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Editor's introduction

Pablo Cortés
University of Leicester

It is a pleasure to present this issue of *Amicus Curiae*. The past months have been a rewarding exercise in reviewing submissions, corresponding with authors and reviewers, and watching manuscripts develop through revision into the contributions gathered here. Each published piece has been subject to rigorous peer review, followed in some cases by more than one round of revision. This issue, like its predecessors, is therefore the product of the authors' research, the careful scrutiny of peer reviewers, and the authors' subsequent revisions.

I would like to begin by thanking the authors for trusting the journal with their research and for engaging so conscientiously with the feedback they received. In several cases, that engagement involved multiple revisions, and the quality of the final work reflects that commitment. I am equally grateful to our anonymous reviewers, whose careful, expert reading is the foundation of the journal's integrity. Their willingness to provide detailed, constructive feedback—often within demanding timeframes to allow publication in the present issue—is something I do not take for granted.

This publication would not have been possible without the institutional and financial support of the Institute of Advanced Legal Studies, whose commitment to making rigorous legal scholarship freely available to all remains a defining feature of this journal. I also wish to thank my co-editors, Drs Amy Kelly and Maria Moscati, and our consultant editor, Professor Michael Palmer, for their wise and timely counsel. A particular word of thanks is due to Marie Selwood, the technical and co-ordinating editor, whose professionalism and dedication were indispensable to the preparation and delivery of this issue.

This issue brings together an eclectic range of legal scholarship, alongside a Special Section edited by Dr Paolo Vargiu on the theme of justice on display. In his guest editor's introduction, Dr Vargiu presents an engaging collection of papers examining how law is made visible through popular culture, visual narrative, public discourse

and legal performance, and how these forms shape public legal consciousness. The contributions develop his central observation that legal authority is produced not only through rules, "but also by scenes, symbols, performances, narratives, and images". As he observes, the Special Section does not simply ask whether justice is seen to be done: its deeper concern is "how justice is made visible, who controls that visibility, who is exposed by it, and what remains unseen".

The issue opens with Michael Murphy's article "Law in the Accusative: Relational Legal Pluralism and the Architecture of Foreclosure." This article is a continuation of his work from the previous issue, where his "The Jurisprudence of the Threshold" (*Amicus Curiae* 7(2): 640–680) examined the administrative state. Murphy here develops a theory of Relational Legal Pluralism as a critical method for challenging closed and self-protective forms of governance. Drawing on the philosophical framework of Watsuji Tetsurō, the article grounds its argument in embodied and spatial forms of vulnerability that legal abstraction tends to occlude and illustrates the stakes of that argument through the Grenfell Tower disaster and the external enforcement of the European border regime. The article proposes an Aesthetic Impact Statement as a mechanism for reintroducing embodied harm into legal processes, reimagining the rule of law around survival, accountability, and relational justice.

Harry Meliniotis follows with "The Algorithm and the Tribunal: Philosophy to the Rescue and the Threat from Within", which asks whether English law can extend party autonomy to recognize binding decisions from autonomous artificial intelligence (AI) systems in construction disputes. Meliniotis argues that while automated dispute resolution may be technically feasible, algorithmic decision-making cannot satisfy the conditions of legitimate adjudication required to justify state-backed enforcement. Drawing on legal philosophy and doctrine, he contends that adjudication is a fundamentally human practice of responsible judgment. His article's most notable contribution, however, may be its warning about hybrid human–AI decision-making: precisely because it is harder to detect, it poses a more insidious threat to the very conception of judgment than full automation.

Remaining on the theme of digital dispute resolution, Faye F Wang's "Shaping the Law Curriculum with Authentic Assessment: Online Dispute Resolution (ODR) Simulation and Dispute

System Design (DSD) in Legal Education" updates her earlier study published in this journal ("Online Dispute Resolution Simulation" *Amicus Curiae* 2(2): 216-236). While the earlier article examined how ODR workshops develop students' legal and digital competencies, the present paper explores how DSD enables law students to advance their skills further—not only by engaging with digital dispute resolution, but by thinking collaboratively about the design of suitable ODR processes for different dispute types. Wang argues that these increasingly vital topics foster the analytical and critical skills students need in an ever-more digitalized legal landscape.

The next article turns to a markedly different domain. In "Barriers to Medical Cannabis in the UK: Human Rights Implications of Criminalization and Inequitable Access", Lydia Kitchen examines the legislative amendments of 2018 that legalized medical cannabis in the United Kingdom (UK) and finds that access to these treatments remains severely restricted in practice. While private prescriptions have increased, National Health Service treatment is exceedingly rare, leaving many individuals who use cannabis to manage health conditions exposed to the risk of criminalization when they obtain it through the illegal market. Kitchen documents how this disproportionately affects ethnic minorities, women, and people with disabilities—groups more likely to experience the conditions that medical cannabis can treat. Through a combined doctrinal and socio-legal analysis, she argues that current restrictions undermine the rights to autonomy and equality protected under Articles 8 and 14 of the European Convention on Human Rights, and makes the case for decriminalizing personal possession as the most practicable step towards addressing these inequalities.

The last two articles offer a detailed judicial perspective on Ghana's relatively recent insolvency reforms. In "Evaluation of the Efficacy of the Corporate Insolvency and Restructuring Act 2020 (Act 1015) of Ghana: A Comparative Analysis with the United Kingdom" (Parts I and II), Justice Dadzie provides a detailed exposition of both the Ghanaian and UK insolvency frameworks before undertaking a thoughtful comparative evaluation. Part I offers a systematic account of the regimes established under the Corporate Insolvency and Restructuring Act 2020 and the range of tools available under UK legislation; Part II carries out the comparative analysis and advances a carefully calibrated set of reform proposals. These include

the introduction of a specialist insolvency list, development of Practice Directions, enhanced judicial training, early warning mechanisms, recalibration of creditor voting thresholds, the introduction of a viability test, and the reform of wrongful trading liability and *ipso facto* rules—proposals that align with international best practices while remaining sensitive to Ghana's institutional context.

Taken together, the articles in this issue reflect the breadth of contemporary legal scholarship published in *Amicus Curiae*. They range across legal theory, AI, legal education, medical cannabis, and insolvency reform. The Special Section further brings together a collection of essays examining how justice is made visible in culture.

What unites these contributions is a shared concern with the relationship between law and lived experience: how legal institutions are represented; how they resolve disputes; how they regulate conduct; how they reflect society; and how they reform and respond to social change. I hope readers will find in this issue not only a diverse range of legal analyses, but also a set of contributions that affirm the continuing importance of rigorous, accessible, and publicly engaged legal scholarship.

Law in the Accusative: Relational Legal Pluralism and the Architecture of Foreclosure

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Abstract

Relational Legal Pluralism (RLP) provides a critical jurisprudence designed to deconstruct the structural pathologies of contemporary governance. While the preceding article, "The Jurisprudence of the Threshold" (Murphy 2026), diagnosed the modern administrative state, the "K-machine", as a topologically closed shell, this article, "Law in the Accusative", translates that diagnosis into a tactical methodology for structural intervention and reconstitution. The article argues that the state maintains its "architecture of foreclosure" through translation capture, epistemic insulation, and a temporal cage. This effectively empties the embodied reality of the governed. To escape this managerial pacification, RLP continues the spatial–ethical inversion, shifting the genesis of law from sovereign decree to the "wound": a juris-generative rupture in the relational fabric (*aidagara*). The article operationalizes this ontology through the Aesthetic Impact Statement, an evidentiary counter-audit that inserts the somatic fact of "combat breathing" directly into the state's documentary apparatus. This intervention weaponizes the administrative duty to inquire as a jurisdictional tripwire, triggering a Lexicographic Triage Rule and an Apophenia Veto to filter out reactionary grievances and secure biological survival. By framing resistance as Spatial Nullification via a suspensive remand, RLP empowers the substrate to halt the state's mechanistic treadmill. This destituent praxis reimagines the rule of law as a compelled Logistical Treaty, replacing the sterile dictates of the 'epistemic machine' with a transmodern, agonistic settlement grounded in present-tense survival and raw material friction.

