Recommendations specifically provide that consumers should have access to ADR mechanisms, including online dispute resolution systems, to facilitate the resolution of claims over e-commerce transactions.⁵⁹

OECD online dispute resolution framework

This is a more recent policy paper released in 2024. Recognising the potential for ODR to transform justice services towards increased accessibility and people-centredness, the OECD ODR Framework offers comprehensive guidance to countries on integrating ODR and improving the seamless transfer of information across various dispute resolution mechanisms.⁶⁰ It considers opportunities associated with ODR for access to justice. The Framework is built on three pillars:

⁵⁵ Kananke Chinthaka Liyanage, 'The Regulation of Online Dispute Resolution: Effectiveness of Online Consumer Protection Guidelines' (2012) 17(2) *Deakin Law Review* 251-282, 256.

⁵⁶ Sree Krishna Bharadwaj H. A, 'Comparative Analysis of Online Dispute Resolution Platforms' (2017) 2(3) *American Journal of Operations Management and Information Systems* 81-85, 85.

⁵⁷ Ibid.

⁵⁸ Recommendation on Consumer Protection in E-commerce 2016, para 43.

⁵⁹ Recommendation on Consumer Protection in E-commerce 2016, para 45.

⁶⁰ OECD, *OECD Online Dispute Resolution Framework* (OECD Publishing 2024) 5
<<https://doi.org/10.1787/325e6edc-en>> accessed 7 November 2025.

governance, policy levers, and ethics and safeguards. According to the OECD,⁶¹ governance focuses on the need for a strategic approach to dispute resolution to create a more cost-effective, efficient system that is agile and responsive to the evolving needs of people and businesses, which should embed digital technologies and data throughout all stages of the dispute resolution continuum. Policy levers provide an in-depth overview of the foundational aspects of ODR, emphasising the need to develop a robust legal and regulatory framework to govern ODR and its implementation while ethics and safeguards highlight the fundamental importance of ethical standards and safeguards for ODR to ensure fairness, accountability and transparency on the use of data in justice. Altogether, the three pillars provide a foundation to guide countries in implementing ODR coherently across the justice system and in improving the seamless transfer of information between various dispute resolution mechanisms.⁶² Some OECD countries have taken concrete steps to implement ODR for in-court and out-of-court dispute settlement.

UNCITRAL Technical Notes on Online Dispute Resolution

The UNCITRAL Technical Notes on Online Dispute Resolution are a set of non-binding, descriptive guidelines adopted by the United Nations Commission on International Trade Law (UNCITRAL) at its 49th session in 2016. UNCITRAL is the core legal body of the United Nations in the field of international trade law. Its mandate is to remove legal obstacles to international trade by progressively modernising and harmonising trade law. The Technical Notes on ODR are designed to contribute to the development of ODR systems, so as to enable the settlement of disputes arising from cross-border low-value sales or services contracts concluded using electronic communications without physical hearings.⁶³ It explains that this is because traditional judicial mechanisms for legal recourse may not offer an adequate solution for cross-border e-commerce disputes.⁶⁴ UNCITRAL noted that it adopted the Technical Notes as a result of “the sharp increase in online cross-border transactions has raised a need for mechanisms for resolving disputes that arise from such transactions, and recognizing also that one such mechanism is online dispute resolution.”⁶⁵ The Notes emphasise principles like impartiality, transparency, efficiency, and data security while outlining three key stages: negotiation, mediation, and arbitration.

Although non-binding, the UNCITRAL Technical Notes on Online Dispute Resolution have influenced laws in over 50 countries by encouraging the adoption of technology-driven dispute resolution systems tailored to low-value cross-border sales or service contracts.⁶⁶ UNCITRAL’s initiative underscores the importance of developing accessible ODR platforms that cater to both developed and developing economies while addressing issues like enforceability and neutrality in international disputes. This global framework has significantly advanced the adoption of ODR worldwide.

Comparative analysis of online dispute resolution implementation in selected jurisdictions

ODR is gradually becoming an indispensable part of the legal landscape. The focus of this section is to examine how the concept and practice of ODR have evolved across selected jurisdictions, illustrating its impact on modern legal systems.

⁶¹ OECD (n60) 7.

⁶² OECD (n 60) 8.

⁶³ UNCITRAL Technical Notes on Online Dispute Resolution 2017, para 5.

⁶⁴ UNCITRAL Technical Notes on Online Dispute Resolution, para 8.

⁶⁵ UNCITRAL Technical Notes on Online Dispute Resolution, vii.

⁶⁶ Dhatri Singh and Kalpana Devi, ‘Online Dispute Resolution (Odr): A Paradigm Shift in Access to Justice’, (2025) 7(2) *International Journal for Multidisciplinary Research* 1-10, 5.

Online dispute resolution in the United States

Online Dispute Resolution has gained significant traction in the United States (US). Building on the momentum toward digitisation, US courts have joined the bandwagon by adopting ODR and developing e-courts. Many jurisdictions in the US are experimenting with ODR, with some launching ambitious small claims e-courts seeking to replace in-person hearings. Several states, like Texas, New York, and Utah mandate or encourage ODR for certain disputes, like consumer complaints.⁶⁷ Over 100 federal district and bankruptcy courts have adopted online filing and dispute resolution systems. According to the Federal Court Management Statistics for March and June 2025 published by the United States Courts, extensive use of electronic case filing and management systems spans all 94 US district courts and numerous bankruptcy courts, confirming widespread ODR adoption in the federal judiciary.⁶⁸ At the same time, groups such as the American Bar Association, the International Council for Online Dispute Resolution, and the National Center for Technology and Dispute Resolution are developing standards and best practices to institutionalise ODR.

The AAA has resolved over 1.1 billion cases with ODR.⁶⁹ These cases span across multiple industries and sectors, including consumer and commercial disputes, workplace and employment issues, debt and financial claims, insurance and healthcare matters, and traffic, family, property, monetary, and civil cases. The NCTDR issued the first Online Dispute Resolution Standards in 2009 and in 2016, it presented a set of Ethical Principles for ODR. The ICODR issued updated ODR Standards in 2017, which were based on the NCTDR 2009 Standards and Ethical Principles. The iteration of these ODR Standards was collaboratively developed by NCTDR and ICODR in April 2022 in response to the developments in technology, ODR, and their application expansion. The aforementioned developments reveal that ODR has moved beyond experimental use in the United States and its expanding role as a credible complement to traditional dispute resolution mechanisms.

Online dispute resolution in India

India's justice system faces a crisis of delay, with approximately 53.4 million cases pending nationwide across all levels of courts as of September 2025. This includes about 47 million cases pending in district and subordinate courts, around 6.38 million cases pending in High Courts, and about 88,000 cases pending before the Supreme Court of India.⁷⁰ As a matter of fact, India has one of the largest number of pending court cases in the world.⁷¹ Traditional courts, designed for physical adjudication, struggle to meet modern demands, prompting a shift towards ADR. Within this framework, ODR has gained prominence, especially post-COVID-19.⁷² The COVID-19 pandemic served as a catalyst for ODR's growth in India. Courts turned to virtual hearings to avoid systemic collapse during lockdowns.⁷³ The Supreme Court of India has been instrumental in carving out space for ODR. Indian judicial precedents bolster ODR's legitimacy. In *Shakti*

⁶⁷ Olamiji Ogun, 'The Rise and Rise of Online Dispute Resolution (ODR) in a Post-Pandemic World: Short Lessons for Nigeria' *LinkedIn* (12 February 2024) <<https://www.linkedin.com/pulse/rise-online-dispute-resolution-odr-post-pandemic-world-olamiji-ogun-hpe1f>> accessed 7 November 2025.

⁶⁸ See United States Courts, Federal Court Management Statistics, March 2025 <<https://www.uscourts.gov/data-news/reports/statistical-reports/federal-court-management-statistics/federal-court-management-statistics-march-2025>> and Federal Court Management Statistics, June 2025 <<https://www.uscourts.gov/data-news/reports/statistical-reports/federal-court-management-statistics/federal-court-management-statistics-june-2025>>

⁶⁹ The American Arbitration Association, 'Online Dispute Resolution', <<https://www.adr.org/odr/>> accessed 10 November 2025.

⁷⁰ Pradeep Thakur, 'Why Are 5.3cr Cases Pending in Indian Courts? Missing Lawyers & Witnesses, Long Stays...' *The Times of India* (New Delhi, 28 Sep 2025) <<https://timesofindia.indiatimes.com/india/why-are-5-3cr-cases-pending-in-indian-courts-missing-lawyers-witnesses-long-stays/articleshow/124187297.cms>> accessed 10 November 2025.

⁷¹ NDTV, 'India Has World's Largest Backlog of Court Cases: PM' (16 August 2009) <<https://www.ndtv.com/india-news/india-has-worlds-largest-backlog-of-court-cases-pm-399857>> accessed 10 November 2025.

⁷² Vidhi Centre for Legal Policy, *ODR: The Future of Dispute Resolution in India* (2020) 12.

⁷³ Dhatri Singh (n 66) 2.

*Bhog v Kola Shipping*⁷⁴ and *Trimex International v Vedanta Aluminium Ltd*,⁷⁵ the Supreme Court upheld online arbitration, signalling judicial acceptance of digital processes. In the case of *State of Maharashtra v Praful B. Desai*,⁷⁶ the court upheld the validity of videoconferencing as a mode for taking evidence and testimony of witnesses, remarking that virtual reality is the actual reality.

In a more recent case, *M/S Meters and Instruments Pvt. Ltd. v Kanchan Mehta*,⁷⁷ the Supreme Court observed that there was a need to consider categories of cases which can be partly or entirely concluded ‘online’ without physical presence of the parties and recommended the resolution of simple cases like those concerning traffic challans and cheque bouncing. This followed its earlier decision in *Grid Corporation of Orissa Ltd. v AES Corporation*⁷⁸ where the court held: “When an effective consultation can be achieved by resort to electronic media and remote conferencing, it is not necessary that the two persons required to act in consultation with each other must necessarily sit together at one place unless it is the requirement of law or of the ruling contract between the parties.”

The Indian judiciary’s efforts in setting the foundation for ushering in ODR into the country is augmented by technology-enabling statutes, though no standalone ODR legislation exists as of November 2025. Instead, ODR is supported and regulated indirectly through existing laws that facilitate electronic transactions, ADR, and consumer protection. Section 43(d) of the Arbitration and Conciliation Act 1996, amended in 2019, explicitly recognises electronic arbitral proceedings in line with UNCITRAL Model Law standards. The Information Technology Act, 2000 further accords recognition to digital records and signatures under sections 4, 5, 10(a), and 11–15 to provide validity to electronic contracts.⁷⁹ Similarly, the Evidence Act⁸⁰ allows electronic records as evidence before a court. On the policy front, NITI Aayog’s ODR Policy Plan 2023 proposes a transformative three-tiered ecosystem to scale dispute resolution. Tier 1 focuses on AI-driven negotiation for low-value disputes (e.g. e-commerce refunds), tier 2 employs human-assisted mediation for complex cases (e.g. contractual disagreements), and tier 3 utilises arbitration with enforceable awards for high-stakes commercial disputes.⁸¹ This framework aims to integrate technology at every stage, from dispute avoidance to resolution. Generally, India’s legal and legislative frameworks are largely ODR-conducive. The Online Consumer Mediation Centre, of National Law School of India University, which was sponsored by the Ministry of Consumer Affairs, targets resolution of consumer disputes both through physical as well as online mediation. Independent private ODR service providers have also been set up in India for the development of technology and increase in capacity to resolve disputes online. Their services currently range from online consultation to online arbitration and mediation.⁸² Organisations such as Sama, Centre for Online Resolution of Disputes, Presolv360, Centre for Alternative Dispute Resolution etc. provide dedicated ODR services. Further, organisations like Centre for Mediation and Conciliation set up by Bombay Chamber of Commerce have been conducting remote mediations before and during the pandemic.⁸³ India has also ratified the UN Convention on Mediation 2018 towards passing mediated settlement agreements, a step that is set to enhance the legitimacy of online mediation.⁸⁴

⁷⁴ (2009) 2 SCC 134.

⁷⁵ (2010) 1 SCALE 574.

⁷⁶ (2003) 4 SCC 601.

⁷⁷ (2018) 1 SCC 560.

⁷⁸ (2003) 4 SCC 601.

⁷⁹ Vidhi Centre for Legal Policy (n72) 26.

⁸⁰ Indian Evidence Act 1872, s 65(a) (b).

⁸¹ Dhatri Singh (n66) 5. See also Ananta Chopra, ‘Revolutionizing Justice: NITI Aayog’s ODR Blueprint for India’, *NLIU LAW REVIEW* (23 October 2024) <<https://nliulawreview.nliu.ac.in/blog/revolutionizing-justice-niti-aayogs-odr-blueprint-for-india/>> accessed 10 November 2025.

⁸² Vidhi Centre (n72) 28.

⁸³ Ibid.

⁸⁴ Narendra Kumar, ‘Online Dispute Resolution (ODR) in E-Commerce: Effectiveness and Challenges’, *Vintage Legal* <<https://www.vintagelegalvl.com/post/online-dispute-resolution-odr-in-e-commerce-effectiveness-and-challenges>> accessed 12 November 2025.

Online dispute resolution in the United Kingdom

In recent years, the UK legal system has undergone a quiet but far-reaching transformation. Traditional courtrooms are no longer the only venue for resolving civil disputes; instead, ODR has emerged as a viable and increasingly preferred alternative. The UK has fully embraced the use of ODR through its court system as an alternative to resolving disputes through the internet in a bid to modernise the justice system. Initiatives such as the HM Courts and Tribunals Service (HMCTS) Reform Programme, supported by legislation like the Courts and Tribunals (Online Procedure) Act 2019, have laid the groundwork for digital transformation. The Act enables the creation of online rules for certain civil, family, and tribunal proceedings, paving the way for digital-first services.⁸⁵ It has also adopted the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 of the European Union (EU), which amend the original Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 to implement and align with Regulation (EU) No 524/2013 on ODR for consumer disputes.

ODR is currently being deployed in several areas of UK civil justice, particularly: money claims under £10,000, family law cases (in non-complex disputes), landlord and tenant matters, employment tribunal case management, and debt recovery actions.⁸⁶ An early milestone in the UK's broader transition to digital dispute resolution was the launch of the first ODR platform for divorce and separation cases in 2016 by Relate, one of the UK's largest support providers.⁸⁷ The aim was to provide couples going through divorce or separation with an accessible, technology-facilitated negotiation and settlement tool to reduce court pressure and adversarial disputes. Additionally, the UK government has implemented a digital divorce application process through HMCTS. The shift to online divorce in the UK has transformed what was once a paper-heavy, time-consuming process, with physical court visits and administrative delays, into a streamlined digital experience that most people can complete from home. As of October 2025, the online divorce system now processes over 850,000 cases with remarkable efficiency and user satisfaction.⁸⁸ The adoption of ODR in the UK is growing exponentially because of "the presence of efficiency, lowered costs and ease of access to the public", according to Lord Justice Briggs.⁸⁹

Online dispute resolution in Nigeria

There is currently limited adoption of online dispute resolution in Nigeria in comparison to other countries, particularly countries in the West. Adelodun and Nurudeen⁹⁰ noted that this is due to a variety of factors, including a lack of awareness of ODR, a lack of trust in the technology, and a lack of understanding of the benefits of ODR. There have, however, been some efforts in recent years to promote the adoption of ODR in Nigeria. These efforts include the Lagos Multi-Door Courthouse ODR platform, the Institute of Chartered Mediators and Conciliators ODR platform, and the establishment of the Nigerian Online Dispute Resolution Centre, established in 2017 to promote the use of ODR in Nigeria and raise awareness of the benefits of ODR. Notwithstanding that the use of ODR in Nigeria is growing, there is no specific legislation on the regulation of ODR in Nigeria till date, which has slowed down its adoption rate.⁹¹

Despite the lack of formal legislation governing ODR, Nigeria is legally prepared to adopt ODR. The current legal framework for ADR offers a favourable environment for the use of information and communications technology and the internet to resolve disputes. For example, the Arbitration

⁸⁵ Axis Solicitors, 'The Rise of Online Dispute Resolution in the UK Courts', <<https://axis.lawyer/online-dispute-resolution/>> accessed 12 November 2025.

⁸⁶ Ibid.

⁸⁷ Terence Trainor, 'UK to Get Online Dispute Resolution in Spring', *The Divorce Magazine* (29 February 2016) <<https://www.thedivorcemagazine.co.uk/online-dispute-resolution/>> accessed 12 November 2025.

⁸⁸ Jess Knauf, 'Online Divorce – A Complete Guide to Digital Divorce in England and Wales', *MediateUK* (8 October 2025) <<https://www.mediateuk.co.uk/online-divorce-a-complete-guide-uk/>> accessed 12 November 2025.

⁸⁹ Briggs, LJ, *Civil Courts Structure Review: Final Report* (Judiciary of England and Wales 2016) 44.

⁹⁰ Adelodun Nurudeen (n 5) 396.