Keywords: Relational Legal Pluralism; critical jurisprudence; admissibility architecture; a-legality; Spatial Nullification.

[A] INTRODUCTION*

The silence of a juridical ghost

This article did not begin within the imaginary of a university library or the animated conceptual modelling of a jurisprudential seminar. Rather, the genesis of this inquiry occurred on a train travelling from Liverpool to London in 1980.[1] I was 11 years of age, and the Murphy family were off on their annual holiday to the Isle of Wight. During that journey, I precociously asked my father, a docker whose physical endurance formed the primary, unwritten record of his world, a question that I would come to learn exceeded the admissibility of his environment: "Have you ever been asked how you want to live your life?"[2] It was at that moment that I became viscerally aware of the violent illusion separating the "law" from the embodied reality of life.

His response offered a lived inculcation of the impotence of modern civic mechanics which invoked the act of voting, the selection of representatives, and the formal machinery of the state. Yet the silence of his imaginary in that carriage carried a heavier communicative burden than the speech itself. To understand the mechanics of this silence, this inquiry centres the foundational insights of Phil Scraton (2016) on the institutionalized sanitization of suffering. Scraton demonstrates how the state deploys a bureaucratic "shield of words" to mask the systemic mortification of the governed, laundering visceral trauma into compliant administrative data. This engineered silence is not a passive absence: it is an active, structural imposition. And, as Anson Au (2017) observes

* Acknowledgments: I would like to express my immediate thanks to the editor, Professor Pablo Cortés, and to the invaluable comments of the reviewer. Deeply appreciate your time and consideration of this article. This is the second of three articles. They have been researched over four years and supported by so many – academically and practically. However, I would like to take this opportunity to thank in particular: Professor Ralf Michaels, Professor Hans Lindahl, Professor Adam Swift, Dr Deval Desai, Professor Desmond Manderson, Professor Bill Mander, Dr Ruth Lightbody, Dr Nina Teasdale, Professor Daniel Newman and Professor Anat Rosenberg.

1 This article is the second instalment of three articles designed to systematically break down and reconstruct the spatial and ethical coordinates of contemporary legal theory. The foundational architecture was set out in Murphy (2021), building upon Murphy (2015). That work introduced the post-Western synthesis of Watsuji Tetsurō's spatial phenomenology (*fūdō*, *aidagara*, *kū*) with decolonial transmodernity to overcome the absolute universalisms of Eurocentric critical theory. The first phase of the current jurisprudential application, "The Jurisprudence of the Threshold" (Murphy 2026), diagnosed the pathology of the Kelsenian administrative state. It exposed how the temporal cage and abyssal thinking operate as an architecture of foreclosure. The present article, "'Law in the Accusative'", translates this diagnosis into a methodological framework. It establishes the wound as the primary juris-generative fact and operationalizes the mechanics of relational repair.

2 I blame my encounter with Thomas Paine for that outburst.

in his social ecological analysis of urban power, the state relies on the imposition of administrative silence and spatial order to neutralize the transient, collective power of the governed. It captures this by forcing the subject into this sanitized architecture, the state executes a biopolitical capture. It claims to hold the body while neutralizing its carnal, affective reality into the unbreathable architecture of the *formce* (Forzani 2025).[3] When the governed subject attempts to speak from the locus of their own woundedness, their *aestheSis* (Mignolo & Vázquez 2013), the forum's admissibility architecture purposely mistranslates the indication, logging the citizen's visceral scream as mere sentiment, complaint, or inadmissible noise (Ahmed 2021).

Conventional jurisprudence dismisses this silence as a matter of sociology or psychology, treating it as simply irritating noise. To accept this dismissal requires adopting a disembodied view of the law, a posture historically and theoretically untenable. Saskia Kroonenberg (2024), excavating Antonio Gramsci's intellectual history, shatters the Vitruvian ideal of the healthy, rational legal subject. Drawing on Deleuze's concept of little health (Deleuze 1997), Kroonenberg demonstrates that Gramsci's physical suffering operated as his epistemological condition rather than an obstacle. Gramsci wrote with his body: his little health allowed him to perceive the structural fractures in the hegemonic order invisible to the healthy, integrated subject. In our study we will radicalize this epistemological posture, though drawing on a decolonial perspective, a perspective of the wound, pollinated through a dialogue with Watsuji Tetsurō (Murphy 2021) to shift our legal attention from the temporality of ontology to the embodied silence of ethics and space.

Sitting in that carriage, suspended within the spatial reality of his lived milieu and the administrative coordinates of the state, my father's silence articulated a deep jurisdictional rupture akin to Gramsci's bodily perception. Viewed through the lens of legal topology and phenomenology (Burchardt 2022; Loidolt 2021), the state operates as a topologically closed legal space actively resisting permeability. The law captured my father while rendering him entirely unaddressable as a participant in its reason-giving. He existed within the administrative record as a Kelsenian fictitious physical person, categorized as a birth, a taxpayer, labour statistic, welfare beneficiary, as a death. Simultaneously, the institution structurally voided his capacity as a reason-bearer, maintaining a maximum degree of resistance to the external, lived reality of his daily survival and aspirations for life.

[3] Forzani (2025) identifies the signature of power in modern legality as the inclusive/exclusion of life, capturing the force of life specifically to neutralize it into the form of law (the *formce*).

This engineered deafness renders a juridical ghost. The nomo-dynamic administrative machine (the K-machine) relentlessly counts, categorizes, and manages the modern legal subject as an idealized, rationalized fiction. The state demands compliance from the ghost while structurally foreclosing its capacity to return practical judgement to the forum. When the governed subject attempts to speak from the locus of their own woundedness without the formatted input of 'appropriateness' demanded by the regime's meta-grammar, the admissibility architecture mistranslates the indication. Just as the administrative gloss of the healthy prison masks the systemic mortification of the incarcerated self, the K-machine logs the citizen's visceral scream as sentiment, complaint, subjective, or inadmissible noise (Ahmed 2021).

From diagnosis to destitution

The preceding diagnostic audit, "The Jurisprudence of the Threshold" (Murphy 2026), established that the architecture of foreclosure operates as a rule by silence (Moncrieff 2025). Dominant forms of legal pluralism collapse into a jurisprudence of management, with the effect of neutralizing claims to maintain colonial–modern stability. Unmasking this compromised order confirms the absolute insufficiency of critique alone. Relying on statutory support or managerial optimism to save the substrate proves untenable, with liberal reformism providing a mere rights-compliant veneer, whilst facilitating a politics of incorporation leaving the underlying architecture of harm entirely intact.

Executing the spatial–ethical inversion from the temporality of ontology to the spatiality of ethics shatters this illusion. This topological pivot forces the inquiry to confront the visceral reality of the wound and to expose the systemic relational severance of the *aidagara*. It unmasks the psycho-affective violence of relational hegemony that pathologizes deep structural conflict as a mere cognitive error, to reveal the lethal chronomancy of the temporal cage that defers present-tense survival into a managed administrative futurity (see Murphy 2026).

These material ruptures remain entirely invisible to orthodox jurisprudence. They cannot be diagnosed by a Kelsenian apparatus compulsively obsessed with the formal validity of its own rules and they escape the sterile metrics and context vacuity of Habermasian communicative rationality. The politics of recognition demands the wounded translate their combat breathing into the affectless grammar of the state. This translation capture actively obscures the spatial abandonment of the governed. It relies on the abstract general idea to

overcode the singularity of suffering. The constituted power of the state never volunteers to legislate its own epistemic limitation. It fiercely guards its zero-point privilege.

However, whilst the K-machine guards its topological impermeability, its legal and democratic space remains structurally incomplete (Walker 2010). Here, whilst in this incompleteness the K-machine is afraid of the people (Möllers 2007: 11), this article argues, in drawing into conversation a decolonized, but embodied, imagination, that the space of incompleteness can reveal the transcultural potential. Within this threshold where divergent realities and epistemologies collide lies a self-revolutionizing logic for understanding our relationships with the institutions and offers the potential to redefine the real. To move beyond a spectral vision of silence requires leveraging this incompleteness to construct a new jurisdictional machine capable of compelling the state to pause and listen. Relational Legal Pluralism (RLP) operates as a structural jurisprudence for practitioners, non-governmental organizations, and the substrate itself. Docking theoretical diagnosis into concrete legal operability, the framework proposes an analytical machinery of accusative attunement designed to execute an *en passant* intervention against the administrative state.[4]

Achieving this requires executing a structural transformation of orthodox legal theory across three specific coordinates, as follows.

From reading to breathing

Orthodox jurisprudence assumes the primary interaction a citizen has with the law is intellectual. This is the wonderful concoction of the informed citizen. RLP asserts that, for the marginalized, this interaction is visceral and affective. The law operates through unobtrusive background affects, structuring the capacity to act long before a formal legal decision is rendered (Wall 2019). When the state is lethally unanswerable, the subject's combat breathing (Fanon 1967; Gibson 2024), the visceral registration of suffocation, supersedes the act of reading. The K-machine's translation capture attempts to strip this affective intensity from the administrative record. Therefore, the law must be evaluated by its spatial breathability.

[4] This methodology rejects the mere application of a Western critical tool to a non-Western concept. It sets out a process of hermeneutic destruction and reconstructive synthesis. The framework docks Mignolo's decolonial critique to inject a rigorous analysis of power into Watsuji's apolitical phenomenology. Simultaneously, it utilizes Watsuji's spatial ontology to rescue Mignolo's framework from its own Manichaean, essentialist totalities (Murphy 2021).

From responsibility to friction

Traditional legal frameworks allocate interpretive risk to the citizen, demanding they format grievances into the state's sanitized vocabulary, the greengrocer's shield (Havel 1985 [1978]). RLP rejects this compliance model to introduce asymmetrical material friction. The objective is for the subaltern to leverage their own illegibility to halt the state's mechanistic treadmill through an epistemic strike.

From horizontal to vertical

Recent advances in legal philosophy map the horizontal conditions of the rule of law, demonstrating how legal reasons must remain shareable among a community of peers (Krentos 2026). The framework verticalizes this logic. It aims the horizontal rules of legal interpretation upwards at the K-machine, turning tests of reasonableness into structural audits to prove the state acts *ultra vires* by ignoring the visceral reality of the governed.

The architecture of repair

Operating as an active procedural engine, RLP exacts present-tense answerability directly within the claustrophobic shell of modern statecraft. It addresses the doctrinal operating system of English administrative law through immanent critique. The objective equips practitioners with the Aesthetic Impact Statement (AIS). The AIS operates as the procedural vehicle for the substrate's immaterial archive, translating the transcorporeal residue of the *fūdo* into hard jurisdictional facts triggering the *Tameside*[5] duty to inquire. The AIS acts as an affective rupture. By leveraging the ordinary affects of the substrate, it forces the unobtrusive, atmospheric reality of the law's violence into the obtrusive foreground (Wall 2019). Weighing these claims without collapsing into utilitarian drift requires the Lexicographic Triage Rule and the Apophenia Veto. This combination acts as a structural firewall against parochial tyranny, normatively subordinating exclusionary cultural preferences to the absolute baseline of biological survival.[6]

When the state fails to bridge the gap of opacity, the framework provides the jurisprudential shield for a-legal Spatial Nullification, the suspensive

[5] *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014 (HL).

[6] These terms do not name settled legal doctrines, but the working machinery of Relational Legal Pluralism. The Aesthetic Impact Statement forces the embodied, spatial and relational fact of harm into the forum; the Lexicographic Triage Rule refuses to balance survival against administrative ease; the Apophenia Veto blocks projected or exclusionary grievances from masquerading as democratic claims; and the suspensive remand pauses closure where the institution's own grammar has failed to hear a materially grounded wound. Together, they convert what the K-machine treats as noise into a disciplined demand for present-tense answerability.

remand. This mechanism anchors itself in the constitutional lineage of jury nullification. As Scheflin and Van Dyke (1972; see also Brooks 2004; Murphy 2021: chapter 5; but more radically Butler 1995)[7] demonstrate, the socio-epistemic dynamics of the community's right to say "no" to the state, even when mandates comply with the letter of the law, serve as a foundational safeguard against administrative tyranny. The counter-tribunal exercises a legitimate veto to suspend an unjust application of the law, avoiding any usurpation of the legislature.

Executing this Spatial Nullification, in returning power to the ethical-forum, exercises structural power to paralyse the state's mechanistic treadmill. But rather than invoke the paralysis of anarchy,[8] drawing on Vivien Lowndes and Marie Paxton's (2018) work on critical institutionalism, the goal is to agonize institutions rather than destroy them. The K-machine relies on a false, exclusionary consensus. The suspensive remand forces the state into an agonistic relationship with the substrate. It rebuilds the rule of law as a compelled, provisional, and contestable institutional design exacted through the raw, material friction of present-tense survival and to embed the sterile nomo-dynamics of law in actual social relations.

Signposting

Constructing this jurisdictional intervention requires moving from a structural diagnosis of institutional deafness toward a viable, cooperative remedy across five stages.

Part B, "The Anatomy of the K-Machine and the Architecture of Foreclosure", maps the structure of modern law, revealing how translation capture, epistemic insulation, and the temporal cage function as a topologically closed space administrating the substrate to death.

Part C, "The Origins of Post-Western Theory and the Spatial-Ethical Inversion", constructs the epistemic justification for fluid institutions. Utilizing Watsuji Tetsurō's triad (*fūdo*, *aidagara*, *kū*) to dismantle the state's zero-point epistemology, it re-centres the nondual, topological reality of the governed (Murphy 2026).

Part D, "The Structural Audit of the Threshold", grounds this theoretical framework in the empirical reality of the administrative state. It audits the Grenfell Tower fire and the European Union (EU) border regime to expose the active sanitization of the pain of others.

[7] I would like to express my thanks to the article's reviewer for highlighting the importance of Butler's work for the article's argument.

[8] In respect of the supposed danger of anarchy through nullification by jury, see Hreno (2025).

Part E, "Strangerdom and the Mechanics of Epistemic Intervention", translates this ontology into procedural mechanics. It repurposes Jason Krentos's reason test from a horizontal theory of interpretation into a vertical theory of structural intervention, providing the epistemic spark required to expose the exact moment the legal harness becomes a lethal noose.

Part F, "The Accusative Rule of Law and the Architecture of Repair", outlines the concrete deployment of the framework. It utilizes the AIS, the Apophenia Veto, and the a-legal counter-tribunal to compel a mandatory, agonistic transmodern constitutional settlement.

Initiating this structural intervention requires an account of the institutional barriers currently suffocating the lived environment. Before setting out a mechanism for relational repair, the next section excavates the temporal coordinates of the state's deafness, exposing how the administrative apparatus actively constructs its own procedural isolation.

[B] THE ANATOMY OF THE K-MACHINE AND THE ARCHITECTURE OF FORECLOSURE

The Kelsenian automaton

Interrogating the institutional shell exposes the mechanics of unbreathability at the contemporary threshold. Attributing the deafness of the law to a deficit of empathy relies on a pathological fallacy that assumes the legal system experiences a temporary malfunction. The architecture of foreclosure operates instead as the standard operating system of Western legality (Murphy 2026). Viewed through legal topology (Burchardt 2022), the shell acts as a Kelsenian nomo-dynamic machine (Invernizzi Accetti 2015).[9] This K-machine defines its own boundaries and dictates its own permeability, and to understand the lethal efficiency of this apparatus requires unmasking its historical genesis. Natasha Wheatley (2023) and Imre Tarafás (2024) provide such tools and demonstrate that Hans Kelsen's drive toward absolute theoretical abstraction was not the discovery of a universal jurisprudential truth. His vehement separation of the state as a pure legal phenomenon (*Sollen*) from the messy social reality of the governed (*Sein*) functioned as a historically contingent survival mechanism of the collapsing, polyglot Habsburg empire. Confronted with a fracturing multinational reality, Kelsen engineered a theory of law

[9] Such a process sees legal validity as a "dynamic" category involving a continuous process of chain-like creation, connecting past, present, and future.

deliberately designed to escape the friction of diverse lived environments. Passed through our decolonial prism, the K-machine operates as the ultimate manifestation of the hubris of the zero point (Mignolo 2009). It projects a provincial Austrian anxiety globally as neutral, universal law, to actively sever the law from the *aidagara* and the *fūdo* because its foundational DNA was explicitly designed to ignore the somatic, material reality of the substrate: the illusion of the relationship between life and law. Within this horizon, the raw material reality of the wound remains irreducible to a norm (Kelsen 1967). A documentary apparatus of risk assessments and algorithmic logs sustains this foreclosure (Vismann 2008).[10] The state achieves monological closure through a vertical imposition and replaces the breathing body with the file. Confronted with the flesh-and-blood reality of the governed, the K-machine orders social relations through the structural voiding of factical experience.[11] This filters out unobtrusive background affects to ensure they never register within the formal legal foreground.