⁹¹ Ayinla and Oniyide (n 3) 74.

and Mediation Act 2023 ('the AMA'), which repealed the 35-year-old Arbitration and Conciliation Act of 2004,⁹² first enacted in 1988, accommodates ODR. While the AMA does not specifically provide for ODR, it contains provisions on ADR and dispute resolution generally that appears to support the use of technology to resolve disputes and may in the long run, serve as guide on the implementation and application of ODR in Nigeria. It recognises written agreements in the form of 'letters, telex, telegrams, or other modes of communication'⁹³ and goes a step further to introduce the concept of 'electronic communication' defined as any communication made through data messages, which includes information generated, sent, received, or stored by electronic, magnetic, optical, or similar means.⁹⁴ This definition covers various forms of electronic communication, such as email, text messages, social media chats, and more.⁹⁵ The 2023 amendment⁹⁶ of the Evidence Act 2011 introduced notable innovations by making provisions for electronic records, digital signatures, admissibility of electronic records, and more in order to bring the provisions of the Principal Act in accordance with global technological advancements.

Hence, it can be concluded that the Nigerian law is ultimately ODR friendly.⁹⁷ The decision of the Court of Appeal per Ogunwumiju JCA, in *Continental Sales Ltd. v R. Shipping Inc.*⁹⁸ further lends credence to this. In this case, the contention was whether communication by email was permissible communication under the English Arbitration Act, 1996, which stipulated that a notice or other document may be served on a person 'by any effective means.' It was contended that communication by email was not one of such 'effective means.' In dismissing this argument, his Lordship in his lead judgment held thus: "Since the intention of the e-mail messages and correspondence from the respondent, the solicitors, Philip A. Bush, and the arbitrator, Mr David Aikman to the appellant was to achieve the result of communicating the fact that the arbitration proceedings had been initiated, and the various stages of the process, I am of the view that there has been effective service of the whole arbitration process on the appellant. The spurious argument that the service of notice was not in writing cannot fly. E-mail is a form of communication that is set down in writing. It is not oral. The fact that it is electronic is immaterial, it is not in the thin air. It can be downloaded and (is) as real as a hard copy of the letter or mail in your hand."⁹⁹

Additionally, there have been successful virtual court hearings which prove that tech-driven approaches are reshaping the landscape of dispute resolution in Nigeria. The first virtual court session in Nigeria¹⁰⁰ was held at Ikeja High Court of Lagos State where Olalekan Hameed was sentenced to death by hanging for the murder of a 76-year-old woman, Mrs Jolasum Okunsanya. Justice Mojisola Dada of Ikeja High Court blazed the trail,¹⁰¹ and other states soon followed Lagos' lead, adopting similar remote hearing practices to mitigate the pandemic's impact on the justice system. Justice Fadawa Umaru of the Borno State High Court, for instance, delivered a judgment virtually in *State v Ali Mohammed*¹⁰² on 27 April 2020, finding the defendant not guilty of murder.

⁹² CAP A18 Law of the Federation of Nigeria 2004.

⁹³ Arbitration and Conciliation Act 2004, s 9 (1) (a)–(c).

⁹⁴ Arbitration and Mediation Act 2023, s 91.

⁹⁵ Tiwalade Aderoju, 'The Nigerian Arbitration and Mediation Act 2023: A Comparison with the Arbitration and Conciliation Act 2004 and Global Practices, *International Bar Association* (20 December 2023) <<https://www.ibanet.org/the-nigerian-arbitration-and-mediation-act-2023>> accessed 12 November 2025.

⁹⁶ Evidence Act (Amendment) Act, 2023.

⁹⁷ Adeleke and Saludeen (n 4) 276.

⁹⁸ (2012) All FWLR (Pt 630) 1377 CA.

⁹⁹ Ibid, 1393.

¹⁰⁰ *The State v Olalekan* ID/9006C/2019.

¹⁰¹ PC Aneke, 'The Legality of Virtual Court Hearing in Nigeria: The Way Forward' (2021) 2 *Madonna University Faculty of Law Journal* 56–61, 57.

¹⁰² Suit BOHC/MG/CR/115/19.

Benefits of online dispute resolution over traditional litigation

One of the most significant advantages of ODR is its cost effectiveness. Traditional litigation often involves substantial financial expenditure, including filing fees, travel costs, legal representation, and administrative expenses. ODR minimises or eliminates many of these logistical costs by allowing parties to participate in the sessions remotely and by streamlining procedures through digital platforms. Furthermore, ODR utilises digital document sharing and online communication to minimise the need for physical resources, such as paper and printing materials, further lowering costs. Austin noted that ODR is more cost effective than litigation, both for parties to a dispute and to the dispute resolver, be that a lawyer, a mediator, or a member of the judiciary.¹⁰³ Similarly, ODR ensures a speedy resolution of disputes. Litigation has become infamous for its lengthy timelines. Court cases can drag on for months or even years, delaying resolution and creating uncertainty for the parties. The court system is often backlogged, and procedural delays and the appeals process can further extend the time frame of the resolution. ODR, on the other hand, offers a faster path to settlement. It significantly reduces the time required to resolve disputes by streamlining procedures and eliminating the need for physical appearances. Parties can schedule hearings flexibly, leading to faster resolution of cases. Using cutting-edge audio and video conferencing technologies, the disputing parties can conduct meetings and hearings remotely. Using asynchronous communication, parties can also exchange information, present evidence, and upload and review pleadings, papers, and evidentiary submissions.¹⁰⁴ This expedites the procedure and the resolution of the dispute within the shortest time possible.

The flexibility of ODR is another major improvement over litigation. ODR provides a level of flexibility that is rarely found in the rigid structure of litigation. Parties involved in ODR can choose their mediator or arbitrator, select the venue, and even set the rules and procedures for resolving the dispute. This autonomy ensures that the resolution process aligns more closely with the specific needs and preferences of the parties involved. Moreover, ODR allows for creative solutions that might not be possible in a court ruling, fostering mutually beneficial outcomes. Another advantage of ODR over litigation is convenience. Litigation offers limited flexibility in procedures and substantive laws. Consequently, parties have little autonomy in choosing the time and place of the dispute resolution. Since ODR processes are conducted entirely online, it allows parties greater freedom in choosing the procedure, time, and place of the resolution. The internet enables parties to agree on convenient times for resolution, uses online forms instead of face-to-face meetings, and communicate through email, video, or voice calls as needed to facilitate dispute resolution. Unlike the challenges that may be occasioned in litigation about scheduling of hearings, ODR has no such difficulties as parties may arrange or participate in a meeting whenever they are ready and at a convenient time. The ability to access fast and efficient dispute resolution services from anywhere, at any time, is one of the main benefits of ODR.¹⁰⁵

Furthermore, ODR enhances confidentiality and privacy as proceedings are typically conducted on secure digital platforms rather than in open court. ODR processes are typically confidential, protecting the privacy of the parties involved and allowing them to resolve disputes without the risk of damaging public exposure. This feature makes it particularly appealing for commercial entities and individuals seeking to resolve sensitive matters discreetly unlike litigation, which exposes details of the conflict to public scrutiny. In addition, ODR preserves relationships. Litigation, by its adversarial nature, can strain or even sever relationships. ODR, however, emphasises collaboration and communication. Online mediation, for instance, involves a neutral third party helping the disputants reach a mutually agreeable solution, which can preserve and even strengthen their relationships. By fostering a cooperative atmosphere, ODR helps parties

¹⁰³ Charlotte Austin (n 33) 10.

¹⁰⁴ Mostafa Al Dirani, 'The Value of Electronic Arbitration in Today's Legal System' (2023) 10(2) *Journal of Research in International Business and Management* 1-4.2 <<https://www.interestjournals.org/articles/the-value-of-electronic-arbitration-in-todays-legal-system.pdf>> accessed 12 November 2026.

¹⁰⁵ Charlotte Austin (n 33) 11.

resolve conflicts without burning bridges. From an institutional perspective, ODR also contributes to judicial efficiency by reducing the number of cases that reach courtrooms, thereby easing the burden on judicial officers and improving overall system productivity.

Conclusion

This article has discussed the integration of ODR into our formal legal system in an effort to modernise our legal system in line with the rapid rate of technology advancements. The evolution from ADR to ODR marks a defining moment in the history of dispute resolution, signalling the intersection between law and digital innovation. From eBay's early mediation platform to the rise of online courts and AI-assisted arbitration, technology has transformed how dispute is settled. This demonstrates how far technology has come in terms of the dispute resolution process. At present, we can assert that ODR is no longer a science fiction fantasy. In this article, we have presented and examined the landscape of ODR, recognising it as an efficient, cost-effective, and flexible alternative to traditional courtroom proceedings. Across jurisdictions like the United States, United Kingdom, and India, ODR has matured into a credible complement to traditional mechanisms, demonstrating that justice need not be confined to physical spaces. In Nigeria, however, ODR is still in its early stages and has great potential strengths, some of which it has already begun to realise, including its efficiency and its capacity to contribute to the expansion of the country's digital economy. Eventually, ODR may be the way we resolve most of our disputes as it is becoming increasingly integrated with traditional legal systems. The question, therefore, is not whether ODR will redefine the future of dispute resolution, but how long this transformation will take to play out, especially as law, as a tool of social engineering, grows or develops at par with societal developments.

CONTRACT LAW

The limits of full compensation: a comparative analysis of contractual damages in English and Chinese law

Haoning Pan*

Introduction

The principle of full compensation is a basic starting point of contractual damages in both English and Chinese law. Under this principle, the innocent party should, as far as money can achieve it, be put in the position they would have been if the contract had been properly performed.¹ However, although both systems share this general principle, they do not apply it in precisely the same manner. In practice, full compensation is limited by other rules, such as causation, remoteness, foreseeability, and the control of agreed damages. Recent developments in both systems show this clearly. In English law, cases concerning commercial damages show that recovery is not decided only by asking what loss was foreseeable. The court may also consider whether the loss falls within the type of risk that the defendant can fairly be taken to have accepted under the contract.² In Chinese law, Article 584 of the Civil Code also adopts a foreseeability limitation, but recent guidance from the Supreme People's Court shows that this rule must be applied in context, taking account of the nature of the parties, the type of transaction, and commercial practice.³ Therefore, neither system allows the full compensation principle to operate without sophisticated limitation. If the principle were applied too broadly, it could, in some commercial situations, impose liability on the breaching party for losses that were beyond the risk they could reasonably have expected when entering into the contract.

This comparative issue has not been fully addressed in the existing literature. Much scholarship on English and Chinese contract law discusses each system within its own legal tradition.⁴ Comparative studies also tend either to discuss the compensation principle in general terms, or to focus on individual doctrines without connecting them to the wider framework of contractual damages. This article aims to address that gap by comparing how English and Chinese law apply the principle of full compensation through several important mechanisms, including causation, remoteness, liquidated damages, and non-pecuniary loss. The central question is whether the shared principle of full compensation leads to similar outcomes, or whether the different legal mechanisms used in each system produce materially different results for the parties.

The article argues that full compensation operates only as a starting point, not as a complete answer. Both systems qualify it and apply it through mechanisms that are structurally different. These differences matter in commercial practice, especially in cross-border transactions, because the choice between English law and Chinese law may affect the scope and the amount of recoverable damages. The article is structured as follows. It introduces the shared principle of full compensation in English and Chinese law; it then examines the main mechanisms that limit or shape recovery for pecuniary loss – namely causation, remoteness and liquidated damages. Finally, it considers non-pecuniary loss, where the differences between the two systems are especially clear.

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¹ Its authority in English law derives from *Robinson v Harman* (1848) 1 Ex 850, and the equivalent in Chinese law is codified in Article 584 of the Civil Code of the People's Republic of China 2020.

² *Prakash Industries Ltd v Peter Beck Und Partner* [2022] EWHC 754 (Comm), [2022] 3 WLUK 528.

³ Civil Code of the People's Republic of China 2020, art 584. See also Interpretation by the Supreme People's Court of Several Issues Concerning the Application of Book One General Provisions of the Civil Code of the People's Republic of China 2022, art 63.

⁴ Larry A. DiMatteo and Lei Chen, *Chinese Contract Law: Civil and Common Law Perspectives* (Cambridge University Press 2018).

The shared principle: full compensation

English Law

English law on contractual damages starts with the rule in *Robinson v Harman*.⁵ Parke B stated that, where a party suffers loss because of breach of contract, the claimant should be put in the same position as if the contract had been performed. This rule is the basis of the expectation interest. The expectation interest includes two different kinds of loss.⁶ One is the loss of bargain. This is a forward-looking measure since it looks at the value of the performance which the claimant was promised but did not receive. For example, it may include the profit that the contract would have produced. Another kind is consequential loss, which refers to the concrete further loss caused by the breach such as damage to property, or other financial loss resulting from the breach. In some cases, these losses may be recovered together, if this does not lead to double recovery. The basic point is that the claimant should be compensated for the benefit they lost and for the real harm caused by the breach.

Distinct from both is the reliance measure. English law also recognises reliance damages, which compensate for expenditure wasted in preparing for performance. They are usually claimed where it is difficult to prove the profits that would have been made (expectation loss) under the contract.⁷ However, reliance damages are not a separate way to obtain extra compensation. Therefore, the claimant cannot normally recover both expectation loss and reliance loss, as it would lead to double recovery. This is shown in *Cullinane v British Rema Manufacturing Co Ltd*,⁸ where the claimant bought a clay-pulverising machine which was said to process six tons of clay per hour, but it in fact processed only two. He claimed both the cost of the machine and the profits he would have made if the machine had worked as promised. The Court of Appeal did not allow both claims because they are alternative. To award both the capital cost and the lost profits would compensate the same loss twice. A similar approach was taken in *Omak Maritime Ltd v Mamola Challenger Shipping Co.*,⁹ Teare J confirmed that reliance damages are still limited by the compensatory principle. A claimant cannot use them to reach a better position than the one they would have been in if the contract had been performed. Therefore, English law gives the claimant different ways to measure loss, but these measures are controlled by the rule against overcompensation.

Another important feature of English contract law is that liability for breach is generally strict. It comes from the non-performance itself, no matter whether the breaching party was at fault, except in the limited group of contracts that require reasonable care.¹⁰

Chinese Law

Chinese law reaches a similar starting point, but in a different way. Whereas the English position rests on a judicial dictum, in China, the principle of full compensation is codified directly in Article 584 of the Civil Code of the People's Republic of China. It provides that, where a party fails to perform a contractual obligation, or the performance does not conform to the agreement, and this causes loss to the other party, the amount of compensation shall be equivalent to the loss caused by the breach. It also includes the benefits that the innocent party expected to obtain if the contract had been performed.

This provision shows that Chinese law also protects the expectation interest. Like the rule in *Robinson v Harman*,¹¹ the purpose is to put the innocent party in the position they would have

⁵ *Robinson v Harman* (1848) 1 Ex 850 (Parke B).

⁶ Hugh Beale, *Chitty on Contracts* (36th edn, Sweet & Maxwell 2025) para 30-022.

⁷ *Anglia Television Ltd v Reed* [1972] 1 QB 60 (CA).

⁸ *Cullinane v British Rema Manufacturing Co Ltd* [1954] 1 QB 292 (CA).

⁹ *Omak Maritime Ltd v Mamola Challenger Shipping Co* [2010] 2 CLC 194 (QB).

¹⁰ P.S. Atiyah, *Essay on Contract* (Oxford University Press 1990), Chapter 2.

¹¹ *Robinson v Harman* (1848) 1 Ex 850.

been in if the contract had been properly performed, but not the pre-contract position.¹² Article 584 covers both actual loss and loss of expected benefits (in other words, loss of bargain),¹³ which is structurally similar to common law's design.

However, Article 584 also internally limits the principle of full compensation.¹⁴ It states that compensation shall not exceed the loss which the breaching party foresaw or should have foreseen at the time of entering the contract, akin to the second limb of the *Hadley case*. It reflects what Chinese scholars such as Wang Liming call “interest balancing”, which means in this context protecting the innocent party's interest in performance while at the same time preventing a disproportionate allocation of risk to the breaching party.¹⁵

Two further features make the Chinese position distinct. First, though the prohibition on double recovery is not stated as a clear rule like the one in *Cullinane*, it is achieved through the compensatory ceiling in Article 584, since damages “shall be equivalent to” the losses caused. It is also reinforced by the Supreme People's Court's 2023 Interpretation on the General Provisions of the Contract Part of the Civil Code, which requires courts to consider benefits which the innocent party has obtained, or could reasonably have obtained, because of the breach.¹⁶ Second, like English law, Chinese contract law imposes liability on a strict basis. Under Article 577, liability for breach comes from non-performance itself, regardless of fault, except where the Code or the contract provides otherwise.¹⁷ The two systems therefore share both a compensatory aim and a no-fault basis of liability. These characteristic matters because neither system uses fault to screen recoverable loss, the work of limiting recovery falls entirely on the mechanisms examined below, causation, remoteness, and the control of agreed damages.

Different mechanisms

The shared principle of full compensation may suggest that English and Chinese law are very similar. However, this similarity becomes less clear when the specific rules on damages are examined. In practice, recovery is shaped by several mechanisms, including causation, remoteness and liquidated damages. These rules affect not only whether loss is recoverable, but also the scope and amount of damages available to commercial parties.

Causation

English Law

Although the compensatory principle in *Robinson v Harman* aims to put the claimant in the position of due performance, not every loss suffered by the claimant is recoverable. The first filter is causation. The claimant must show that the breach *caused* the loss for which compensation is claimed.¹⁸ The strict-liability character of English contract law, mentioned above, carries particular weight as it performs the screening function that fault performs in tort.¹⁹

English law usually starts with the but for test, as the baseline measure of factual causation. This test asks whether the loss would have happened but for the defendant's breach. If the same loss

¹² Article 500 of the Civil Code of the People's Republic of China 2020 lists three types of circumstances when damages are recoverable such as pre-contractual liability.

¹³ Liming Wang, *Study on Contract Law* (4th edn, China Renmin University Press 2025).

¹⁴ Civil Code of the People's Republic of China 2020, art 584.

¹⁵ Liming Wang, ‘The Hierarchy of Competing Interests in Civil Law’ [2014] *The Jurist* 79.

¹⁶ Interpretation by the Supreme People's Court of Several Issues Concerning the Application of Book One General Provisions of the Civil Code of the People's Republic of China 2022, arts 60-62.

¹⁷ Civil Code of the People's Republic of China 2020, art 577.

¹⁸ Margaret Brazier, John Frederic Clerk and William Henry Barber Lindsell, *Clerk and Lindsell on Torts* (2nd supp, 17th edn, Sweet and Maxwell 1997).

¹⁹ For the relationship between strict liability and causation in English contract law, see Andrew Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th edn, Oxford University Press 2019).

would have happened anyway, the breach is not deemed as the factual cause of that loss.²⁰ However, the but for test is necessary, not sufficient. Where there are several causes, or where the breach starts a chain of events whose later stages owe more to other factors than to the breach, the courts ask a second question, that is whether the breach was an effective or dominant cause of the loss. The leading authority is *Galoo Ltd v Bright Grahame Murray*,²¹ where the Court of Appeal held that the breach must be an “effective” or “dominant” cause, and that it should be decided by a common-sense approach rather than a purely mechanical test. It is demonstrated that the court does not only ask whether the breach formed part of the factual background but also ask whether it is fair and reasonable to attribute the loss to that breach.

The but for test runs into a well-known difficulty in cases of concurrent causation.²² Where there are two causes, and each one on its own is sufficient to produce the loss, neither cause passes the but for test, because the loss would have happened anyway through the other cause. It would be unreasonable, however, to conclude from this that neither party is liable. The courts therefore relax the requirement in this situation. The breaching party is liable if the breach was an effective cause of the loss, and the court does not need to decide which of the two causes was more effective.²³ To this extent the strict “dominant cause” language of *Galoo* gives way. Where two causes are each sufficient, it is enough that the breach was one effective cause among them.

A further issue is whether an intervening event has broken the chain of causation. This is also known as *novus actus interveniens*. The intervening event can take any form. It may be the conduct of a third party, an unreasonable act of the claimant himself, or a natural event. Such event may relieve the defendant from liability for the losses that follow. In practice, the court decided that the chain is broken only where the intervening event is of a kind that the defendant could not reasonably have anticipated because of the breach. Where the intervention is foreseeable as a likely reaction to the breach, the defendant stays liable for the further loss it causes. Where it is unforeseeable, unusual, or is an independent wrong of its own, the chain is broken, and the defendant’s liability ends at that point.

The classic illustration is *Lambert v Lewis* where the claimant kept using a trailer coupling even after discovering the defect. The trailer later detached and caused a fatal accident. The House of Lords held that the farmer’s continued use of an obviously damaged coupling was so unreasonable that it broke the chain of causation between the manufacturer’s breach of warranty and the loss that the farmer had to pay in the tort claim against him. As a result, the farmer could not pass that liability up the contractual chain to the manufacturer.²⁴ The modern approach is also shown in *Borealis AB v Geogas Trading SA*,²⁵ Gross LJ in this case asked whether the intervening conduct was such as to “obliterate” the defendant’s wrongdoing as the operative cause of the loss.²⁶ This is a demanding test, where mere unreasonable conduct may not always be enough, especially if the defendant’s breach remains an effective cause. Reckless conduct, on the other hand, will usually break the chain, although no rule limits the doctrine to recklessness alone. The doctrine therefore performs different role from the but for and effective-cause analysis. It does not ask whether the breach caused the loss in the first place, but whether something occurring *after* the breach has displaced it as the operative source of the loss.

²⁰ Edwin Peel, *Treitel on the Law of Contract* (15th edn, Sweet & Maxwell 2020). See also *Quinn v Burch Bros (Builders) Ltd* [1966] 2 QB 370 (CA).

²¹ *Galoo v Bright Grahame Murray* [1994] 1 WLR 1360, 1374-1375.

²² See Andrew Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th edn, Oxford University Press 2019).

²³ *County Ltd v Girozentrale Securities* [1996] 3 All ER 834 (CA).

²⁴ *Lambert v Lewis* [1982] AC 225 (HL).

²⁵ *Borealis AB v Geogas Trading SA* [2010] EWHC 2789 (Comm), [2011] 1 Lloyd’s Rep 482 [42]-[47].

²⁶ *Borealis AB v Geogas Trading SA* [2010] EWHC 2789 (Comm), [2011] 1 Lloyd’s Rep 482 [44].

Chinese Law

Chinese law deals with causation in a different form. Article 584 of the Civil Code provides that compensation shall be equivalent to the loss caused by the breach of contract.²⁷ This single formula, with key phrase “loss caused by the breach” included, gives Chinese courts a statutory basis for asking whether there is a sufficient connection between the breach and the loss.

The obvious strength of this approach is that it gives the courts one fixed point to start from. An English court must move between the but for test and the common-sense test, choosing among them according to the facts. A Chinese court does not face that choice in the same way, because Article 584 supplies a single standard. At least on the face of the Code, this looks like a more predictable starting point for commercial parties.

That predictability, however, is more apparent than real, because a short statutory phrase cannot do all the work that the English case law does. In straightforward cases, Article 584 provides a clear basis for limiting damages. If the loss was not caused by the breach, it is not recoverable. But in more complex cases, such as where there are several causes, several parties, or later intervening events, the statutory wording gives less detailed guidance. Chinese courts still need to decide whether the connection between the breach and the loss is strong enough to justify compensation, close in substance to the English *novus actus* doctrine but without any clear basis in the Code. The Supreme People’s Court’s judicial interpretations have begun to fill this gap, yet the position remains less developed than in English common law.

For this reason, the difference between the two systems should not be overstated. English law has a more developed set of causation doctrines, but this can also make the law more complex and less predictable. Chinese law has a clearer statutory starting point, but difficult questions may still arise in practice because Article 584 does not explain in detail how to deal with concurrent causes or intervening events.

Remoteness

English Law

The second limitation on the compensatory principle is remoteness. Even where the claimant can show that the breach caused the loss, the loss will not be recoverable if it is too remote. The basic rule, the orthodox rule, derives from *Hadley v Baxendale*, which divides recoverable loss into two categories. The first category is loss which arises naturally, in the ordinary course of things, from the breach (the first limb). The second covers losses which do not arise in the ordinary course but were within the reasonable contemplation of both parties at the time of contracting because special circumstances had been communicated (the second limb).²⁸

An important point is that the contractual test is not the same as reasonable foreseeability in tort. In *Koufos v C Zarnikow Ltd (The Heron II)*,²⁹ the House of Lords held that the threshold of probability required in contract is higher than in tort and expressly disapproved the looser language of “foreseeability” that Asquith LJ had used in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*. The question is not simply whether the loss was foreseeable as a possibility. Lord Reid stated that the loss must be of a kind which the defendant ought to have realised was “not unlikely” to result from the breach. He explained that this degree of probability is considerably less than an even chance, but it is nevertheless not very unusual.³⁰ This is because contracting parties normally have a chance to discuss unusual risks and allocate them before making the contract. In tort, the defendant usually has no such chance.³¹ Another important point

²⁷ Civil Code of the People’s Republic of China 2020, art 584.

²⁸ *Hadley v Baxendale* (1854) 9 Ex 341, 354 (Alderson B).

²⁹ *Koufos v C Zarnikow Ltd (The Heron II)* [1969] 1 AC 350 (HL) 424.

³⁰ *The Heron II*, 383.

³¹ *The Heron II*, 385–86.

is that the parties only need to contemplate the kind or type of loss, not its exact amount. Once the kind of loss is within reasonable contemplation, the defendant is liable, even if the actual quantum is much greater than could have been anticipated.³²

The orthodox rule was recast in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)*.³³ Lord Hoffmann reframed remoteness as a question of the implied allocation of responsibility. The issue, on this view, is not simply whether a loss was within reasonable contemplation, but whether, on the proper construction of the contract against its commercial background, the defendant can be taken to have assumed responsibility for losses of that kind. The case concerned late redelivery of a vessel. Because of the delay, the owners lost a later fixture. Although this kind of loss may have been foreseeable, the House of Lords held that the charterers were not liable for the whole loss from the missed fixture. In the commercial context of the shipping market, a charterer would not normally be understood as accepting responsibility for such enormous and volatile losses. However, *The Achilleas* should not be understood as replacing the rule in *Hadley v Baxendale*, which was clarified by the Court of Appeal in *Supershield Ltd v Siemens Building Technologies FE Ltd*.³⁴ Toulson LJ held that *Hadley v Baxendale* remains the general rule, which simply reflects the responsibility the parties would ordinarily be taken to have assumed. The assumption of responsibility approach is mainly useful in unusual cases, where the ordinary foreseeability test does not properly reflect the risks which the parties can be taken to have accepted. It can exclude a loss that the orthodox test would admit, as in *The Achilleas*, or include a loss that the orthodox test might exclude. *Supershield* itself was an instance of the latter. Damage from a flood, though an unlikely consequence of the defendant's failure to maintain a float valve, was recoverable because preventing precisely that flooding was within the scope of the contractual duty the defendant had undertaken.³⁵

The better view, confirmed in *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd*,³⁶ is therefore not that *The Achilleas* displaced the orthodox rule, but that the two operate together. *Hadley v Baxendale* and *The Heron II* supply the general test, and assumption of responsibility is a supplementary inquiry, reserved for the unusual case in which the commercial context makes the orthodox rule inappropriate. Therefore, in most cases, the court asks whether the type of loss was within the parties' reasonable contemplation at the time of contracting. In more unusual commercial cases, the court may also ask whether the defendant can fairly be treated as having assumed responsibility for that type of loss.

Chinese Law

In contrast to the common law's separation of remoteness from causation, Chinese law deals with it through Article 584 of the Civil Code. The same provision which governs causation also contains a foreseeability limit. It provides that compensation shall not exceed the loss which the breaching party foresaw or should have foreseen at the time of entering the contract.³⁷ Three points of comparison with English law stand out.

First, the relevant date, the moment of contracting, not the moment of breach, is the same as in English law. Each system therefore fixes the parties' horizon of responsibility at the point where they could still have bargained over the allocation of risk.³⁸ This alignment is not accidental, as

³² *Parsons (Livestock) Ltd. v Uttley Ingham & Co. Ltd.* [1978] QB 791 (CA).

³³ *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, [2009] 1 AC 61.

³⁴ *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] EWCA Civ 7, [2010] 1 Lloyd's Rep. 349.

³⁵ *ibid* [43].

³⁶ *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd* [2010] EWHC 542 (Comm), [2010] 2 Lloyd's Rep 81 [40]–[48].

³⁷ Civil Code of the People's Republic of China 2020, art 584.

³⁸ For the English position that the relevant date is the time of contracting, see *Koufos v C Zarnikow Ltd (The Heron II)* [1969] 1 AC 350 (HL).

both systems treat remoteness as a question of what the parties could have dealt with when they made their agreement.³⁹

Second, the threshold of probability appears, on the face of the Code, to be lower than its English counterpart. Article 584 asks only whether the loss was “foreseen or should have foreseen.” That language is closer to the tort-derived “reasonable foreseeability” that the House of Lords in *The Heron II* rejected as the English contractual standard, in favour of the stricter requirement that the loss be “not unlikely to result.”⁴⁰ On a literal reading, this may suggest that some losses which would be too remote under English law might still be recoverable under Chinese law. However, this point should not be overstated, because Chinese courts do not apply Article 584 only by looking at the words in isolation.⁴¹

Third, and most significantly, the bare statutory language has been supplemented by Article 63 of the Supreme People’s Court’s 2023 Interpretation. This article directs courts to determine foreseeability objectively by reference to a range of contextual factors such as the nature of the parties, the type and content of the contract, transaction practices, and the negotiations between the parties.⁴² This makes the Chinese approach more contextual. The court does not only ask whether the loss was foreseeable in an abstract sense. It also considers the commercial background of the contract. This development makes Chinese law closer to the modern English approach in some respects. In English law, *The Achilles* asks whether the loss falls within the risk which the defendant can be taken to have assumed. In Chinese law, Article 63 also asks courts to look at the commercial context and the parties’ transaction background. The legal route is different, because English law develops through cases while Chinese law develops through statute and judicial interpretation. But both systems are concerned with a similar question: whether it is fair to make the breaching party responsible for this type of loss, given what the parties knew or should have known when they made the contract.

Liquidated Damages

Chinese Law

Chinese law allows parties to agree in advance what amount should be paid if one party breaches the contract. Article 585 of the Civil Code provides that the parties may agree on a fixed sum of liquidated damages or agree on a method for calculating compensation after breach.⁴³ The reason Chinese law allows for such compensation is that it works effectively in commercial sense in the business practice. Parties no longer must go through tedious work to prove the extent of the loss caused by the breach. It both facilitates the risk assessment and simplifies the compensation assessment.⁴⁴

One important feature of Chinese law is that liquidated damages do not always have to be a genuine pre-estimate of loss. In Chinese doctrine, liquidated damages may have both a compensatory function and a deterrent function (punitive liquidated damages). In other words, they may compensate the innocent party for loss, but they may also encourage performance and discourage breach.⁴⁵ This means that Chinese law is more willing to accept liquidated damages which are higher than the actual loss, at least in principle. However, this freedom is not unlimited. Article 585(2) gives the court or arbitral tribunal discretion to adjust the agreed amount. If the agreed sum is excessively higher than the actual loss, the court may reduce it on the application

³⁹ Jianyuan Cui, ‘On the Doctrinal Interpretation of the Reasonable Foreseeability Rule’ [2022] *Oriental Law* 171.

⁴⁰ *The Heron II*, 385–86.

⁴¹ Yongkuan Zheng, ‘Reflections on the Application of the Reasonable Foreseeability Rule in Damages for Breach of Contract’ [2025] *Journal of Comparative Law* 158.

⁴² Interpretation by the Supreme People’s Court of Several Issues Concerning the Application of Book One General Provisions of the Civil Code of the People’s Republic of China 2022, art 63.

⁴³ Civil Code of the People’s Republic of China 2020, art 585(1).

⁴⁴ Larry A. DiMatteo and Lei Chen, *Chinese Contract Law: Civil and Common Law Perspectives* (Cambridge University Press 2018).

⁴⁵ Shiyuan Han, *The Law of Contract* (4th edn, Law Press China 2018).

of a party. If the agreed amount is lower than the actual loss, the court may also increase it.⁴⁶ The Supreme People's Court has given this open standard more concrete content. In the guidance, where the agreed sum is more than 30 per cent higher than the actual loss, this may be treated as a sign that it is "excessively higher". When deciding whether to reduce the amount, the court may also consider factors such as the actual loss, the degree of performance, the parties' fault, fairness and good faith.⁴⁷ Therefore, Chinese law allows liquidated damages clauses to go beyond actual loss to some extent. But the final amount remains subject to judicial control. The agreed sum is generally respected, but it may be adjusted if it becomes clearly unfair or disproportionate.

English Law

English law approaches the same problem from the opposite direction, through the rule against penalties. A clause fixing the consequence of breach is either enforceable as liquidated damages or void as a penalty. English law does not recognise a separate category of valid "punitive" liquidated damages in the same way as Chinese law.⁴⁸

The traditional test came from *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*.⁴⁹ Lord Dunedin gave four working criteria for deciding whether a clause was a valid liquidated damages clause or a penalty. The main question was whether the agreed sum was a genuine pre-estimate of the likely loss, or instead it was extravagant and unconscionable when compared with the greatest loss that could result from the breach. This test was developed by the Supreme Court in *Cavendish Square Holding BV v Makdessi*.⁵⁰ The Court held that Lord Dunedin's criteria, though still useful for a simple damages clause, are not a universal test that fits every case. Lord Neuberger and Lord Sumption explained that the real question is whether the clause imposes a detriment on the contract-breaker which is out of all proportion to any legitimate interest of the innocent party in enforcing the contract. It means that English law no longer asks only whether the agreed amount is close to the actual loss. The innocent party may have a legitimate interest in performance which extends beyond simple compensation. In *ParkingEye*, for example, the £85 parking charge was enforceable even though it did not reflect *ParkingEye*'s actual financial loss. The charge was accepted because it protected a legitimate interest in managing the car park and making users follow the parking rules.