The signature of power

To understand how this machine interfaces with living bodies requires turning to Francesco Forzani (2025). Forzani identifies the signature of power in modern legality as the inclusive-exclusion of life. The legal order captures the force of life to neutralize it into the form of law. This produces a zone of indistinction termed the *formce*. However, unmediated human existence resists administration. As I have discussed in Murphy (2026), and in the last subsection, the law therefore creates a sanitized cipher by voiding the actual human being, instituting the individual as a fictional zero-degree of immutability. This juridical ghost is designed solely to receive normative commands and mirrors the mortification of the self identified by Scraton (2016). The administrative machinery strips the subject of relational identity and objectifies the citizens, increasingly through an abstract and non-relational process of algorithmic reduction.

[10] Orthodox sociologists of law may read the architecture of the K-machine, specifically its reliance on epistemic insulation and translation capture, as a restatement of Niklas Luhmann's autopoietic systems theory (Luhmann 2004). RLP shares Luhmann's descriptive diagnosis: the legal system operates through strict operational closure, and it relegates the visceral reality of the human being to the external environment. However, viewed through the spatial dynamics of Murphy (2021; however, see also Burchardt 2022), the current framework departs from Luhmann's functionalist fatalism. Luhmann observes this operational closure as an evolutionary achievement necessary for managing social complexity. Our analysis diagnoses it as a lethal pathology. It is a topologically closed, jurispathic architecture of foreclosure. Luhmann posits that the system can only be irritated by its environment. RLP actively leverages this environment.

[11] For the relevance of this "distancing" between law and factical existence (social relations), see Halpin (2006) and Siliquini-Cinelli (2020).

This architecture of insulation, this duality, forms the constitutive grammar of global capitalism and defines the modern corporate entity (Hardman 2024). This entity operates as the apex privatization of the *formce*. The state concedes the shell, granting artificial legal personality and procedural immunity, which allows the corporate substrate to operate without present-tense answerability to the spatial *fūdo* it extracts from. It shields beneficiaries behind artifactual immunity.

The lithic seam and the jurispathic void

Recognizing the shell and substrate partition as the standard operating system elevates RLP beyond utopian policy reforms. The framework executes an analytical intervention at the exact lithic seam where the media-artifact of law overwrites the bodily substrate of life. Friction manifests here as a wound. This wound signifies an embodied, relational harm arising within governance. But it can only return to the K-machine as an incomputable input. It represents the literal pain of others (Scraton 2016) that the apparatus is structurally designed to ignore from behind a prism of patronizing and unaccountable power (Home Office 2017). Following Clive Barnett (2017), the framework presented within this article asserts the priority of injustice. As I have discussed above, orthodox jurisprudence operates as an ideal theory that defines a top-down abstraction of justice to measure reality against. Justice is located instead on the ground of social relationships (Halpin 2006). The K-machine leverages and elevates orthodox theory to void the material reality of harm. It reduces the spatial entanglement of the substrate into the ontic univocity of a single registry. The reliance of the state on procedural infallibility imposes an idealized map that erases the territory of injustice. As Robert Cover (1983) argued, while the substrate remains juris-generative, the legal shell of the state operates as a jurispathic entity. This extinguishes rival normative worlds to secure its monopoly on reality and executes a continuous structural sacrifice of plurality (van der Walt 2007).

Translation capture and the neutralization of affect

Sustaining this relational hegemony requires an admissibility architecture that pre-emptively dictates the grammar of the encounter. Claims arrive heavily mediated and submit to translation capture. Václav Havel's (Havel 1985 [1978]) greengrocer placed a regime-approved sign in his window. He deploys a procedural passcode rather than a cognitive conviction. The sign operates as a spatial shield, a calculated submission designed to deflect punitive processes. Translation capture forces the combat breathing of

the substrate into the administrative form of the file (Fanon 1967; Gibson 2024). It neutralizes affect. The state strips visceral panic and bodily suffering from the record to capture only what the symbolic order permits (Vismann 2008). To achieve recognition requires the subject to adopt the greengrocer's shield and translate physical survival into an affectless lexicon. That is, that the claim for abstraction is a claim for "fairness". And yet, at the "threshold" (the point of entry into court), it demands the destruction of the subject's actual experience to sanitize pain into hygienic terminology (Christie 1981; Scraton 2016). In *R v Secretary of State for the Home Department, ex parte Doody* (1994), the requirement to provide the gist of a case reveals itself as a media-technological mandate: it discloses artifactual reasons, only to compel the subject to mirror them back. Experiences that resist this filing architecture are discarded as inadmissible noise. The K-machine then deepens this foreclosure through a Forsythian narrowing (Forsyth 2011), forcing the subject's substantive expectations through a private-law prism that refracts lived reality into a sterile, procedural form.

The temporal cage and the spatialization of a-legality

If the shell and substrate partition manages spatial coordinates, the temporal cage governs chronometry, to convert present-tense survival into managed futurity.[12] When the substrate presents a bodily emergency, the shell defers it through reviews and inquiries. Orthodox administrative law defends this deferral as due process. This current framework diagnoses the manoeuvre as substituting epistemic inquiry for existential remedy in which the state maintains total unanswerability to bodies perishing in the present. The law lacks an absolute origin outside of time. The retreat of the shell into its procedural timeline perverts its own nature. Breaking this temporal self-authorization requires a materialist appropriation of Lindahl's philosophy (see also Murphy 2026). A-legality marks the juridical appearance of strangeness (Lindahl 2013; 2018; 2025). It destabilizes a boundary by registering as neither legal nor illegal. RLP integrates the affective dynamics of the threshold, translating a-legality into a tool for

[12] There may be a tendency for the reader to doubt the bloodied reality of this claim. However, the everyday structural friction of the K-machine finds articulation within the adult social care crisis in the United Kingdom. As Baroness Casey recently documented, the administrative state subjects motor neurone disease patients to an artifactual administrative sequence averaging 375 days for necessary home adaptations. These individuals possess a median biological survival of 22 months. See Baroness Louise Casey, Chair of the Independent Commission into Adult Social Care, Speech to the Nuffield Trust Summit (5 March 2026). Regrettably, Casey approaches this crisis from a posture of managerial optimism. She proposes a National Safeguarding Board that would effectively centralize the monological closure of the shell. Despite this orientation, her empirical findings supply an audit of the temporal cage.

institutional intervention to become an ontological shield for Spatial Nullification.[13] When the substrate withdraws compliance through a rent strike or blockade, the state attempts to process this friction as illegal. This reaffirms state boundaries and justifies police violence.