Both systems therefore accept, in different ways, that an agreed sum may be higher than the innocent party's actual loss. Chinese law openly recognises punitive liquidated damages, subject to the ceiling in Article 585(2). English law does not openly allow punitive liquidated damages, but after *Cavendish* it accepts that a clause may protect a legitimate interest beyond compensation. The real divergence lies in the limiting mechanism and its rationale. Chinese law treats the agreed sum, even in punitive nature, as presumptively valid and steps in only where it is disproportionate to the actual loss by a wide margin, keeping an openly compensatory benchmark. English law, by contrast, gives up actual loss as the benchmark altogether and asks instead whether the clause is proportionate to a legitimate interest. But it still refuses to enforce a clause that goes beyond any legitimate interest and exists only to punish. The contrast, therefore, is not simply that Chinese law permits penalties and English law forbids them. Rather, both systems try to separate legitimate agreed remedies from unacceptable punishment, but they do this through different legal techniques – a quantitative test of proportionality to loss, applied after the event by the Chinese courts, and a qualitative test of proportionality to interest, applied by the English courts.

⁴⁶ Civil Code of the People's Republic of China 2020, art 585(2).

⁴⁷ Interpretation by the Supreme People's Court of Several Issues Concerning the Application of Book One General Provisions of the Civil Code of the People's Republic of China 2022, art 65.

⁴⁸ Ewan McKendrick, *Contract Law, Text, Case, Materials* (6th edn, Oxford University Press 2014) 905.

⁴⁹ *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 (HL).

⁵⁰ *Cavendish Square Holding BV v Makdessi ParkingEye Ltd v Beavis* [2015] UKSC 67, [2016] AC 1172.

Non-pecuniary damages

Damages for non-pecuniary loss, such as disappointment, distress, and loss of enjoyment, are difficult to measure in market terms, and this raises a doctrinal problem common to both systems. The compensatory principle in *Robinson v Harman* and the equivalent rule in Article 584 both assume losses that can be quantified in money, and the difficulty of putting a money value on subjective suffering has made both systems cautious about awarding such damages. Each system, however, has carved out a defined space for recovery, and the techniques they use are conceptually different.

English Law

The general rule in English contract law is that damages are not recoverable for the mental distress, disappointment, or anxiety caused by a breach of contract.⁵¹ This rule was authoritatively restated by Bingham LJ in *Watts v Morrow*,⁵² who explained that the law refuses such damages not because the loss is unreal, but because in ordinary commercial contracts it is too remote and speculative to compensate. However, *Watts v Morrow* also recognised two exceptions to this restrictive position. The first occurs where the very object of the contract is to provide pleasure, relaxation, or peace of mind. The second is where the claimant suffers physical inconvenience or discomfort caused by the breach, together with mental distress that follows directly from that physical inconvenience.⁵³

The first exception was illustrated in *Jarvis v Swans Tours Ltd*,⁵⁴ where the Court of Appeal awarded damages for the disappointment of a skiing holiday that was very different from what had been promised. Lord Denning MR observed that the disappointment, frustration, and distress caused by such a breach were recoverable when the explicit purpose of the contract was the provision of enjoyment. A similar approach was taken in *Jackson v Horizon Holidays Ltd*, where the court also considered the disappointment suffered by family members who were meant to benefit from the holiday. These cases established the first *Watts* exception in its narrow form, confined to contracts whose entire object was pleasure or enjoyment.⁵⁵

The exception was substantially broadened in *Farley v Skinner*.⁵⁶ In this case, a surveyor negligently reported that a country house was unaffected by airport noise, despite being specifically instructed to investigate the matter. After the purchase, the claimant found that the property was in fact badly affected and sued for the loss of amenity. The House of Lords unanimously held that the *Watts* exception extends to contracts where a major or important object, even if not the exclusive or primary purpose, is to provide pleasure, relaxation, or peace of mind. The resulting £10,000 award was described by their Lordships as being “at the higher end of the scale” but not excessive, illustrating the modest quantum at which English law conventionally caps these types of damages.

These cases indicate that English law has not removed the general rule against damages for distress. Instead, it has created limited exceptions where the contract itself is closely connected with enjoyment, peace of mind, or physical comfort. The approach is therefore quite categorical. Recovery is permitted only within these tightly managed, judicially defined exceptions, regardless of the actual depth of distress a claimant might have suffered.⁵⁷ Even where damages

⁵¹ *Addis v Gramophone Co Ltd* [1909] AC 488 (HL). See also modern illustration: *Johnson v Gore Wood & Co* [2002] 2 AC 1 (HL) 49.

⁵² *Watts v Morrow* [1991] 1 WLR 1421 (CA).

⁵³ *ibid.*

⁵⁴ *Jarvis v Swans Tours Ltd* [1973] QB 233 (CA).

⁵⁵ *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468 (CA).

⁵⁶ *Farley v Skinner* [2001] UKHL 49, [2002] 2 AC 732.

⁵⁷ Roger Halson, ‘The Recovery of Damages for Non-Pecuniary Loss in the United Kingdom: A Critique and Proposal for a New Structure Integrating Recovery in Contract and Tort’ (2015) 3 *The Chinese Journal of Comparative Law* 245.

are allowed, the amount is usually modest and is assessed by reference to previous similar cases rather than by an exact calculation.

Chinese Law

Chinese law approaches non-pecuniary loss in contract through a structurally different mechanism, statutory cross-reference. Article 996 of the Civil Code provides that where a party's breach of contract has also infringed the other party's personality rights and causes serious mental harm, the injured party's claim for non-pecuniary damages is preserved. This claim is not excluded simply because the party chooses to sue in contract rather than in tort.⁵⁸ To succeed under this framework, three elements must be established, a breach of contract, a simultaneous infringement of the claimant's personality rights causing serious mental harm, and a causal link between the breach and the harm.⁵⁹

Article 996 is therefore not a general contractual remedy for all kinds of distress. It sits within the personality rights provisions of the Code and works through the protection of personality rights, such as life, health, bodily integrity, reputation, privacy or human dignity. This creates a possible gap. Some breaches of contract may cause real disappointment or emotional harm but may not clearly infringe a recognised personality right. For example, a ruined holiday, failed wedding photography, or poor funeral services may cause serious distress. However, it may be difficult to explain these cases only through the language of personality rights.⁶⁰ On the face of Article 996, claims of this kind fall outside the statutory remedy.

In practice, some Chinese courts have responded to this problem in a flexible way, granting compensation in a substantial portion of these emotionally significant cases. This includes situations where the performance of the contract is closely linked to the claimant's emotions or is aimed at providing emotional satisfaction.⁶¹ Notably, courts frequently achieve this outcome by reframing the contractual breach itself as a tortious infringement of a personality interest. It is often categorized broadly under human dignity or the right to personal feelings, thereby allowing non-pecuniary damages to flow from tort provisions rather than through Article 996 directly.⁶² While the substantive outcome often mirrors the English *Watts* or *Farley* position, the underlying legal route is different. English law creates exceptions inside contract law, while Chinese law often relies on personality rights and tort-based reasoning.

Comparison between the two legal systems and conclusions

The two systems therefore reach broadly comparable practical results by opposite techniques. Both begin with a general bar on contractual damages for mental distress, justified by the difficulty of monetary valuation and the risk of speculative recovery. However, both systems also recognise that this rule cannot be absolute. Where the contract is closely connected with enjoyment, peace of mind, emotional interests or personal dignity, damages for non-pecuniary loss may be possible. The difference is in the legal method. English law builds its exception inside the law of contract, through judicially defined categories within the *Watts/Farley* framework. It is more transparent doctrinally, but it is rigid, leading to a result that a claim either fits a recognised category, or it fails.⁶³ Chinese law builds the qualification by cross-reference to the law of tort, leaving courts to develop pragmatic workarounds for the gaps the statute fails to

⁵⁸ Civil Code of the People's Republic of China 2020, art 996.

⁵⁹ Xianbin Yang, 'On Damages for Mental Distress for Infringement of Personality Rights' [2025] *Journal of Comparative Law* 104.

⁶⁰ Aijun Zhu, 'The scope of compensation for moral damages under the Civil Code has been extended and improved' (2023) 4 *Legality Vision* 87, 89.

⁶¹ Hui Li, Yumei Xu and Zhiying Pang, 'Comparative Reflections on the Issue of Moral Damages for Breach of Contract' (2018) 4 *Legality Vision* 39.

⁶² Jun Xue, 'The development of the system of compensation for moral damages in the Civil Code' (2021) 3 *Journal of Xiamen University (Arts and Social Sciences)* 91.

⁶³ Hui Li, 'A Comparative Study of Damages for Mental Distress for Breach of Contract' [2012] *Commercial Research* 200.

reach. It has the clarity of a statutory rule but may leave uncertainty in cases where the emotional loss is real but the link with personality rights is not obvious.⁶⁴ Neither system has produced a fully settled doctrine in this area and demonstrates that the shared idea of compensation does not produce the same legal structure in both systems.

This article has compared how English and Chinese law apply the principle of full compensation and has asked whether the shared principle leads to the same result, or whether the different mechanisms in each system lead to different results. The principle itself is only a starting point in both systems. Each of them tries to put the innocent party in the position they would have been in if the contract had been performed, and neither of them requires fault. For this reason, the real control on damages does not come from the shared principle, but from the mechanisms discussed above, and these mechanisms are not the same in the two systems. However, the difference is not equally large in every area. In causation and remoteness, the two systems are in fact quite close. They ask similar questions, although they reach the answer in different ways. English law works through a large body of case law and Chinese law through one general provision, read together with 2023 Interpretation. The clearest difference appears in liquidated damages. Chinese law allows the agreed sum to be higher than the actual loss, and the court may adjust it under Article 585(2). English law does not take this approach. After *Cavendish*, it asks whether the clause protects a legitimate interest, and if it does not, the clause is treated as a penalty and cannot be enforced. The same clause may therefore be valid in China but not in England. Furthermore, non-pecuniary loss shows a similar result but a different method. In both systems the innocent party may sometimes recover, but English law does this inside contract law, while Chinese law works through personality rights and tort. In both areas the law is still not fully settled. It is suggested here that the shared principle of full compensation does not mean that the two systems are really the same. In many cases the choice between English law and Chinese law affects the reasoning more than the final amount. But in some cases, and most clearly in liquidated damages, this choice may also change how much the innocent party can finally recover. This shows that, even though the two systems share the same basic principle, they do not always achieve the same result.

⁶⁴ Sumin Xu, 'The Judicial Application of the Civil Code's Provision on Damages for Mental Distress for Breach of Contract: An Empirical Study of 202 Cases after the Civil Code Came into Force' [2023] *Law and Economy* 100.

RECENT DEVELOPMENTS

PROPERTY LAW

WhatsApp messaging, bankruptcy and postponement of sale of the family home

Reid-Roberts v Mei Lin [2026] EWHC 49 (Ch).

Professor Sukhninder Panesar*

Introduction

In a recent decision of the High Court, *Reid-Roberts v Mei Lin*,¹ Cawson J had to address two points of contemporary importance in the context of the sale of the family home following a marriage breakdown and the bankruptcy of a husband. The first revolved around the ever-increasing use of encrypted and digital messaging and the frequently asked question before the courts on the legal effect, if any, of messages in the form of a WhatsApp as well as communications and negotiations which have taken place through email exchanges. The second point related to the exercise of the courts power to order sale of the family home following a breakdown in the relationship between the co-owners and the extent to which that sale can be postponed by a court under exceptional circumstances. Both these areas of law have attracted significant judicial and academic commentary over the years. This article analyses the decision of the High Court and assesses its implications and refinement of the existing principles of law.

The facts in *Reid-Roberts v Mei Lin*

The facts involved a complicated marriage breakdown and a subsequent divorce proceeding between Mr Gudmundsson and Ms Lin. The family home was purchased in 2009, and the title was held as beneficial joint tenants. The couple had two children, and Mr Gudmundsson ran a mezzanine finance business. Mr Gudmundsson became addicted to drugs which changed his personality and became overly aggressive towards Ms Lin thus having significant impact on her and their children living in the family home. Their relationship deteriorated to the extent that there was a complete breakdown around 2016 whereupon they separated, and Ms Lin remained in the family home with her two children. In 2018 divorce proceedings under the Matrimonial Causes Act 1973 were commenced by both parties. Whilst these proceedings were taking place, and before a conclusion was reached by the Family Court, both Mr Gudmundsson and Ms Lin exchanged WhatsApp and email exchanges in which they communicated their intentions in respect of the family home and the welfare of the children. It is not intended to rehearse all of these communications here but save to say that discussions took place through messages and emails as to the future intentions of the parties both in respect of the family home and the custody of the children. One such WhatsApp message included the following communication from Mr Gudmundsson to Ms Lin:

“I suggest that the responsibility of taking care of the kids goes to u 100%, then I can sign over my share of southcote road to u without any complications as I don’t need any accommodation in London.” And followed by “Please let me know that u r happy with this and we can then close the financial part of the divorce this week.”

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¹ [2026] EWHC 49 (Ch).

A further message was in the form of an email which states ‘why don’t you just keep the house in London, and the kids move with me to Iceland.’

A week before the Family Court had delivered the outcome of the divorce proceedings, Mr Gudmundsson had been declared bankrupt and bankruptcy proceedings commenced with the appointment of a trustee in bankruptcy. The Family Court and neither Ms Lin knew that bankruptcy proceedings had begun and, that a week before the family court hearing Mr Gudmundsson had been declared bankrupt. The Family Court ordered that the full ownership of the family home be vested in Ms Lin. This order was made by taking into account all the facts including the conduct of Mr Gudmundsson. The trustees in bankruptcy commenced proceedings in the Insolvency and Companies Court in order to secure vacant possession of the family home where Ms Lin was residing with her children. The Deputy Judge, Frith J, declared that Ms Lin and the trustees each held a 50 per cent interest in the family home and that vacant possession be delivered to the trustees on 1 August 2032 whereupon the trustees would exercise their power to sell the family home pursuant to the power of sale contained in s.14 of the Trusts of Land and Appointment of Trustees Act 1996. Both the trustees in bankruptcy and Ms Lin appealed to the High Court.

In the appeal before the High Court, the trustees argued that the Deputy Judge had erred in finding that there were exceptional circumstances in favour of Ms Lin for the purposes of s.335 of the Insolvency Act 1986 which allowed the court to order a delay of sale of the family home until August 2032. Ms Lin cross appealed on the grounds that the Deputy Judge was wrong to find that the Trustees had a 50 per cent interest in the family home as she had evidence that her former husband Mr Gudmundsson had divested himself of any interest in the home by messages to that effect.

Effects of messaging, intent and authentication

These cases have primarily been in the context where the negotiations between the parties require some compliance with statutory formalities such as those found in sections of the Law of Property Act 1925 and The Law of Property (Miscellaneous Provisions) Act 1989 to name a couple. These sections not only require certain creation and dispositions of interests in property to be in writing, but they require proof of signing or actual signing before the actual creation and disposition can take effect.

In recent times the courts have been asked to deliberate over questions about the legality and effect of messages in the form of WhatsApp and email exchanges. There is now a growing body of law which seeks to explain the circumstances in which such messages and communications will have legal effect. In *Reid-Roberts v Mei Lin*, the question before the court was whether the cumulative effect of WhatsApp messages and emails had the effect of divesting Mr Gudmundsson of his beneficial interest in the family which he once shared with his former wife Ms Lin. In the High Court, Cawson J, after looking at the specific facts before him and also reviewing a series of cases where the issue of such messages was considered, held that in the present case the WhatsApp messages and the emails did not have the effect of divesting Mr Gudmundsson of his beneficial interest in the family home as required by the statutory formalities contained in s.53 (1) of the Law of Property Act 1925.

Section 53(1)(a) of the Law of Property Act 1925 provides that no interest in land can be created or disposed of except by writing signed by the person creating or disposing of such an interest. Section 53(1)(c) further provides that a disposition of an equitable interest must be in writing and signed by the person disposing of such. With respect to Mr Gudmundsson’s WhatsApp messages and his email exchanges, these could not be seen to have met the requirements of s.53 of the 1925 Act for several reasons. In the first place, the messages exchanged between Mr Gudmundsson and Ms Lin were not deemed to have the effect of an immediate release of Mr Gudmundsson’s interest in his property. At best these were pre divorces negotiations which may have indicated their intentions but only to be finalised by an order of the Family Court. Cawson J made reference

to the decision in *Xydhias v Xydhias*,² where the court held that even where parties to a divorce proceeding may attempt to negotiate any issues regarding matters such as ownership and the rights and welfare of children, these negotiations are not conclusive, and any such agreements reached only become binding once they have been approved by the Family Court. Furthermore, reliance was placed on the decision of the Court of Appeal in *Soulsbury v Soulsbury*,³ where the Court of Appeal made a distinction between a negotiation which had the effect of an immediate disposition of property and an agreement to dispose of the same in the future. Only an agreement that had the effect of an intention to immediately dispose of an interest could be caught by the provisions of s.53 of the Law of Property Act 1925, and even then, there would be a need for a requisite signature disposing of the same.

In respect of signature and authentication of a message Cawson J referred to the decision in *Hudson v Hathway*,⁴ where the Court of Appeal was faced with a question as to the effect of an email exchanged between a non-married couple who had separated some time ago. In the email, one former partner expressly stated that they wished to have no interest in the shared property with immediate effect. This email was taken as an immediate release of his interest. Cawson J explained that this was quite different from the present situation where the Mr Gudmundsson and Ms Lin were preparing for a divorce hearing and the matter was to be agreed by the judge in the Family Court.

Even where a message, whether it be in the form of a WhatsApp or an email, there does remain the more critical question about the requisite signature required to invoke s.53(1) of the LPA 1925. After reviewing a line of authorities on what actually constitutes a signature for the purposes of the formality requirement in s.53 of the LPA 1925, Cawson J explained that what was needed was some authentication that the sender intended the message and that message was intended to be sent by him or her. In doing so, the sender's signature was giving effect and recognition to what was being conveyed in the message by the sender.⁵ Normally, in the case of an email, an email address with the sender's name will automatically appear at the top of the email header. The same is true when a WhatsApp message is sent, where the name and in some cases a picture identity of the sender will appear. Cawson J explained that the mere appearance of the email address or header of a WhatsApp was insufficient to authenticate the message for the purposes of a signature. What was needed was an actual signing of by the sender to authenticate the message.

Sale and postponement of sale under s. 335 Insolvency Act 1986.

It is trite law that s.14 of the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA) confers upon the court to order a sale of land in circumstances where there is a dispute between the co-owners of the land. The section is invariably used in order to sell, for example, the family home in circumstances where there is a breakdown in the relationship between married and non-married cohabitants. In circumstances where one of the co-owners is declared bankrupt and the application is made by the trustees in bankruptcy of the bankrupt co-owner, there is a further requirement before an order for sale can be made. The order for sale has to be made to the bankruptcy court under s.335(A). In the exercise of its power to order a sale, the court is required to balance the interests of the creditors on the one hand and the family of the bankrupt on the other hand. Section 335(A)(2) list the following factors which the court must take into consideration in order to arrive at a just and reasonable decision:

“... the court shall make such order as it thinks just and reasonable having regard to:

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² [1999] 1 All ER 386.

³ [2008] Fam 1.

⁴ [2023] KB 345.

⁵ See, for example, *J Pereira Fernandes SA v Mehta* [2006] 1 WLR 1543.

- (a). The interests of the bankrupt's creditors.
- (b). where the application is made in respect of land which includes a dwelling house which is or has been the home of the bankrupt or the bankrupt's spouse or civil partner or former spouse or civil partner –
 - (i) the conduct of the spouse, civil partner, former spouse, or former civil partner, as far as contributing to the bankruptcy.
 - (ii) the needs and financial resources of the spouse, civil partner, former spouse, or former civil partner; and
 - (iii) the needs of any children; and
- (c) all the circumstances of the case other than the needs of the bankrupt.”

Section 335(A) is further qualified by subsection 335(A)(3) which provides that “where such an application is made after the end of the period of one year beginning with the first vesting of the bankrupt's estate in a trustee, the court shall assume, unless the circumstances of the case are exceptional, that the interests of the bankrupt's creditors outweigh all other considerations.”

Exceptional circumstances and the role of an appellate court

In *Reid-Roberts v Mei Lin*⁶ the Deputy Judge, Frith J, held that in the exercise of the power of sale at the request of the trustees in bankruptcy, and taking on board the full ambit of S.335(A) of the Insolvency Act 1986, there were exceptional circumstances operating in favour of Ms Lin and her children to the extent that the sale of the disputed family home was postponed by 8 years to 2032. The trustees cross appeal in the High Court was on the grounds that the Deputy Judge had erred finding that there were exceptional circumstances postponing the sale of the family home for a period of eight years.

Once a bankruptcy court has made a judgment in postponing sale on grounds of exceptional circumstances, the grounds upon which an appellate court can interfere with the decision of the bankruptcy court is very limited.⁷ It is also very clear from the caselaw that on appeal, the appellate courts are not to carry out a re-assessment of the factors that are, for example in the case of *Reid-Roberts v Mei Lin*, contained in s.335(A)(3) of the Insolvency Act 1986. There is no room for a re-trial, rather the role of the appellate court is to establish what may be described as a judicial review of the decision of the bankruptcy court. The matter is no better explained than by the words of McCombe, Leggatt and Rose LJ in *Re Spiritroom Ltd*,⁸ where they explained commented that “the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, “such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion”.⁹

It is, therefore, clear that the only grounds for an appellate court to interfere with the decision of an earlier court is confined to situations where the earlier court made an error in law. In terms of what constitutes errors of law, this was articulated by Saini J in *Azam v University Hospital Birmingham NHS Foundation Trust*¹⁰. The learned judge explained that there were five types of errors that a lower court could have made giving rise for an appellate court to intervene. These were a misdirection of law; some procedural unfairness or irregularity; the judge considered irrelevant matters, the judge failed to consider relevant factors and finally that the judge had

⁶ [2026] EWHC 49 (Ch).

⁷ See, for example, *Cloughton v Charalambous* [1998 BPIR 558 at 562 per Jonathon Parker J.

⁸ [2019] EWCA Civ 932.

⁹ [2019] EWCA Civ 932 at para. 76.

¹⁰ [2020] EWHC 3384 QB.

simply made the wrong decision. An example of the final one being where the decision of the judge was simply too generous as it was claimed to be by the trustees in *Reid-Roberts v Mei Lin*.

What amounts to exceptional circumstances under s.335(A)(3) Insolvency Act 1986?

It is a natural consequence of marital breakdown that all parties to the marriage, including any children, will often endure an extended period of hardship and uncertainty before there is a complete settlement. The matter can be further exacerbated where one of the parties is declared bankrupt and the trustees in bankruptcy commence proceedings to realise the assets of the bankrupt party which will generally be seen as being paramount to other claims of the family unless there are exceptional circumstances. The mere fact that a wife and her children may have to face a sale and relocate to another property is not in itself sufficient to amount to exceptional circumstances. There is a growing body of law around the question of what amounts to exceptional circumstances. It is not intended to rehearse all of the caselaw which has been decided under the former s.30 of the Law of Property Act 1925 and s.14 of the Trusts of Land and Appointment of Trustees Act 1996. In *Re Citro*¹¹, regarded as one of the seminal cases in bankruptcy proceedings, Nourse LJ explained that ‘as the cases show, it is not uncommon for a wife with young children to be faced with eviction in circumstances where the realisation of her beneficial interest will not produce enough to buy a comparable home in the same neighbourhood, or indeed elsewhere; and, if she has to move elsewhere, there may be problems over schooling and so forth.

Such circumstances, while engendering a natural sympathy in all who hear of them, cannot be described as exceptional. They are the melancholy consequences of debt and improvidence with which every civilised society has been familiar. It was only in *Re Holliday* that they helped the wife’s voice to prevail; and then only, as I believe, because of one special feature of that case.’¹² Similarly in *Grant v Baker*¹³ the court made it clear that even where there exceptional circumstances, it was important and necessary for the court to have regard to right of the creditors of the bankrupt and only in truly exceptional circumstances could the rights of those creditors give way to an excessive delay in the sale of the bankrupt’s share in the family home.

Exceptional circumstances were found in the decision in *Re Holliday*,¹⁴ a case decided under the old provision of s.30 of the Law of Property Act 1925. Here a wife’s and her children’s interest outweighed the interests of the creditors when a bankrupt husband has left his wife to defend for herself and her children. The husband had moved out of the former family home and settled with another woman. The actual monies owned by the husband were relatively low and Buckley LJ took the view that the wife and the children were relatively young and at school, should not be displaced. In relation to an order for sale in the context of bankruptcy, Lawrence Collins J in *Dean v Stout*¹⁵ summarised the principles to be applied when considering the operation of s.335(A)(3). His Lordship explained that “the presence of exceptional circumstances is a necessary condition to displace the presumption that the interests of the creditors outweigh all other considerations, but the presence of exceptional circumstances does not debar the court from making an order for sale.

Typically, the exceptional circumstances in the modern cases relate to the personal circumstances of one of the joint owners, such as a medical or mental condition... The categories of exceptional circumstances are not to be categorised or defined and the court makes a value judgment after looking at all the circumstances... It is not uncommon for a wife with children to be faced with eviction in circumstances where the realisation of her beneficial interest will not produce enough

¹¹ [1991] Ch 142.

¹² [1991] Ch 142

¹³ [2016] EWHC 1782 (Ch).

¹⁴ [1981] Ch 405.

¹⁵ [2004] EWHC 3315.

to buy a comparable home in the same neighbourhood or, indeed, elsewhere. Such circumstances, while engendering a natural sympathy, cannot be described as exceptional.’¹⁶

Exceptional circumstances in *Reid-Roberts v Mei Lin*?

In the bankruptcy court, the Deputy Judge Frith J held that there were indeed exceptional circumstances in favour of Ms Lin and her children. In respect of the creditors of Mr Gudmundsson, the learned judge explained that the extent of Mr Gudmundsson’s debt was not clear for several reasons. Some of the debt had been caused by a dishonest solicitor acting for Mr Gudmundsson and in that respect, the creditors had a potential claim against the solicitor for dishonest assistance. Furthermore, there was a potential claim against insurances that the creditors could benefit from although whether those would be successful was another matter. The learned judge also took into consideration the conduct of Mr Gudmundsson in not informing the Family Court and neither Ms Lin about the bankruptcy proceedings against him. Frith J took the view that had Ms Lin have known that there was service of bankruptcy against her former husband, she would have expedited matters to resolve the ownership of the family home much earlier.

Frith J made took further consideration of the mental health of Ms Lin and her son. The learned judge regarded these mental health conditions as not being the normal consequences of having to sell the family home as a result of the breakdown of the marriage and the subsequent bankruptcy of the husband. They were, in the opinion of the learned judge, exceptional circumstances. Ms Lin was diagnosed with PTSD and her son with ADHD. This principally brought on by the aggressive behaviour of Mr Gudmundsson over a considerable time when they were married and lived together. Frith J paying significant attention to this mental stress that had been put upon Ms Lin and her children. Frith J held that although it was clear that the sad consequence of debt and subsequent displacement from the family home was not exceptional, the case before him was different. Mr Gudmundsson’s behaviour and treatment of his wife could not be regarded as a normal consequence of his bankruptcy and subsequent debt.

Cawson J in delivering his judgement in the High Court disagreed with the findings of Frith J in the bankruptcy court. His Lordship explained that although Ms Lin and her children had exceptional circumstances operating in their favour for the purposes of s.335(A)(3) of the Insolvency Act 1986, the postponement of sale was far too long. The postponement of the sale for a period of 8 years was incorrect and should only have been postponed for 1 year. In coming to this conclusion, Cawson J explained that the Deputy Judge had erred on a number of points which gave the court grounds upon which to overturn the decision. In the first place, there was insufficient evidence relating to Ms Lin’s mental health. Cawson J explained that there were ‘some errors in the Deputy Judge’s approach to the misconduct on the part of Mr Gudmundsson, and whilst there are deficiencies in the evidence as to the state of Ms Lin and her son’ mental health, I have come to the conclusion that the Deputy Judge’s overall evaluation that there are, in the present case, exceptional circumstances is one that he was entitled to come to.’¹⁷

Cawson J explained that the costs of bankruptcy had already increased significantly and the fact that Ms Lin would have to displace was not significant. The Deputy Judge had paid significance to the fact that the creditors were to receive a windfall at the expense of Ms Lin, however, Cawson J explained that the interests and windfall to the creditors should not be factor taken into consideration. His Lordship explained at ‘I consider it a further fair criticism of the Deputy Judge’s approach that he did not give any real consideration to the alternatives that might be available to Ms Lin. It is correct that he did identify that Ms Lin would stand to receive a not insignificant amount out of the proceeds of sale of the Property, albeit diminished by various liabilities or costs. Further, he did identify the fact that any substitute property would have to be smaller, and not within the same vicinity with the implications for schooling etc. However, no

¹⁶ [2004] EWHC 3315 at para 5-11.

¹⁷ [2026] EWHC 49 (Ch) at para.163.

real consideration appears to be given to finding a rental property, which could be smaller than the Property given that the latter is large enough to house lodgers, and to do so within the more immediate locality.’¹⁸

Conclusions

The decision of the High Court in *Reid-Roberts* continues to build on an important line of authorities in the context of WhatsApp and email exchanges in legal negotiations as well as the cases on what constitutes exceptional circumstances in the context of a postponement of the sale of the family home under s.335(A)(3) Insolvency Act 1986.

In respect of WhatsApp and email messaging, the mere presence of an email address or a WhatsApp identity is insufficient to amount to a signature for the purposes of statutory provision such as those found in s.53(1) LPA. What is needed is an actual signature or “signing off” of the message in order to authenticate the message. In the present case before the High Court held there had been no such authentication and Ms Lin’s argument that her former husband Mr Gudmundsson had divested himself of his interest in the former family home was rejected. Given technological advances and the use messages through mobile devices, the courts will continue to be asked the question as to the legal effect of such mobile communications. The law is developing with technological advances and is now recognising that such messages can have legal effect where the intention is that the parties intended them to be so. However, the key question is one of authentication and that will require something more than the automated email address of the sender or in the case of a WhatsApp message, the name and identity of the sender.

As far as the operation of s.335(A)(3) of the Insolvency Act 1986, and the grounds for a court to postpone sale of co-owned following a dispute between the co-owners where there are exceptional circumstances, the decision illustrates the very high threshold of evidence that is required before the court can postpone sale and the duration of that postponement. The decision in *Reid-Roberts v Mei* is yet another clear affirmation that, although the courts will take into consideration exceptional circumstances, those exceptional circumstances will not allow an extensive delay in the sale of disputed property.

¹⁸ [2026] EWHC 49 (Ch) at para.163.

CASE NOTES

Prisons – prisoners – segregation – closed supervision centres – judicial review – human rights – compensation

R (Awale) v Secretary of State for Justice [2024] EWHC 2322 (Admin)

Administrative Court

Introduction

In *R (Abu) v Secretary of State for Justice* [2025] EWHC 3026 (Admin), the High Court found, inter alia, a breach of Article 3 of the European Convention (prohibiting inhuman and degrading treatment and punishment); the first finding of Article 3 in the prison context in the domestic courts (See Steve Foster, 'Segregating prisoners: judicial review and complying with human rights law' (2025) 30(2) *Coventry Law Journal* 53). In addition, the government has faced other defeats in the domestic courts with respect to segregating prisoners in domestic prisons. As with the decision in *Abu*, in the present case – *Awale* – the Court upheld all the prisoners' claims on illegality, procedural unfairness, breach of his human rights and failure to comply with their equality duties under the Equality Act 2010. In addition, the government was ordered to pay compensation to the prisoner for breach of his Convention rights, together with substantial legal fees.

The facts and decision in *Awale*

The claimant is a prisoner and was serving a life sentence for the murder of two teenagers. In 2013, in consequence of his involvement in a serious incident involving taking a prison guard hostage, he was referred to a Closed Supervision Centre (CSC), and in 2014, he was made subject to a direction under Rule 46 of the Prison Rules 1999, which provides that where it was desirable, a prisoner should not associate with other prisoners. Under Rule 46(2) a monthly review of whether the original direction should be reviewed must be made and Rule 46(3) then provides that the Secretary of State can direct that such a prisoner resume association with other prisoners.

While subject to CSC, the claimant was subsequently permitted to associate with another prisoner outside his cell, but that ended on 13 April 2022 when the other prisoner was relocated. In June 2022, association with another prisoner was suggested, but the claimant, who was black and Muslim, was concerned about being racially abused. In September 2022, the claimant raised his lack of association with the prison and asked whether he could be considered for a transfer, which was refused. Thus, other than a six-week period between January and March 2023, the claimant had not associated with any other prisoner; the defendant explaining that there was no suitable placement in which association could be facilitated. The consequence was that the claimant had been locked in his cell for almost 23 hours a day for that relevant period.

The issues for the Court were as follows: whether the claimant's continued removal from association was unlawful under Rule 46 because of the lack of review; whether the claimant had not been provided with reasons for the decision, preventing him from having a meaningful opportunity to make representations; whether the claimant's right to private life under Article 8 of the European Convention had been breached; and whether the defendant had breached her public sector equality duty (PSED) under s. 49 of the Equality Act 2010.