A-legality provides the jurisprudential framework to demonstrate the rupture is a constituent suspension of the K-machine. It is not a crime (Menga 2014). The framework spatializes this rupture as a vertical strike against the legal forum. Such a Spatial Nullification operates as a provisional material injunction. It is a defensive necessity to preserve biological life and secures the breathability of existence until the media-technological apparatus of the state is compelled to negotiate. This mechanism anchors itself in the constitutional lineage, though invoking the spatial dynamics it represents, of jury nullification. Whilst judges and administrators hate this doctrine, RLP focuses on the incompleteness it reveals, and the socio-epistemic dynamics of the right of the governed to say "no", "this is unjust" to the state. This right persists even when mandates comply with the letter of the law. In bringing together the experiences of the colonialized confronted with the ideals of injustice as enlightened, with the embodied imagination of Watsuji, is to Spatial Nullification, as the spatialized descendant of this doctrine. Whilst it serves as a safeguard against administrative tyranny, it offers much more. Transforming the site of sovereignty from the institution to embodied relationality offers ethical sites of independent rationality, which possess the inherent right to suspend unjust applications of power. It exercises a legitimate veto to halt the K-machine as an alternative site of rationality.[14]

[13] This framework seeks to set Lindahl's indispensable account of a-legality into a structural tool. It avoids theoretical subordination. Lindahl (2013; 2024) discloses the temporal and ontological crisis of the collective "'we'". The analysis shifts to the material reality of its institutional production. It integrates Wall's (2019) critique of affective legality. Drawing on Forzani's (2025) archaeology of the law and life distinction, the framework diagnoses the failure as the violent breakdown of the inclusive-exclusion constituting the shell. This moves beyond simple misrepresentation. Lindahl's stranger operates as a formal limit whilst the account of agency set out through *aidagara* and *fūdō* set out below-a subject-to-subject ethical position (also see Araújo's 2024 decolonial concept of co-presence) regrounds the encounter in a spatial and ethical demand. The admissibility audit, set out below, functions as an analytical tool for translating Lindahl's law in the accusative into practice to convert his philosophical insight into a manual for institutional accountability.

[14] It is necessary to draw an absolute boundary regarding the mechanics of a-legal Spatial Nullification. The intervention against the K-machine targets infrastructure, logistics, and artifactual sensors. It targets the poor door, the server, or the barricade. It never targets human flesh. RLP is grounded in an ethic of radical compassion and strict subject-to-subject accountability. The *aidagara* dictates that we are all constitutively accountable to one another. Inflicting physical violence upon another human being, even an agent of the state, commits the exact jurispathic erasure the framework opposes. It claims the absolute, sovereign finality over life that the discipline of *kū* (emptiness) strictly forbids.

Addressing this architecture of foreclosure requires moving beyond the orthodox boundaries of Western critical theory. As I have discussed, orthodox theory frequently reproduces the very epistemological hierarchies it seeks to dismantle. The next stage in this article is to introduce a post-Western epistemic framework capable of executing a topological inversion. It dismantles the zero-point epistemology of the state to re-centre the nondual, spatial reality of the governed.

[C] THE ORIGINS OF POST-WESTERN THEORY AND THE TOPOLOGICAL INVERSION

The zero-point epistemology and the legal prosopography of the K-machine

The preceding article, "The Jurisprudence of the Threshold" (Murphy 2026), established the architecture of foreclosure as a rule by silence (Moncrieff 2025). The K-machine secures this monological closure by enforcing a strict legal prosopography. It strips the legal subject of relational context, manufacturing a rigid, disembodied unit. This architecture sustains itself by projecting the hubris of the zero point (Castro-Gómez 2005; Mignolo 2009). The state claims to speak from a neutral, objective nowhere. It operates from the highly insulated space of the administrative shell. Viewed through legal topology, this zero-point epistemology asserts the apex of a closed space and denies border permeability. It projects a false universality that underdetermines actual social relationships to overdetermine procedural compliance. Treating the lived environment as a neutral backdrop allows the state to colonize the future. It locks human agency into a sterile temporal cage. To shatter this architecture requires the epistemic framework of post-Western cosmopolitan social theory, developed through the critical dialogue between Gerard Delanty's relational sociology, Walter Mignolo's decolonial transmodernity (Dussel 1985 [1977]), but pollinated through Watsuji Tetsurō's spatial phenomenology (Murphy 2019; 2021).[15]

[15] Importantly, this synthesis operationalizes the methodology of critique and cooperation (see Murphy 2021, "Introduction"). Delanty's critical cosmopolitanism provides the relational ambition but remains tethered to the temporal logic of European cognitive universalism. Mignolo's decolonial project provides the visceral critique of the colonial wound but risks collapsing into an essentialist, diametric duality. We pass both theories through the prism of Watsuji. Watsuji's spatial topology grounds Mignolo's critique in actual relational networks rather than abstract ethnic identities. Simultaneously, it shatters Delanty's abstract universalism by demanding embodied, spatial co-presence. And, finally, it introduces critique and power in the embodied ontology of Watsuji.

Transmodernity, bricolage, and shifting the locus of enunciation

Delanty (2009) identifies the urgent need for a relational social ontology. Yet his cognitive universalism remains trapped within the evolutionary, temporal logic of European modernity. Mignolo's decolonial project disrupts this Eurocentric temporal imagination. For him, drawing on Enrique Dussel, transmodernity demands a structural shift in the locus of enunciation (Mignolo 2007). This allows jurisprudence to confront the visceral price exacted for institutional progress and its separation from existent social relations. Mignolo reveals the seamless legal order of the K-machine as a violent illusion, with Martti Koskenniemi (2021) observing a similar fracture. The history of legal imagination is a bricolage. It is a tactical assembly of fragmented discourses and power relations deployed to justify authority. But, integrating transmodernity allows us to position the critique of the "temporal cage" as a shift in the locus of enunciation, moving from modern legal universality to a pluralistic, decolonial paradigm that empowers the substrate: spatial a-legality. By rejecting the "zero-point hubris" of administrative law, RLP utilizes a-legality to transform Spatial Nullification into an ethical site of independent rationality that challenges the K-machine.

The K-machine conceals this unruly bricolage beneath a film of procedural infallibility and propriety. There is an irony in that the shell, with its bricolage of privileged perspectives, fears the fragmented, lived reality of the substrate with this dread reflected in the inherent fear of the state toward constituent power, the unpredictable sovereignty of the people (Möllers 2007). Protecting itself from this democratic indeterminacy requires the state to ossify its institutions. It seeks a self-regulating homeostasis that suppresses conflict and contingency (Lowndes & Paxton 2018). However, when the state retreats into these static, monolithic shells, leaving "lawlessness", it reveals a fracture between the "shell" of the law and the "substrate" of the governed and, importantly, reveals a voice for incompleteness. If the reality of the people is a complex assembly of social and historical fragments, they cannot be contained by a rigid legal geometry. This tension signals the arrival of transmodernity, which incorporates the voices and histories it previously discarded. These pathways do not exist outside of law but rather demand a transformation of it: toward a pluriversal legality. In this transmodern landscape, the state's monolithic shell is recognized as an artifact of the past, replaced, instead, by porous and relational legal structures that finally incorporate the lived complexity of the substrate.

Within this framework, the transition is mediated by a-legality. By maintaining an a-legal stance, the substrate refuses capture by the K-machine, as judicial ghosts, instead transforming perceived "vacuums" into productive zones of decolonial agency. These are no longer sites of lawlessness, but ethical sites of independent rationality where the substrate, rather than awaiting state permission, negotiates its own relational sovereignty. Consequently, re-imagining nullification spatially provides the front line of a RLP: a living, breathing bricolage that offers a sophisticated, transmodern alternative to institutional ossification. By framing these spaces as ethical sites of independent rationality, we transform them into the front lines of an RLP. Here, the substrate does not wait for the state's permission to exist; it actively negotiates its own sovereignty, forcing the K-machine to confront a living, breathing bricolage that is no longer "pre-modern" or "primitive", but a sophisticated, transmodern alternative to institutional ossification.[16]

Watsuji Tetsurō, the moral background, and the spatial inversion

Whilst Mignolo offers us the opportunity to plunge into the colonial wound, Delanty ascends into the critique of ideology. However, both frameworks frequently collapse into a diametric duality. Positioning the West versus the Rest, or liberal versus non-liberal, totalizes reality and inadvertently mirrors the absolute universalism both seek to dismantle. Escaping this deadlock required operationalizing institutional fluidity and grounding the locus of enunciation in material reality. Here, I executed a methodology of critique and cooperation through docking the socio-epistemology of Watsuji Tetsurō into this critique. We deploy his conceptual triad of *fūdo* (spatial milieu), *aidagara* (relational betweenness), and *kū* (emptiness) (Watsuji 1961; 1996; Murphy 2021).[17]

Against the abstract legal prosopography of the K-machine, Watsuji posits that human existence (*ningen sonzai*) is inextricably spatial and relational (Johnson 2019). Johnson allows us to understand *fūdo* (milieu) and *aidagara* (betweenness) as operating as the nondual, topological, and

[16] Below, the article will offer an example in the Preston Experiment from the United Kingdom.