The High Court granted the application on all four grounds. With respect to the defendant's compliance with Rule 46(3), the Court held that a direction within that Rule had not been

provided in the claimant's case. Although such a direction need not take a particular form, its terms had to be both express and clear, as anything short of those basic requirements left the need, which was imposed by Rule 46(2), for renewal of a Rule 46(1) direction unclear. Thus, there had been no direction under Rule 46(3) and no monthly review of the Rule 46(1) direction relating to the claimant's removal from association in accordance with Rule 46(2).

With respect to the giving of reasons for the decision, the Court held that a prisoner should normally have a reasonable opportunity to make representations before a decision was taken by the Secretary of State. Further, a prisoner's right to make representations was largely valueless unless he knew the substance of the case being advanced in sufficient detail to enable him to respond, although fairness did not require the disclosure of information which could compromise the safety of others. It would, therefore, be sufficient to inform the prisoner in general of the gist of the reasons. In the instant case, the claimant had not been provided with adequate reasons enabling him to make representations regarding his continued removal from association, including as to why he could not be transferred, and any administrative burden on the prison service in doing so was outweighed by the importance of procedural fairness.

The Court then ruled on the legality of the segregation with respect to Article 8 of the European Convention. It noted that under s. 6 of the Human Rights Act 1998 for a public authority to act in a way which was incompatible with a Convention right. In this case, Article 8, guaranteeing the right to private life, was engaged by the prisoner's removal from association, and therefore had to be justified in accordance with Article 8(2), as a necessary and proportionate restriction for a legitimate aim. In this case, the claimant's removal from association from April 2022 had not been in accordance with domestic law, as required by Article 8(2). The claimant contention that the legal framework relating to removal from association itself ran contrary to Article 8 was upheld. In the Court's view, the process by which Rule 46 operated set out in an operating manual, and in so far as the manual related to association and its removal, it was sparse and did not provide for external scrutiny of decisions regarding continued removal from association. Hence, that legal framework lacked clarity as to the manner of the exercise of the discretion to remove a prisoner from association and did not require that the prisoner be involved in the decision-making process to a degree sufficient to provide them with the requisite protection of their interests and was accordingly in breach of his Article 8 rights.

Finally, the Court ruled on whether the defendants had public sector equality duty, imposed on public authorities by s. of the Equality Act 2010. In finding a breach of that provision, the court held that the equality impact assessments undertaken had not considered whether the known presence of a significant body of racist prisoners in the CSC disproportionately impeded the ability of non-White prisoners to associate or progress. Thus, in failing to have made enquiries as to the impact of that body of racist, Islamophobic prisoners, the defendant had not had due regard to her duties with respect to the PSED.

With respect to relief for the claimant, the Court noted that no award of damages was to be made under s.8 of the Human Rights Act 1998 unless the court was satisfied that the award was necessary to afford just satisfaction to the claimant. It then noted that the finding of a violation of Article 8 not in itself constitute just satisfaction. Accordingly, the court granted declaratory relief to the effect that the claimant's Article 8 rights had been breached and that the defendant had breached her duty under the Equality Act. It then determined that, in the absence of agreement between the parties, the Court would assess an award in respect of non-pecuniary damages payable to the claimant by reason of the violation of his Article 8 rights. Subsequently, Awale was awarded £7,500 in damages as just satisfaction for non-pecuniary loss by the High Court relating to his prolonged solitary confinement.

Commentary

The power of prison authorities to segregate prisoners, for their own or others' safety or as part of a punishment, are contained in Rules 45 and 46 of the Prison Rules 1999 and impact on

prisoners' rights, whether at common law or under the Human Rights Act 1998. Decisions on segregation are intended to uphold good order and discipline in prisons and to protect other prisoners from harm or exploitation and are essential in managing prison safety and order. Segregation is capable of breaching the prisoner's Convention rights to private life (under Article 8), and not to be subject to inhuman or degrading treatment or punishment (Article 3), in addition to their public law rights in judicial review. actions in judicial review.

The breadth of remedies available to prisoners with respect to wrongful segregation is illustrated in *Awale*, where the Court found both substantive and procedural breaches of the Prison Rules 1999, a breach of his Article 8 rights, a breach of the Secretary's equality duty under the Equality Act 2010. The prisoner's treatment in that case is typical of the challenges made to segregation decisions, where in an effort to protect other prisoners from physical and other harm, the executive often ignore the substantive and procedural limits placed on the use of such powers, and the basic rights of prisoners who are subject to the consequences of segregation.

The decision in *Awale*, together with previous cases, re-iterates that any segregation or removal of association must be within the law. Thus, if a decision to segregate or restrict association is *ultra vires*, then not only is the decision reviewable in public law, this might also lead to a breach of article 8 ECHR, as the decision (and the interference with the prisoner's private life was not 'in accordance with law' so as to justify any interfere (See *R (Bourgass and another) v Secretary of State for Justice* ([2015] UKSC 54), and *Shahid v Scottish Ministers* [2015] UKSC 58).

Although the courts are prepared to insist on full and fair procedure in challenging such decisions, they are often unprepared to offer a real and effective remedy (*Bourgass* and *Shahid*, above). A simple finding of a violation of both common law (and Convention rights) has some use in that it reminds the authorities of the limits of their powers. However, that finding loses its utility if lessons do not appear to be learnt, and where we may reach the position of systemic failures. The availability of damages in *Awale*, and the previous decision in *Abu*, might, therefore concentrate the minds of the Secretary and the Prison Service to pay more attention to their public law duties, and thus respect the rights of these vulnerable prisoners.

The findings in the present case display the wide number of grounds that a decision on segregation can be challenged. In this case, the Secretary's general policy on segregating such prisoners took the decision away from prison governors and was thus *ultra vires* as the Rules envisioned governors making individual decisions. However, such a breach did not provide a public law remedy as the court found that the governors would have made the same decisions had they acted individually and thus lawfully. So too, the procedural breach failed to afford a remedy for the same reason – the prisoners could have said nothing significant had they been given the gist of the reasoning and an opportunity to argue against the segregation. This shows the flexibility and discretion of public law remedies, which can consider the proper functioning of public duties, rather than breach of individual rights.

The finding of a breach of Article 8 is particularly relevant, as the harm caused by a breach of public law duties needs to be supplemented by a separate action in order for the court to grant compensation; either in tort or under the Human Rights Act 1998. will not usually cross the threshold required to find a breach of Article 3. Under ss. 7 and 8 of the Human Rights Act 1998, domestic courts must consider to the European Court's jurisdiction of providing just satisfaction for Convention breaches, and in this case just satisfaction of £7500 was awarded, and the government was faced with a bill for legal costs of over £200,000.

In addition to the cases cited above, there have been other decisions in this area recently, not all successful, but showing that this is a fertile area of prisoner litigation, and that the prison service's rules on segregation either need reform, or closer attention being paid to their detailed restrictions. For example, in *R (on the application of De Silva) v Secretary of State for Justice* [2025] EWHC 128 (Admin), the High Court found that the decision-making committee placing the prisoner in a separation centre (created to address extremism and terrorism in prisons and involving further

restrictions on the prisoner's movement, association and activities) breached several aspects of procedural fairness. Thus, the authorities had failed to consider the prisoner's submissions on allegations made against him, had failed to hold an oral hearing, had taken an unlawful approach to factual disputes, and had not provided adequate reasons for its decision. In that case, the court also found that Article 8 of the European Convention was engaged because of the potential psychological harm caused by his segregation, and that his segregation could not be justified within Article 8(2), as it was not in accordance with law – the lack of consultation and fairness in this case rendering the segregation unlawful.

On the other hand, if the prisoner is to succeed in these claims, there must be evidence that they have cooperated with the authorities with respect to the enforcement of the rules. Thus, in *R. (on the application of Thakrar) v Secretary of State for Justice* ([2026] EWCA Civ 503), the Court of Appeal found that prisoner's prolonged segregation within a close supervision centre under Rule 46 was lawful and did not breach his Convention rights, as his persistent refusal to engage with psychological assessments prevented the prison authorities from assessing the risks he posed to staff and other prisoners.

Conclusions

Cases such as *Awale* and *Abu* demonstrate the potential for prisoner litigation in this area and the vulnerability of the Prison Service and the government to legal challenge. The courts are no longer displaying unconditional deference to the Prison Service or the Secretary of State on the location and management of prisoners, with respect to their efforts to attain good order and discipline in prisons and insist on them following (their own) regulations to ensure fairness and legality. Further, the courts' willingness to award damages to prisoners affected by unlawful segregation should send a clear warning to both that procedural and substantive justice must be provided to prisoners in such cases.

This is, by no means, an enviable task for the prison service and the government in an area of prison life that calls for the securing on good order and discipline and the safety of other prisoners and prison staff. However, the courts have made it clear that these aims do not justify breaches of their public law duty to act legally and in compliance with natural justice. Further, the availability of damages (and high legal costs) are further reasons for the authorities to ensure that prisoner segregation marries safety and prison order with the rule of law.

Prisons – accommodation – equality – sex – gender reassignment – human rights

For Women Scotland v Scottish Ministers [2026] CSOH 59

Court of Session (Outer House)

Introduction

Since the decision of the Supreme Court in *For Women Scotland v Scottish Ministers* ([2025] UKSC 16) that the term ‘sex’ in the 2010 Equality Act was biological and did not include transsexuals, various agencies and employers have had to amend their equality and inclusion policies to ensure that that distinction is preserved where possible, without discriminating against trans persons (also a protected group under the 2010 Act). The decision has had a particular impact on the provision of mixed sex toilets, but the current case is concerned with the different issue of the prison environment.

The background and facts

A campaign group sought judicial review of guidance on the management of transgender prisoners issued by the Scottish Prison Service, an executive agency of the Scottish Ministers, on the basis that it allowed, in some circumstances, for the accommodation of some biological men within the women’s prison estate.

Rule 126 of the Prisons and Young Offenders Institutions (Scotland) Rules 2011 required separate accommodation for male and female prisoners, but the effect of the guidance was that in the absence of a marker for risk of violence against women and girls, a trans woman prisoner should be considered for admission into the women’s prison estate. There was, then, a presumption that the presence of a marker meant a trans woman prisoner would not be admitted into the women’s estate, although exceptions remained possible. Section 29 of the Equality Act prohibited discrimination in the provision of services, although Schedule 3 permitted the provision of separate services for persons of each sex. Section 29(6) prohibited discrimination in the exercise of a public function, but by virtue of Schedule 22 an act undertaken in the exercise of a public function would not contravene s.29(6) so far as relating to the protected characteristic of sex if it was done ‘pursuant to a “requirement of an enactment”’.

The petitioner argued that the allocation of prison accommodation was a public function in terms of s.29(6), and that the provision of women-only prison accommodation was intended for the protection of women prisoners as a group. Thus, accommodating women prisoners in women-only prisons was lawful because Regulation 126 constituted a ‘requirement of an enactment’ for the purposes of Sch.22 para.1. Further, in light of the Supreme Court’s judgment that the words “sex”, ‘woman’ and ‘man’ in the Act meant biological sex, biological woman and biological man, the applicable provisions of the 2010 Act could only be read as referring to biological women, with the result that trans women could not be accommodated in women’s prisons in *any* circumstances. In response, it was argued, firstly, that the petition was irrelevant because no specific claim of discrimination or harassment had been advanced, and secondly, that it might be necessary to place transgender prisoners in a prison of the opposite biological sex in order to avoid a violation of such prisoners’ rights in terms of the rights contained in the European Convention on Human Rights 1950, in particular under Article 2 (the right to life) in the context of suicide risk.

The decision of the Outer House

The Court of Session found that the Scottish Prison Service’s operational guidance on the management of transgender prisoners was, following the Supreme Court’s decision, unlawful, as the guidance misstated the law in so far as it permitted trans prisoners to be accommodated in prisons for the opposite biological sex. In the Court’s view the 2011 Rules, read with the 2010

Act, required separate prison accommodation for male and female prisoners according to biological sex, and that respect for trans prisoners' rights under Article 8 of the Convention (guaranteeing respect for private life) did not extend to a right to be accommodated in a prison for the opposite biological sex. Further, there was no positive obligation, in general terms, based on Articles 2, or 3 (freedom from inhuman and degrading treatment) to accommodate a trans prisoner in a prison for the opposite biological sex.

In granting the petition, the Court first looked at whether there was a requirement for a particular claim. It held that the structure of the 2010 Act and the fact that it allowed for individuals to bring claims did not provide a complete answer to the petition. Service-providers and those who exercised public functions had to ensure that they carried out those responsibilities lawfully, and if they adopted a policy which, when implemented in individual cases, would result in a breach of their statutory obligations, that policy could be challenged as being unlawful.

Turning to the legal basis for sex segregation in prisons, the court noted that Rule 126 mandated sex segregation in prisons in order to protect the safety of women and to secure the privacy and dignity of both women and men. Further, in deciding to which prison a prisoner was to be committed, the Scottish Ministers exercised a power under s.10(2) of the Prison (Scotland) Act 1989, which was a governmental function which could be discharged only by the Scottish Ministers, exercising the coercive powers of the state. Accordingly, deciding prison allocation was the exercise of a public function, subject to s.29(6) and Sch.22 of the 2010 Act.

In the Court's view, s. 29 constituted a general prohibition on discrimination, and applied to the Scottish Ministers in their exercise of their public function in determining prison allocation. Pursuant to Sch.22 para.1, there would be no contravention of s.29(6) if the Scottish Ministers' act of allocating prisoners to establishments according to sex was done pursuant to a 'requirement of an enactment'. Rule 126 of the 2011 Rules constituted such a requirement. Accordingly, if, to any extent, an allocation decision entailed sex discrimination, sex segregation in prisons could be justified and there would be no breach of s.29(6). Such a justification did not require a case-by-case analysis, and it was not necessary to refer to specific evidence relating to an individual claim. As the petitioner challenged the guidance on the basis that it mis-stated the law, in order to do that in relation to sex discrimination, it was not necessary to put before the court the circumstances of any individual case.

The Court then considered the claim based on Convention rights, as given further effect to by the Human Rights Act 1998. In the Court's view, respect for trans women prisoners under Article 8 did not extend to an obligation to provide accommodation with women. Sex segregation was in accordance with the law and, under Article 8(2) was necessary for the protection of health and morals and for the protection of the rights and freedoms of others, specifically women prisoners. The Court noted that the margin of appreciation in regulating prisoner allocation was wide, and that the statutory scheme imposed a bright-line rule, and sex segregation in prisons did not admit of exceptions on the basis of Article 8. Further, in terms of Articles 2 and 3, there was no positive obligation, in general terms, to accommodate a trans prisoner in a prison for the opposite biological sex, and that the existence of a suicide risk did not necessitate an option, *as a matter of policy*, to accommodate trans women prisoners within the women's prison estate. However, it was conceivable that, in an extreme case involving a threat to life and a potential breach of Article 2, a trans prisoner might be able to argue that the Scottish Ministers ought to disapply Rule 126; although in the instant proceedings, it was impossible to say whether that could be done, and whether any such argument would succeed. Thus, to operate a policy premised on the *possibility* that the Scottish Ministers might disapply the applicable subordinate legislation would undermine the clarity of the existing scheme, and a statement in a policy, in advance and in the abstract, and in the absence of an established Convention right, to the effect that a public authority might disregard the statutory requirements, would also mis-state the law.

The Court concluded, therefore, that sex segregation in prisons in Scotland was lawful, and that the statutory scheme required separate prison accommodation for men and women. That,

following the Supreme Court decision, meant sex segregation in prisons according to biological sex, and thus, in so far as the guidance allowed the Service to accommodate trans prisoners in prisons for the opposite biological sex, that was in conflict with the requirement that prison accommodation be provided separately for men and women.

Commentary

Since the Supreme Court's ruling, above, various public bodies and agencies needed to redraft many of their previous policies, where the desire to include and protect trans persons clashed with the wishes and privacy and dignity rights of those seeking to retain their binary status rights. As with the original *For Women Scotland* case, litigation has tended to centre around issues such as the provision of toilet and ancillary facilities, and the question whether permitting transsexual (females) to use such facilities interfered with the equality and human rights of binary females. The present case before the Outer House deals with an equally controversial and important area and the question of whether, and how, prison services can accommodate trans prisoners into male and female prisons without breaching the respective rights and claims of both binary and trans prisoners.

The Supreme Court, in defining sex for the purpose of equality legislation, offered a warning that the legislation offered protection on grounds of sex *and* sexual identity. Thus, Lord Hodge was careful to point out that the parties bringing the claim should not see the judgment as an outright victory in terms of the ongoing debate in this area. The decision, therefore, was based on the statutory interpretation of words used in the 2010 Act, not a statement that one view on sex and sexuality is preferable to another. Accordingly, any enforcement of the rights of binary (fe)males under the law has to be conscious of any potential discrimination against the rights of others – in these cases, the rights of trans persons.