[17] This docking manoeuvre executes the definitive shift from the prioritization of time and ontology to space and ethics. Western jurisprudence, obsessed with the temporal emergence of the state, demands that we define what the law *is* before we assess what it *does*. Watsuji's spatial phenomenology reverses this. By grounding existence in the *fūdō* and the *aidagara*, the framework insists that the ethical reality of the spatial wound precedes and dictates the ontological validity of the legal order.

phenomenological dimensions of the self (Murphy 2021: chapters 5 and 6). They are not merely environments containing a pre-existing subject.

The violence of the K-machine executes a systemic relational severance and constitutes a profound rupture of the subject from the very spatial and relational coordinates that sustain biological and social life. Instead, what Watsuji allows us to conceive is a self, constitutively embedded in its milieu. It is its *fūdo*. Moving beyond geographic determinism, *fūdo* identifies the relational web in which life unfolds. It is a juridical atmosphere (Murphy 2026) that encompasses the infrastructures, customs, courtesies, timelines, and credibility distributions through which human existence becomes mutually intelligible. We share this consciousness (Johnson 2019). Within RLP, *fūdo* functions as the very medium of betweenness and holds the practical act-connections of life (*aidagara*). Legality is lived, suffocated, or contested within this space, not against an external context. Breathability becomes a specific admissibility property. Rather than enamelling one's thought between a contextless forum, or veil of ignorance, the matter at hand is to take injustice and social relations as they are. Therefore, a forum is breathable only if it supplies responsive routes by which acute exposure can stabilize as a shareable reason capable of binding the order (Fanon 2004 [1961]; Stanley 2021).

As discussed above and in Murphy (2026), foreclosure operates as the deliberate production of an unbreathable atmosphere. It is a managed futurity where warning pathways are systematically rerouted into routes of capture. Therefore, if we are to offer an account of jurisprudence capable of informing a democratic culture, we must execute a structural redefinition of the moral background of law and politics (cf Walker 2010). Orthodox liberal theory frames the moral background as a sterile, disembodied consensus reached in an ideal speech situation (Habermas 1996). RLP strips the moral background of this polite abstraction. We share a common life where people of different backgrounds bump up against one another (Sandel 2020). The moral background of law and politics is therefore the embodied, lithic friction of bodies, identities, and hopes rubbing together. It is the spatial reality of *aidagara*.

Watsuji defines *aidagara* as the fundamental structure of human existence. We are nodes in a web of relations rather than isolated atoms (Watsuji 1996). The violence of the shell lies in its attempt to govern individuals as discrete units of administration. It severs the *aidagara* that sustains them. Embodied knowledge and affective presence inform this web. The bumping into one another generates the ordinary affects

(Stewart 2007, cited in Wall 2019; see also Murphy 2021; 2026) that bind a community together. We integrate Sara Araújo's concept of co-presence (Araújo 2024). The goal of the corrective is the maintenance of co-presence. Different legal maps must exist in the same space without one destroying the other.[18]

Incompleteness, reflexive negation, and agonistic institutional design

The final mechanism for establishing fluid institutions is Watsuji's application of *kū* (emptiness). Emptiness is deployed in this project as an epistemic principle of reflexive negation (Murphy 2021; 2026). Within RLP, *kū* leverages the insight that incompleteness is the fundamental ontological condition of the law. It is not a procedural flaw. The framework introduces *kū* as a principle of jurisdictional porosity. Watsuji critiques the isolated subject (1996). We extend this to argue that no legal standpoint possesses inherent, independent existence. Neither the state nor the subject stands alone. Both exist only in *aidagara* (relation). The authority of the shell is entirely contingent on its capacity to maintain the relation. When the relation ruptures, marking the a-legal moment, the shell loses its claim to completeness.

Applying reflexive negation as a form of legal logic strips the K-machine of its groundless grounds. Institutions are empty of permanent essence and are structurally obligated to remain open, porous, and fluid. Attempts by the state to achieve monological closure by sealing itself off behind epistemic insulation violates the fundamental ontological condition of *kū*. The K-machine's attempt to deny its own porosity by filtering out the lithic wound exposes a fatal constitutional defect.

Translating this spatial inversion into concrete legal operability requires moving beyond theoretical abstraction to examine the material ruins of the administrative state. Grounding the epistemic principles of *fūdo* and *aidagara* in empirical reality necessitates a structural audit of the threshold. This is the exact seam where the institutional shell encounters the bodily substrate. Interrogating specific sites of jurisdictional friction will allow the article to set out the mechanics the K-machine deploys to maintain its procedural closure against the lived environment.

[18] As such, this is to reject inclusion. Inclusion implies assimilating the substrate into the shell.

[D] THE STRUCTURAL AUDIT OF THE THRESHOLD

Proving the unbreathability of the legal order

To prove the unbreathability of the legal order, jurisprudence must descend into the material ruins, executing the spatial and ethical inversion established in Part C by auditing the exact institutional coordinates where the K-machine collided with the living substrate. It is at this site of consequence, where the state systematically processed the visceral reality of the governed as inadmissible noise, that the fracture between formal procedure and lived existence is most vividly exposed.

By measuring a fatal disjunction, the admissibility audit establishes the distance between the affective, bodily materiality of the *fūdo* and the sterile, media materiality of the Kelsenian file, providing the metric necessary to shatter the mythology of modern law (Humfress 2023). In this state-sponsored pretence, the monopoly on coercion is masqueraded as an exclusive and neutral source of order, yet, as Burchardt (2022) exposes, the state functions as a topologically closed legal space designed to engineer a maximum degree of resistance to its external environment. Through this deliberate closure, the institution actively sanitizes the outside world by stripping away the unobtrusive affective background of human suffering and laundering the trauma of the *aidagara*, all to maintain the cold equilibrium of its own procedural homeostasis.

The mobile logic of foreclosure

In order to develop such a metric, the article will apply this admissibility audit to two distinct validity sites. We examine the Grenfell Tower fire in London and the external border regime of the EU at the Aegean maritime frontier (Murphy 2026). These sites differ vastly in scale and jurisdiction. Yet the audit reveals a shared, mobile logic of foreclosure.

In both instances the legal order succeeded perfectly. It maintained its nomo-dynamic continuity by violently expelling the visceral reality that threatened its borders. The state executed the structural erasure of the pain of others (Scraton 2016), through the deployment of a bureaucratic shield of words (Christie 1981), to launder bodily trauma into compliant administrative data without consequence for the shell. The article captures these ruptures by docking the dialogue between Ferdinando Menga (2014) and Hans Lindahl (2013) into our spatial matrix. We translate their concepts across two intensities of a-legality: Grenfell exposes weak

a-legality and contests the limit of an orderable claim; the Aegean frontier exposes strong a-legality. It contests the fault line of an unorderable subject.

Grenfell Tower: the audit of ruptured *aidagara* (weak a-legality)

The Grenfell Tower Inquiry *Phase 2 Report* (2024) provides a granular cartography of the K-machine in operation.[19]

The lithic rupture and the artifactual sensor

Between 2013 and 2017, the residents of Grenfell Tower registered the affective materiality of a toxic *fūdō*. They documented the transcorporeal residue of state abandonment. Power surges caused appliances to smoke; fire breaks vanished; a single stairwell trapped the inhabitants. This combat epistemology established a rebuttable presumption of unbreathability. It exposed a Level 1.5 systemic relational severance. The residents articulated the raw, affective panic of a community whose *aidagara* was undergoing structural suffocation.

The tenant management organization (TMO) operated under the regime of sociological positivism. It relied entirely on an artifactual sensor. The Fire Risk Assessment (FRA) functioned as a documentary technology engineered to manufacture procedural infallibility. It created a Kelsenian model of the building. This model achieved legal compliance while remaining physically lethal, but with residents pointing to the bodily reality of the danger. The TMO retreated into the closed epistemic resources of its technical consultants. The regime was successful; the state achieved monological closure. It replaced the visceral materiality of the residents with the media materiality of the file. The topologically

[19] While these specific examples of state violence, Grenfell Tower and the Aegean frontier, were examined in the preceding article (Murphy 2026), their methodological deployment here serves a distinct structural function. In "The Jurisprudence of the Threshold", these sites operated primarily as diagnostic anchors to map the macro-pathology of relational hegemony and expose the spatial violence of the abyssal line. The objective was ontological and theoretical: to prove the deliberate, institutionalized nature of spatial abandonment and to validate the necessity of a spatial–ethical inversion. In contrast, the present inquiry descends directly into the media-technological ruins of these events to perform a structural admissibility audit. Here, Grenfell and the Aegean are not merely observed as tragedies of the *fūdō*; they are forensically disassembled to expose the specific artifactual sensors and filters, increasingly algorithmic (such as the FRA and the JORA database), the K-machine utilizes to execute translation capture. Consequently, whereas the first article mapped the *fact* of foreclosure, this article audits the precise *mechanics* of institutional deafness in order to justify the deployment of the AIS and operationalize the destituent machinery of the epistemic strike.

closed space of the TMO lacked the sensory apparatus to process the affective legality of the residents' terror.

Translation capture and credibility downgrading

The residents' disclosures carried the raw, accusative knowledge of the wound. The K-machine subjected these disclosures to translation capture. The institution coerced urgent warnings of lethal risk into its own ritual communication. It reformatted survival claims in the institutional record as routine casework or maintenance queries. This executes the exact administrative violence Scraton (2016) identifies. The state, and its instituted law, weaponized formal, sanitized language to mask the mortification of the governed, thus ensuring that the pain of others never breaches the official record.

The *Phase 2 Report* documents how the TMO leadership viewed resident complaints. They perceived these warnings as a threat to their own management authority rather than demands requiring investigation. The TMO labelled the residents as militant troublemakers (Grenfell Tower Inquiry 2024). This executed a diagnostic shift. The problem shifted from the fire risk in the substrate to the resident's personality within the shell's classification. This epistemic bifurcation allowed the TMO to criminalize the friction, categorizing the combat breathing of people trapped in a fire hazard as harassment rather than evidence. The state and its instituted law violently severed the *aidagara* and replaced the relational duty of care with a relation of pure, hostile administration.

The temporal cage and weak a-legality

While residents, the forgotten and left-behind, demanded immediate, material repair: the TMO responded with a managed futurity, producing an incessant cycle of meetings, reviews, and consultations that functioned as a form of chronomancy, deferring present-tense survival into an institutional future controlled entirely by the state. This temporal abstraction reached its apex in the "Stay Put" policy, an artifactual promise of safety that voided the physical reality of the fire by relying on the theoretical assumption of compartmentation: a logic that had already been rendered a fiction by the highly combustible cladding.[20] In this light, Grenfell represents a crisis of weak a-legality: though the right

[20] The Stay Put policy functions as the ultimate, lethal expression of the zero-point epistemology. It demands that the resident actively ignore their own *aesthesis* (the smell of smoke, the rising heat, the visual confirmation of flames) and submit to the disembodied, artifactual command of the state. It is a demand for absolute epistemicide, with the state requiring of the citizen to die rather than violate the prior procedural logic of the shell.

to safe housing exists within the legal lexicon, its embodied form shatters the admissibility grammar of the shell, as toxic smoke and locked doors constitute a visceral reality that the K-machine simply cannot process. The managed futurity of the TMO finally reached its terminal conclusion on the night of 14 June 2017, but only after the substrate had already suffered total destruction, exposing the fatal gap between the state's procedural homeostasis and the lived breathability of the *fūdo*.

The EU border: JORA and the atmo-technics of the shell (strong a-legality)

If the tragedy of Grenfell exposes the K-machine suffocating the substrate by refusing to shift an internal limit, the EU border regime reveals a more absolute erasure, violently policing a fault line where the validity site shifts to the Aegean maritime frontier. At this coordinate, Frontex deploys the Joint Operations Reporting Application (JORA) as the primary artifact of foreclosure, marking a site of strong a-legality where the migrant's sheer physical presence exceeds the assertion of any right within the existing order. By shattering the Kelsenian binary of citizen and alien, the migrant embodies a claim that remains unorderable within the prevailing grammar of the nation state. This forces the shell, which is unable to adjust its limits, to repel the anomaly through lethal atmo-technics (Wall 2019). This spatialized cruelty enacts an abyssal line, leveraging the environmental power of the metropolitan zone to systematically erase the colonial zone of consequence; yet, as Hanna Eklund (2023) importantly reveals, this is no contemporary aberration but the system functioning as designed. Because the foundational architecture of the EU was drafted by active colonial empires, the Treaty of Rome embedded a differentiated, exclusionary logic into the very DNA of European governance, ensuring that the contemporary border regime remains the modern iteration of a colonial legal politics that institutionalizes the abyssal line as a permanent feature of the "shell".

Translation capture and the JORA algorithm

JORA operates as an algorithmic filter engineered to execute translation capture and extends far beyond a neutral reporting tool to act as a mediator that, as Covadonga Bachiller López and Niamh Keady-Tabbal (2021) document, transforms the embodied violence of the border into mundane administrative logs. The structural audit identifies this capture within the bureaucratic category of "prevention of departure", where the affective materiality of coercion, physical exhaustion, and the violation of

non-refoulement is subjected to an act of ontological laundering. While the term "pushback" acknowledges an active violation by the state against a subject within its jurisdiction, the narrative of "prevention of departure" constructs a reality where the subject never truly entered the domain of the shell, effectively deploying Christie's "shield of words" (Scraton 2016) to ensure the K-machine processes physical trauma as a successful, compliant operation.

The necessity of the epistemic strike

The comparative audit of Grenfell and the Aegean frontier yields a definitive jurisprudential conclusion: reforming the K-machine through superior data collection remains impossible because the apparatus is explicitly designed to leverage data *against* the human body. In this light, managerial optimism and liberal reformism inevitably fail, as they rely upon the very administrative architecture that produces foreclosure: a system where the FRA and the JORA database function not as neutral reflections of reality, but as hostile media-technologies that actively overwrite the "combat breathing" of the substrate. By sanitizing the pain of others and neutralizing the affective legality of the governed, the state's documentary apparatus structurally filters out the "lithic wound", forcing the subaltern to filter their visceral needs through elite-vetted institutions that Shmuel Lederman (2022) identifies as imperial legacies designed to manage the "domestic barbarian".

Consequently, the substrate cannot rely on orthodox legal petitions to achieve justice; instead, it must introduce its incomputable input into the machinery of the state to disrupt the algorithmic treadmill, moving from an empirical audit of the threshold to a procedural mechanics of intervention. The following framework translates the horizontal rules of legal intelligibility into a vertical strike aimed, not at destroying the institution, but at agonizing it, shattering the false, exclusionary homeostasis of the state to force a "critical institutionalism" (Lowndes & Paxton 2018) where the rules of the game become processual, collective, and contestable. To achieve this agonistic settlement, we must excavate the historical precedent of the community's right to say "no", translating the logic of jury nullification into a modern mechanism of spatial destitution. This disruption of monological closure is achieved by critically appropriating Krentos's jurisprudence of strangerdom (2026), weaponizing a horizontal theory of intelligibility as a vertical structural intervention that documents the epistemic incapacity of the state and transforms a tool for polite adjudication into an instrument for compelling present-tense answerability.

Ultimately, this theoretical strike finds its material grounding in the Preston Experiment, which serves as the primary site where the logic of spatial destitution is currently being practised to re-weave the *aidagara* and force a breathable, decolonial alternative to the ossified state shell.