The legality of prescribing toilet facilities on the basis of binary sex was accepted by the England and Wales High Court in *R (Good Law Project) v EHRC* ([2026] [2026] EWHC 279 (Admin)), in finding that the interim guidance issued by the Equality and Human Rights Commission concerning single-sex toilet and changing facilities in workplaces and public services was lawful and compliant with the Commission's statutory duties. The High Court also held that any consequent interference with an individual's right to private life under Article 8 of the European Convention on Human Rights was capable of being justified for the protection of the rights and freedoms of others. Also, the guidance recognised that the application of the Act's provisions on single-sex facilities would require a factual evaluation and an assessment of whether the facilities provided were a proportionate means of achieving a legitimate aim. Specifically, the Court held that the Commission had stated that the consequence of single-sex lavatory provision should not be that no provision was made for transsexual people. It had, therefore, encouraged the provision of unisex or single-person-use facilities. Those matters directed everyone to consider the consequences for gender reassignment discrimination of providing single-sex lavatories and to consider the dignity of transsexuals.

The outcome of disputes in this area, thus, depend on their facts, and some tribunal decisions turn on how the policy was introduced and implemented by the employer or agency. Thus, in *Hutchinson v County Durham and Darlington NHS Foundation Trust* ([2026] 1 WLUK 238), a tribunal partly upheld nurses' claims of harassment and indirect sex discrimination after they were required to share a female changing room with a transgender colleague and after their concerns were dismissed. On the question of harassment, the tribunal held that the Trust had subjected the claimants to harassment related to sex and gender reassignment by permitting a trans person to use the female changing room and requiring the claimants to share that changing room without providing suitable alternative facilities, and by not taking seriously and declining to address the claimants' concerns regarding the use of the female changing room by a biological male, transgender woman colleague.

As the implementation of mixed facilities is not necessarily unlawful or discriminatory against those of a binary sex, it is important that the courts and tribunals lay down some guidance as to how employers or other agencies can provide facilities that reflect the rights of both groups. In *Peggie v Fife Health Board* ([2025] 12 WLUK 249), some such guidance was provided on this issue by the tribunal when it found that a health board's grant of permission to a trans woman junior doctor to use the female staff changing room was unlawful under the Equality Act 2010. In the tribunal's view, such permission, although not unlawful *per se*, was not the least intrusive measure and should have been revoked until a long-term solution was implemented. Importantly, the tribunal found that the original grant of permission was not inherently unlawful under the 2010 Act, as the protected characteristic of gender reassignment was of equal status to sex, as were the claimant's and the trans person's respective beliefs. Thus, it was potentially but not necessarily, lawful under the 2010 Act to permit a trans woman to use a female only space in the context of work.

The result, therefore, was that the claimant could argue the claims of direct and indirect discrimination and of harassment if a trans woman was granted permission to use the female changing room, and a trans woman could argue indirect discrimination and harassment if excluded from that changing room. The tribunal then suggested ways in which the conflict could have been resolved without insisting that the claimant share those facilities, such as a temporary solution to provide spaces for both sexes and mixed sex facilities, which would not have impacted so disproportionately on the rights of the claimant.

Returning to the present decision on the allocation of male and female prisoners, the Outer House employed the formal tools of statutory interpretation to decide the ambit of the prison service's duties under the prison legislation. Thus, although the prison service sought to include trans prisoners within male and female prisons (in some circumstances), the Court held that that was not possible under the current statutory duties imposed on the prison service. Any change to that clear bright rule, therefore had to come through a change to the existing legislation. The situation is different therefore than to the one with same sex toilets, where the accommodation of transpersons can be lawful, provided the rights of binary sex and transgender individuals are respected.

In this case, the Court refused to provide a remedy for breach of trans gender Convention rights in abstract, in other words without a specific allegation of rights' violation by specific claimant who was a victim of the policy. That ruling contrasts with the decision to allow the claimants' allegation of illegality to proceed, without a specific victim. Of course, the test for standing is different in human rights claims (being a victim), than in cases of judicial review (sufficient interest, and the public law character of judicial review proceedings allow for a broader test of standing. Instead, the Court in this case recognised that in the future such a prisoner may be able to bring a case using the Human Rights Act 1998, to claim that incarceration in a (male) prison was a breach of the right to life (under Article 2), amounted to inhuman and degrading treatment (under Article 3), or infringed the right to private life (under Article 8). In such a case, the authorities would have to justify to the court why, as a matter of interpretation and principle, why a transperson needed to be exposed to a risk to life, bodily integrity and private life in the prison environment. The outcome of such cases will turn on the facts and the protection offered to trans prisoners within the prison, but it would be difficult to justify those risks solely on the basis that a trans prisoner is, by law, a (fe)male, and must be imprisoned in a male or female prison accordingly.

Nevertheless, the Court was adamant that nothing in Article 8 imposed a positive obligation on the state to house transsexuals in a particular prison to reflect their gender identity. That aspect of the ruling was based on the interpretation of both domestic law and precedent as well as understanding of a limited jurisprudence of the European Court in this area.

The respondents sought to draw on this jurisprudence to claim that the Article 8 rights of trans prisoners are far from trivial, and should be respected, but, in the Court's view, did not argue that

that entailed a positive right for any individual trans prisoner to be accommodated in a prison of the opposite biological sex. Thus, although the Article 8 rights of trans prisoners may be engaged when they are admitted to custody, it did not follow that there is a right to be accommodated in a particular prison.

The Court noted that there were means of protecting trans prisoners' rights which do not involve accommodation in a prison for the opposite biological sex, such as the various forms of special provision set out in the Prisons Guidance with respect to arrangements allowing a trans prisoner to live in their affirmed gender and for the authorities to respect trans prisoners' Article 8 right to a private life. Although a trans prisoner may consider that these measures are insufficient to allow for life as fully a man or as fully a woman, but there is no case to support an argument that Article 8 entails a right for a trans woman to live in the same place as and in the company of women. In the Court's view, it is precisely because of the impact of mixed sex accommodation provision on the privacy and dignity of the would-be fellow prisoners that the restriction in rule 126 exists. Thus, even if Article 8 rights are engaged, the interference is justified under Article 8(2), as sex segregation is necessary for the protection of health or morals, or for the protection of the rights or freedoms of other prisoners.

Although Convention rights of prisoners are important and should, so far as possible, be respected, in the custodial setting, accommodating the wish of a trans woman prisoner to live as a woman by a transfer to the female estate entails association with an identifiable group of other prisoners, that is to say women prisoners. At liberty, a trans woman may consider that she can best express her female identity by sharing accommodation with women, and that may be achieved on the basis of consent, but a person, whether male or female, cannot be compelled to share the living space needed for essential daily activities such as eating and washing, with another person. A trans prisoner cannot live in his or her transgender identity in the abstract and accommodating a trans woman prisoner in the women's estate necessarily involves association with women, and their circumstances are such that they cannot opt out.

The Court recognised that the Convention rights of trans prisoners have come before the courts previously. For example, in *WW v Poland* ((2025) 80 EHRR 9), a trans woman prisoner complained that she did not have access to hormone treatment. The Strasbourg Court found that the authorities failed to strike a fair balance between the competing interests at stake, resulting in a violation of Article 8., noting that the applicant's particular vulnerability as an imprisoned transgender person undergoing a gender reassignment procedure, which required enhanced protection from the authorities. However, the Court of Session noted that there was no argument in that case of a right to be accommodated in a women's prison.

Further, although the decision in *R (FDJ) v Secretary of State for Justice* [2021] EWHC 1746 (Admin) accepted that it was not possible to argue that the Secretary of State should have excluded from women's prisons *all* trans women, as that unlawfully ignored the rights of transgender women to live in their chosen gender, that case cannot be reconciled with the protection recognised by the Supreme Court in 2025, which is afforded to separate sex spaces, in respect of which sex is biological sex.

Hence, in the Court's view, sex segregation in prisons is in accordance with law and necessary for the protection of health and morals, and to protect the rights and freedoms of others, specifically women prisoners. Further, Article 8 does not create a positive obligation requiring accommodation in the women's estate. The Court also rejected the respondents' argument that a flexible policy was required to accommodate the rights of trans prisoners. Although the Court recognised that for at least some trans women prisoners the consequences may be, or may be perceived to be, harsh, and perhaps especially for trans women well-accustomed to living as such for a long period prior to custody, the law recognises the necessity for clear rules which are not subject to a case-by-case analysis in their application, as suggested by the respondents. The imposition of a bright line rule may have adverse consequences for individuals but there is a strong line of authority which makes clear that a state can adopt general measures which apply

to pre-defined situations regardless of the individual facts of each case even if this might result in individual hard cases (*Animal Defenders v United Kingdom* ([2013] 57 EHRR 21)).

Conclusion

The rights of all prisoners are affected by policies on same sex or mixed prisons, and obviously, the consequences of an unlawful and unsympathetic policy are greater in terms of respect for safety and dignity in the prison environment than they are in a working environment.

The decision of the Outer House, as with the Supreme Court's ruling in 2025, is based on common and formal legal sense and the adoption of the traditional rules of statutory interpretation (through the words of the legislation and the intention of the legislature). That interpretation is also consistent with the reasoning of segregating male and female prisoners, the safety of the prison population. By adopting that method, the courts appear to have resolved certain dilemmas regarding sex and trans sexual status rights as they might apply to controversial areas such as prisons and toilets and changing facilities. However, the duty to recognise various protected rights (under equality laws and human rights legislation) makes the application of equality policies less certain, and open to further claims from both groups. In the context of mixed toilet facilities, the courts are gradually resolving and balancing those rights and claims to ensure that the policies comply with all rights of protected individuals. However, with respect to prisons, creating initial and inflexible classifications from the outset may lead to enormous unrest in the prison environment, and to further legal challenges by those whose rights to life, dignity and privacy are affected by such policies.

BOOK REVIEWS

Black Women in Prison: Exploring the Intersection of Race and Gender Experiences in Prison,

Angela Charles (Palgrave Macmillan) 2025

The Lammy Report into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System (CJS) was published in 2017. The report stated:

‘Despite making up just 14 per cent of the population, BAME men and women make up 25 per cent of prisoners, while over 40 per cent of young people in custody are from BAME backgrounds. If our prison population reflected the make-up of England and Wales, we would have over 9,000 fewer people in prison – the equivalent of 12 average-sized prisons.’

Against this background of disproportionality in the CJS, Angela Charles, lecturer in criminology at the University of Northampton, asks: what is the reality of imprisonment for Black women in our prisons in England?

Charles writes:

‘Despite being written in 1989, Crenshaw’s¹ statement remains true of society today. ‘Black women are caught between ideological and political currents that combine first to create and then to bury Black women’s experiences’

The currents are the structural inequalities that have been created to oppress, marginalise and subjugate Black women. This can be seen in all aspects of society: education, employment, housing, mothering, healthcare and the CJS. This book addresses the systemic racism and disadvantage that Black women encounter in their everyday experiences within the prison system. Both ideology and politics damage the lives of Black women in society and continue to do so within the CJS.

Previous studies

Charles’ research follows the work of earlier researchers.

In 2013 Laura Foley and Irena Papadopoulos found that the needs of ethnic minority groups were not adequately met in prison. This was due to language barriers, stigma, cultural variations in perception of mental illness and poor comprehension of cultural differences.² In 2017 J. Cox and Katharine Sacks-Jones outlined how Black, Asian, and Minority Ethnic (BAME) women face a “double disadvantage” in the UK criminal justice system due to overlapping discrimination based on both their gender and their race.³

Laura Kelly-Corless and Helen McCarthy published *Moving Beyond the Impasse: Importation, Deprivation, and Difference in Prisons*. They use an intersectionality lens to show that, together, the importation and deprivation models can act as an important theoretical tool for understanding the lives of incarcerated people who deviate from the expected population of young, white, able-bodied, hearing males.

¹ Kimberlé Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Kimberlé Crenshaw in her seminal 1989 paper, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics.”

² L. Foley and I. Papadopoulos (2013). Perinatal mental health services for black and ethnic minority women in prison. *British Journal of Midwifery* 21 (8), 553-562.

³ *The Prison Journal* (<https://doi.org/10.1177/00328855241292791>).

Research by Angela Charles

Charles' recently published book covers an important and challenging topic: what are the experiences of Black women in the criminal justice system in England and Wales?

It is based on qualitative research conducted by Dr Charles in 2018-2019 in two English women's prisons, one open and one closed. The themes explored include – staff interactions, access to cultural goods and services, prison processes, racism and disadvantage, the ways in which Black women cope with being imprisoned, and their ability to remain resilient. The book highlights the multiple ways Black women face racism and disadvantage within the prison system.

Systemic racism and disadvantage

The participants' comments 'echo other Black women who described negative experiences of the CJS, particularly judges' harshness, sentence disparities, and the court system overall.' A participant points out that Black individuals start their prison sentences already carrying the lived experiences of discrimination and perceptions of injustice from prior CJS processes. This impacts how an individual interacts with staff, responds to disappointment and frustration, and feels able to trust. 'The experiences of Black women,' Charles writes 'whether in the form of problematic relations with staff or drawn-out prison processes, added to their beliefs about the unfairness of the CJS. Consequently, this led to pains of imprisonment that were experienced as particularly acute.'

The interviews reveal that these women in prison are well aware of institutional racism but have to dismiss their concerns and focus on getting through their sentence. One interviewee told Dr Charles: '[If] you start complaining, then you start getting [labelled as] a nuisance, then it's straight you're on that bus [shipped back to a closed prison].'

Many Black women reported holding back on challenging staff displaying prejudicial and discriminatory behaviour in order to secure a more manageable prison experience, and to ensure access to important facilities like ROTL (Release on Temporary Licence), training and access to rehabilitative activities. Charles reports: 'Black women were acutely aware of processes taking longer compared to others as well as reduced access to rehabilitative processes.'

'Ruth', in a closed prison, explained that her transfer to open prison took longer compared to a white counterpart.

'I think there's discrimination because ... my neighbour that moved in next door to me, she is in for exactly the same crime as me, no different. She got exactly the same time, and she's done six months in closed conditions and then just been transferred to open, where I had to wait 20 months before I could come here. And I couldn't understand why. She hasn't done none of the courses, nothing, and her crime is identical to mine, so why her and her mother got transferred to open and I had to wait. I think to me, sometimes it's if your face fits. I was seeing that a lot. Yeah, and I see a lot of the Black girls, not a lot of them get the opportunity to go to open, that's what I see'.

The interviewees reported that ROTLs took longer to be authorised compared to their white counterparts. Many of the Black women stressed the importance of having a point of contact with whom they could liaise about processes, get progress updates and raise concerns about any issues they had. Such dialogue would create open communication about delays and setbacks.

An earlier study by R. Chigwada-Bailey reported that Black women were often left with no understanding of why their applications for work or education opportunities, for ROTL, for a

move to open conditions, were delayed.⁴ In many cases officers had negative stereotypes of Black women as mad, criminal, arrogant, anti-authority, hostile and aggressive. Charles writes: 'Consequently, these stereotypes impacted access to education, employment and other rehabilitative activities.' Charles' interviewees recount being turned down for courses and work opportunities, stating that such events demonstrate 'the discrepancies and differential treatment Black imprisoned women face'. Black women regularly question why other women's progression is put before their own; ultimately it leads to distrust of prison officials.

Microaggressions

Microaggressions have been noted and analysed by earlier researchers. In their study (2012) in Education, Sociology and Critical Race Theory, Rita Kohli and Daniel Solorzano described microaggressions as 'preconscious or unconscious, subtle verbal and non-verbal insults, layered and accumulative with profound effects'. Charles gives many examples of microaggressions as experienced by Black women in prison. For example, two women in the open prison claimed that staff regularly misconstrued Black women's behaviour and speech as aggressive:

'They wanna act like you're arguing with them. No, I'm not arguing with you, I'm just having a conversation with you, there's a difference. But then, this is what annoys me, because they characterise a lot of Black women as antisocial or that we're aggressive. But it's just the way we talk!' 'A slight raise of the voice or voicing of my opinion in a way that isn't completely docile and placid is seen as being aggressive and I need to calm down. Even more so in prison.'

An interviewee reported:

'Our voice and tone are very different, so when we speak, they have already subconsciously in their mind said that we're aggressive. So, anything you do, you're aggressive.'

Encountering microaggressions had material and detrimental impacts on the women when it came to accessing vital services and resettlement opportunities. The way Black women interacted with staff inhibited their ability to benefit from employment opportunities, training, medical provision and applications for ROTL which allows contact with the prisoner's family.

The study revealed the extra burden Black people carry, not knowing how their race and ethnicity is being perceived by those in positions of authority and power. Some prison staff do not appear to know how to interact or deal with Black women, or that some alternative form of supervision was needed to 'manage Black women'.

Recommendations

Dr Charles makes a number of important recommendations.

Prisons have numerous policies and frameworks on equality and strengthening family ties. Whilst these frameworks are useful, this book is evidence that these policies are not always implemented or adopted by staff, to the detriment of Black women.

The Women's Estate Case Advice Framework (Ministry of Justice) describes five guiding principles of trauma-informed care: safety; trustworthiness; choice; collaboration; and empowerment.

Moreover, it specifies the importance of 'Recognition of culture and recognition of practices that are re-traumatising' (Ministry of Justice, 2021). Similar statements are made in the Women's

⁴ (Black women's experiences of criminal justice: race, gender and class: a discourse on disadvantage R. Chigwada-Bailey 2003 Waterside Press

Policy Document (Ministry of Justice, 2021), where point 3.15 states that women should be supervised/held in trauma-informed conditions and provided with a rehabilitative culture where they feel safe and that meets their specific needs, and which facilitates their successful resettlement.

It appears that women's prisons are not achieving these aims as well as they could be, if the two prisons visited during Angela Charles' fieldwork are indicative of the wider estate. Black women are distrustful of staff because of their experiences prior to imprisonment and, once incarcerated, because of the microaggressions they face, the lack of explanations about delays to their access to training, rehabilitative activities and ROTL, and a failure to understand and accept cultural differences.

Prison policies should aim to acknowledge this and attempt to break down barriers to achieve meaningful connections and to provide an atmosphere conducive to rehabilitation. Prisons should work with and consult Black women to ensure access to cultural goods to meet their needs. By involving Black women in this way, barriers can start to be broken, and trust and respect built. When prisons fail to include racialised groups in matters concerning them, they are re-traumatising those prisoners who have experienced or watched incidents of disregard for their heritage in society prior to imprisonment.

The Equality Analysis Policy Framework (Ministry of Justice, 2023) refers to the

Public Sector Equality Duty (PSED) as set out in Section 149 of the Equality Act 2010, which requires the prison service to: eliminate unlawful discrimination and victimisation; advance equality of opportunity; and foster good relations. The prison institution should embed these requirements into everyday practices rather than mainly through new starter or refresher training provided to officers. There should be a detailed enquiry on how processes currently in place lead to indirect discrimination for Black women. This enquiry should cover access to rehabilitative activities and to work opportunities within prison, the deprivation of cultural goods, haircare products, clothes, body care products, and music, as well as discrepancies between transfers to open prisons and ROTL procedures.

In terms of procedural recommendations, the complaints system based on discriminatory grounds must also be improved. Whilst prison management may look at the number of Discrimination Incident Reporting Forms (DIFS) submitted and perceive the low numbers as a positive sign of reduced levels of discrimination, it could be argued that it reflects rather a lack of confidence in the process and the system. The prison needs to improve Black women's confidence in the complaint systems (Ministry of Justice, 2023). The women represented in this book had low trust in the system; instead, they had to opt for alternative methods to resolve their grievances, or they had a fatalistic acceptance that their issues would not get resolved.

Lastly, as a practical recommendation, the prison could do more to support Black women to achieve strong family ties. This book has shown that for most of the women, phone calls and visits with family were integral to staying resilient and coping with the pains of imprisonment. Given the socio-economic position of many of these women, support should be provided to allow regular communication with family that is financially appropriate and does not leave them at a disadvantage.

ROTL offers the best opportunity for family contact to be maintained. Mothers with younger children will benefit from ROTL as it allows them to be more present in their lives, which will reduce emotional turmoil for both child and mother. ROTL processes must be timely and fair, and any discrepancies between process times for women with protected characteristics and those without must be investigated and rectified.

To the recommendations made by Dr Charles I would add these observations, concerning women of all backgrounds and ethnicities.

There are far too many women in prison who should not be there. We need radical reform to limit imprisonment for women to those few who have committed serious offences. The majority of women in prison have committed non-violent offences, often shop theft and other minor crimes. They should be dealt with in the community. The excellent liaison and diversion services offered by many police forces with the support of women's centres should be the default approach to women's offending. There should be greater investment in these services and far fewer women entering prison.

The Intensive Supervision Courts are a powerful and hopeful initiative, with the judge working with probation staff to keep convicted women out of prison, supported in the community, using the expertise of Women's Centres, following the imposition of an Intensive Supervision Order.⁵

Too many women are in prison on remand. Approximately one in four women in prison in England are held on remand, representing roughly 26 per cent of the female custody population. Out of an overall total of around 3,461 to 3,500 female prisoners, this accounts for approximately 900 women in prison without a full sentence. (See <https://www.thejusticegap.com/women-in-prison-remand-in-custody/>).

There are far too many women in prison on recall. Over 2,600 total recalls of women to custody were recorded over a recent 12-month tracking window, with only 17% of those instances involving women facing brand new charges (meaning the vast majority stem from license condition breaches like failing to keep in touch). The disastrous Offender Rehabilitation Act 2014, an initiative of Mr Chris Grayling, required every person leaving prison, however short the sentence, to be subject to one year's probation supervision: failure to keep to stringent conditions, missing appointments (all too easy in chaotic and disturbed lives, with too little support) led to return to prison. This law should be repealed immediately. It has resulted in very serious injustice as short sentences have become long ones, with repeated returns to prison; it has imposed much additional strain and difficulty for an already struggling criminal justice system.

The Women's Justice Board has as its aim to radically reduce the numbers of women in prison. Their work is both important and hopeful. I would recommend to them a careful reading of Angela Charles' book on Black women in prison so that the improvements to the system which she recommends could become reality.

To conclude

This is an important book: Charles' research highlights Black women's experiences, using them to advocate for change within the prison system, presenting evidence through the narratives of Black women as they navigate the criminal justice system.

The book is a call to arms, to care about Black women, their bodies, their plight, their lives and their future. Angela Charles writes: 'Black women deserve a platform, they deserve a platform to tell their stories, to be heard for who they are, and to be heard as a standalone group. For too long Black women's experiences have been relegated and were forgotten— in many ways they have been ignored.'

*Rona Epstein**

⁵ Early pilots like the one at Birmingham Magistrates' Court successfully diverted dozens of women from custody while reducing substance misuse. They are now being extended to other cities including Leeds, Liverpool, London, Newcastle and Swansea. See The Jabbs Foundation <https://jabbswomenandgirls.org.uk/what-we-do/>

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OBITUARIES

Lord Mackay of Clashfern (1927–2026)

Dr Stuart MacLennan¹

James Peter Hymers Mackay, Baron Mackay of Clashfern, who died on 7 July 2026, five days after his ninety-ninth birthday, was the pre-eminent Scots lawyer of his generation and the only member of the Faculty of Advocates ever to hold the office of Lord Chancellor of Great Britain. He occupied the woolsack from 1987 to 1997, the longest continuous tenure of any Lord Chancellor in the twentieth century, having reached it by a route that began at the Scottish Bar and passed through the Office of Lord Advocate, the College of Justice, and the appellate committee of the House of Lords. To an English audience he is remembered as a reforming Lord Chancellor. To a Scots lawyer he was the outstanding Scottish jurist of the late twentieth century, whose speeches still shape the law of delict (civil wrongs), and whose career brought Scots legal thinking to the very centre of the British state.

From mathematics to the Faculty

Mackay was born in Edinburgh on 2 July 1927, the only child of a railway signalman from Clashfern in the north-west of Sutherland, the place from which he later took his territorial designation. He was raised in the Free Presbyterian Church, in a household where Bible study and observance of the Sabbath were the ordinary furniture of life. A scholarship took him to George Heriot's School, and from there he read mathematics and physics at the University of Edinburgh, graduating with first-class honours in 1948. He taught mathematics at the University of St Andrews and took a further degree at Trinity College, Cambridge, before turning at last to law, returning to Edinburgh for an LLB with distinction and admission to the Faculty of Advocates in 1955.

His hinterland as a mathematician was evident throughout his legal career. Contemporaries at the Bar, and later those who read his opinions, noticed in him an insistence on exact definition, an unwillingness to be hurried past a step in the argument, and a gift for finding within a mass of authority the directly relevant legal principle. He built a substantial practice, much of it in complex revenue work. He took silk in 1965 and served as Sheriff Principal of Renfrew and Argyll before being elected Dean of the Faculty of Advocates in 1976.

The Scots Law Lord

In 1979, the incoming Conservative government appointed him Lord Advocate – the senior law officer in Scotland – and he was created a life peer to hold the office. Judicial preferment followed soon after, first as a Senator of the College of Justice in 1984 and then, within a year, as a Lord of Appeal in Ordinary in 1985. He thus became the Scottish voice in the House of Lords, the seat he would eventually vacate for Lord Jauncey of Tullichettle.

His tenure as a full-time Law Lord lasted only two years, and as Lord Chancellor he sat sparingly, so his reported opinions are not numerous – but his limited contributions nonetheless had an outsized influence on the law. Every Scots law student is familiar with *Smith v Littlewoods Organisation Ltd*,² a delict (tort, for the common lawyers) appeal arising from the burning of a disused Dunfermline cinema by vandals, in which the House held that there is no general duty to prevent third parties from causing harm. In this, Mackay gave one of the two leading speeches – setting a high bar where loss is brought about by an independent human agency. Foreseeability

¹ Associate Professor of Law, Coventry Law School.

² *Smith v Littlewoods Organisation Ltd* 1987 SC (HL) 37 (reported sub nom *Maloco v Littlewoods Organisation Ltd*); [1987] AC 241.

of a mere possibility is not sufficient. Instead, a pursuer must establish a basis for treating the harm as more than a bare possibility, approaching the highly probable.³ This remains the starting point, north and south of the border, for liability founded on the wrongdoing of others, and for the reluctance of the law to build a duty of care on foreseeability alone.

He returned to this theme, delivering the opinion of the House, in *British Telecommunications plc v James Thomson & Sons (Engineers) Ltd*,⁴ a Scots appeal on the duty owed by nominated sub-contractors. When the House came to consider a landlord's liability for a tenant's violence in *Mitchell v Glasgow City Council*,⁵ it was Mackay's warning in *Thomson* against an analysis resting simply on foreseeability that was applied.⁶ A continuous thread therefore runs from *Littlewoods* through *Thomson* to *Mitchell* over the course of three decades.

His influence was not confined to Scots law though. He sat on the seven-member bench in *Murphy v Brentwood District Council*,⁷ that overruled *Anns v Merton*⁸ and restated the law of pure economic loss. In his time on the Appellate Committee, he prepared one of the principal speeches in *R v Howe*,⁹ the authority that duress is no defence to murder. Mackay disinclined to grand statements of policy favoured by some of his contemporaries and was correspondingly wary of any executive interference with the courts. Mackay was also highly protective of the distinctiveness of Scots law.

Pepper v Hart

Perhaps Mackay's most important judicial intervention, however, was a dissent. In *Pepper (Inspector of Taxes) v Hart*,¹⁰ the House of Lords relaxed the exclusionary rule and permitted, in defined circumstances, reference to ministerial statements in Hansard as an aid to construing ambiguous legislation. The case concerned a provision of the Finance Act 1976,¹¹ and is also the leading judicial authority on valuing benefits in kind. On the meaning of the section, Mackay agreed with the majority, but he alone declined to open the door to Hansard. His objection was practical rather than constitutional. Advisers and counsel, he warned, would feel bound to trawl parliamentary debates as a matter of routine, lengthening litigation and inflating its cost, and often to no purpose.¹²

That concern with the price of justice perhaps reflected his staunchly presbyterian beliefs, and it made the dissent unusually prescient. Within a decade the majority's rule was being narrowed and questioned. In *Robinson v Secretary of State for Northern Ireland*¹³ three of his successors observed that Mackay had proved 'the better prophet',¹⁴ and by *Spath Holme*¹⁵ the rule had been confined to the ascertainment of the meaning of a particular word or phrase.¹⁶ It is rare for a lone dissent to be so thoroughly vindicated, and rarer still for the vindication to come from the bench itself.

³ *ibid* 65–68 (Lord Mackay of Clashfern).

⁴ *British Telecommunications plc v James Thomson & Sons (Engineers) Ltd* 1999 SC (HL) 9.

⁵ *Mitchell v Glasgow City Council* [2009] UKHL 11; 2009 SC (HL) 21.

⁶ *ibid* [25] (Lord Hope of Craighead), citing *British Telecommunications* (n 3) 12.

⁷ *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL).

⁸ *Anns v Merton London Borough Council* [1978] AC 728 (HL).

⁹ *R v Howe* [1987] AC 417 (HL).

¹⁰ *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 (HL).

¹¹ Finance Act 1976, s 63.

¹² *Pepper* (n 9) 614–615 (Lord Mackay of Clashfern LC).

¹³ *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32; [2002] NI 390.

¹⁴ *ibid* [40] (Lord Hoffmann).

¹⁵ *R (Spath Holme Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 AC 349 (HL).

¹⁶ *ibid* 391–392 (Lord Bingham of Cornhill).

Lord Chancellor

Mackay was appointed Lord Chancellor in October 1987, in a surprise move following the resignation of Lord Havers, and held the office until the Conservative defeat of May 1997. That a Scots advocate should preside over the law of England and Wales was without precedent, and it is reflected in his work in the role. Where his predecessors had exported English assumptions northwards, he used his position to import Scottish ones south.

His central achievement was the reform of the legal professions. Three green papers in 1989 proposed to end the Bar's monopoly on rights of audience in the higher courts, and to widen competition in the conduct of litigation and conveyancing. The proposals drew fierce resistance from the senior judiciary and the Bar, who warned that the independence of the profession would be imperilled. Mackay pressed on, and the Courts and Legal Services Act 1990 established the framework under which solicitors could obtain higher rights of audience.¹⁷ The reform was consistent with the solicitor-advocate role in Scotland, as was his introduction of conditional fee arrangements – 'no win, no fee' – which was, effectively, the Scottish speculative basis transplanted into English practice.

His period as Lord Chancellor was not an unqualified success. His later years in office were dominated by bitter disputes over the cost and scope of legal aid, and his attempt at divorce reform in the Family Law Act 1996 was so heavily amended that its central provisions were never brought into force.¹⁸ He observed that a Lord Chancellor, once retired, should speak to the law as he found it rather than as the government wished it to be, and after 1997 he did exactly that. He returned to participating in the judicial work of the House of Lords as a former holder of high judicial office under s.5(2) of the Appellate Jurisdiction Act 1876.

Conscience and the Free Presbyterian Church

Mackay had been for some thirty years an elder of the Free Presbyterian Church of Scotland (the so-called 'Wee Frees'), a small and rigorously Calvinist denomination, strict in its sabbatarianism and firmly opposed to Roman Catholicism. Mackay would not work or travel on a Sunday and declined even to give an interview that might be broadcast on the sabbath. His austere nature was an intrinsic part of his identity at the Bar and on the Bench. A well-worn story from the Faculty of Advocates involves a colleague noticing a single small pot of honey set out with his tea and remarking 'I see your Lordship keeps a bee.'

Despite his devotion, Mackay ended up causing a major schism in the Free Church. Mackay attended two Requiem Masses for Roman Catholic colleagues, among them his friend the former Lord Justice-Clerk, Lord Wheatley. To the Free Presbyterian Synod, attendance at the Mass was participation in what it regarded as idolatry, and a breach of the church's prohibition on any show of support for the doctrines of Catholicism. Mackay's answer was that he had gone only to pay his respects to the dead, but the Synod was unsympathetic. In 1988, it suspended him from the eldership and from membership, and when it met again the following year it asked him to undertake not to attend such services in future. He declined to give such an undertaking and withdrew from the church. The dispute proved irreparable, crystallising a longer argument over freedom of conscience, and in May 1989 a substantial body of ministers and members seceded to form the Associated Presbyterian Churches. Mackay, characteristically, neither led the secession nor joined the new communion.

What this revealed was not obstinacy but the integrity that marked his professional life. He would not dissemble to preserve his standing, and he would not give an undertaking he did not mean to keep, even at the cost of a lifelong membership. He served for many years as Honorary President

¹⁷ Courts and Legal Services Act 1990, s 27.

¹⁸ Family Law Act 1996, pt II (not brought into force).

of the Scottish Bible Society, supporting its work to place a Bible in every court in Scotland, and continued to speak of scripture as a foundation of the Scottish legal tradition.

Assessment

Mackay's later honours were, fittingly, Scottish ones. He was appointed a Knight of the Thistle, Scotland's senior order of chivalry, in 1997, and installed at St Giles' Cathedral in 1999; in 2007 he was made Lord Clerk Register and ex officio Keeper of the Signet, ancient offices of the Scottish state. After the woolsack he served as editor-in-chief of *Halsbury's Laws of England*, the post customarily held by a former Lord Chancellor, and he remained an active working peer until his retirement from the House of Lords on 22 July 2022, at the age of ninety-five.

He held an office that has since been diminished, the judicial functions of the Lord Chancellor having been removed by the Constitutional Reform Act 2005, and he was among the last to embody its older form, uniting lawyer, judge, minister, and Speaker of the Upper House. He worried, latterly, that the separation of those functions had left the rule of law with fewer guardians who understood it from within. Perhaps a final, fitting, act of prescience.

He is survived by his son and two daughters. His wife, Elizabeth, whom he married in 1958, predeceased him. He was a mathematician who became an advocate, a Highlander who governed the law of England, and a Scots lawyer whose reputation for rectitude was beyond doubt.