[E] STRANGERDOM AND THE MECHANICS OF EPISTEMIC INTERVENTION

The horizontal illusion and the vertical reality

We are faced with an immediate problem in developing the article. Proving that the shell voids the substrate leaves jurisprudence confronting a profound procedural deficit; because the K-machine operates as a topologically closed apparatus engineered to process compliance and filter out facticity, it fundamentally lacks the cognitive capacity to listen. As a consequence, the article must shift from mere observation to determining how the substrate can halt/pause the machine, for to translate the ontology of *aidagara* or the transcorporeal reality of the wound into the dead grammar of the state is to submit directly to translation capture, rewrapping the wound in the "greengrocer's shield" and sanitizing the pain of others into a compliant administrative metric (Scraton 2016). To resist this, the substrate must leverage its own illegibility, forcing a structural pause at the administrative desk by introducing the raw, unformatted wound as a disruption to the binary logic of compliance.

Constructing this "law in the accusative" requires a schematic capable of formal epistemic intervention. We find this through a critical appropriation of Krentos's (2026) jurisprudence of strangerdom. While Krentos diagnoses the top-down model of law as a vertical illusion and establishes a horizontal imperative, arguing that legal intelligibility must operate as a peer-to-peer relationship among epistemic strangers who bridge their opacity through shareable reasons, the project must explicitly distinguish our operational horizons. Where Krentos provides a theory of interpretation for a community of strangers reading the law as peers, RLP engineers a theory of structural intervention for a substrate attempting to stop a lethal, vertical automaton. If Krentos provides the harness for legal safety, RLP identifies the exact moment that harness becomes a noose; we do not merely apply his theory, but weaponize his horizontal rules of intelligibility to document the epistemic incapacity of the state, replacing polite reading with structural intervention when the right to say "no" becomes a biological necessity.

While RLP shares Krentos's architectural diagnosis, it departs from his liberal-humanist application by recognizing the vertical reality of the K-machine, a state that, rather than acting as a peer seeking a shared communicative modality, leverages the gap of opacity as a form of epistemic insulation. By retreating into closed, artifactual sensors, the institution uses risk assessments and algorithmic dictates to impose monological closure from above. This relies on the unobtrusive affective background of its own bureaucratic violence (Wall 2019) to maintain order. In this context, RLP does not use the horizontal rules of strangerdom for polite interpretation. Instead, it appropriates them to execute a vertical strike against the administrative state, by repurposing Krentos's "Reason Test", which he established as an adjudicative filter to ensure reasons are non-arbitrary and existentially social, as a politico-legal mechanism of resistance. By synthesizing this blueprint of legal reasoning with Watsujian and decolonial phenomenology, the Reason Test is transformed from a tool for resolving appellate controversies into a diagnostic instrument for the material rupture of the *aidagara*, forcing the K-machine to confront the very social and historical fragments it has systematically sought to erase.[21]

Deploying the Reason Test: the epistemic strike

By weaponizing the Reason Test, RLP transforms it from a qualitative filter for courtroom adjudication into a structural audit for institutional intervention. This ensures that, whenever the state issues a mandate threatening the substrate, be it the Stay Put policy at Grenfell or a border pushback, it is subjected to the primary prong of Krentos's framework: the Principle of Avoiding Arbitrariness (PAA). While Krentos uses the PAA to reject subjective judicial moralizing, RLP deploys it to indict the blind bureaucratic automatism of the K-machine, asserting that no chain of institutional justification can end in a "just because" or rely upon private, inaccessible data.

The Grenfell TMO, for instance, relied on a desktop FRA to justify ignoring residents. This offered an artifactual reason that risk-bearing agents could neither access nor verify: this reliance on closed epistemic resources that functions as what Brian Massumi (2023) diagnoses as an "objective illusion". By taking the derivative level of the administrative file and arrogating all causal efficacy to itself, the state overcodes the

[21] This spatial inversion of the work of Krentos must not be understood as a rejection of his jurisprudence. Krentos provides an intellectually stimulating blueprint. Like the work of Lindahl, Delanty, Watsuji, and Mignolo, this blueprint has been introduced into the decolonialized spatial phenomenology of post-Western cosmopolitan social theory to engineer a concrete mechanism of resistance.

singular, lived reality of the tower with a sterile metric of compliance. This represents an act of systemic stupidity that signifies the institutional, systematic missing of the event. Ultimately, forcing the state's artifactual data through the PAA proves that such mandates are epistemically arbitrary. However, the meaning for RLP is that failing the Reason Test does not merely denote a flawed opinion but triggers an epistemic collapse: the mandate is rendered *ultra vires*, a-legal, and the Reason Test becomes the jurisdictional tripwire that strips the state of its procedural infallibility.

The immaterial archive and the materiality of the wound

Subjecting the state to the Reason Test exposes RLP to a profound epistemological challenge. Krentos's second prong demands that all legal reasons be existentially social and shareable among strangers while explicitly banning private moral psychology. If we demand that the state reject its own closed data, we must answer how the substrate can simultaneously expect the machine to accept its "combat breathing", for, to the K-machine, the visceral pain of the citizen appears as closed, insider data. This would represent a request that seemingly violates the rules of strangerdom by demanding institutional telepathy. Resolving this opacity paradox requires RLP to abandon the plea for empathy; as Krentos (2026) rightly prohibits relying on inaccessible internal states to ground justification, combat breathing cannot be presented as a subjective feeling of dread, which remains inadmissible noise, but must instead be drawn from the transcorporeal residue of the *fūdo*, where breathability is established as a material, atmospheric standard of the shared environment.

To achieve this, we deploy the AIS as an evidentiary counter-audit that weaponizes what Cheikhali and colleagues (2026) term "lawless chunks of reality". This bypasses the curated, hegemonic archive by documenting undeniable physical facts such as locked fire doors, toxic mould, and severed caloric access. The AIS serves as the translation mechanism that converts the illegible scream into hard jurisdictional data, spatializing the wound to transform Krentos's linguistic test into a material one. This creates an affective rupture that drags the state's violence from the unobtrusive background into the obtrusive foreground. However, this transition demands a definitive divergence between the horizontal stability of Krentos and the vertical intervention of RLP, requiring the prescribed remedy to mutate by spatializing the right to begin. While Krentos defends the right of a legal subject to initiate a fact-pattern within

the legal forum, relying on a judge to act as the referee of horizontal intelligibility, such a reliance again only traps the substrate in a temporal cage where the K-machine weaponizes the chronometry of inquiries and appeals to outlast the biological life of the victim.

From reading to breathing: the spatialization of the right to begin

To escape this attrition, we drag the right to begin from the courtroom docket into the material dirt of the street through two fundamental shifts.

First, moving from reading to breathing, we recognize that while epistemology is a luxury of the safe, for the marginalized, the law is a physical environment that must be survived before it can be interpreted; and second, moving from responsibility to friction, we refuse to demand that the subaltern shoulder the cognitive burden of the state's lethal rules, choosing instead to leverage their illegibility to halt the mechanistic treadmill. When the state fails the Reason Test, it is stripped of its authority to dictate reality, allowing the right to begin to mutate into a-legal Spatial Nullification, a suspensive remand where the physical withdrawal of compliance constitutes an unauthorized, material exercise of the community's inherent right to suspend unjust power. Ultimately, establishing this theoretical justification necessitates a transition toward a concrete architecture of repair, moving from the exposure of monological closure to the engineering of a compelled, agonistic settlement through the practical deployment of the AIS and the Lexicographic Triage Rule.

[F] THE ACCUSATIVE RULE OF LAW AND THE ARCHITECTURE OF REPAIR

The Aesthetic Impact Statement as an evidentiary counter-audit

Ultimately, we engineer the architecture of repair not as a utopian blueprint for statecraft, but as a set of structural interventions, a counter-logistic created through the recognition that the Promethean state will never volunteer to legislate its own epistemic limitations. Rather than addressing the K-machine through a raw, unformatted scream, RLP antagonizes the state's admissibility architecture from the outside, equipping practitioners with the AIS as an evidentiary counter-audit. This AIS is not a plea for bureaucratic empathy; it is an epistemic intervention injected directly into the documentary apparatus of the state to translate the immaterial

archive of the substrate into hard jurisdictional facts. By weaponizing the transcorporeal residue of the *fūdo*—the locked fire doors, the severed caloric access, and the combat breathing—the AIS creates an affective rupture that drags the state's violence from the unobtrusive background into the obtrusive foreground, refusing the bureaucratic "shield of words" that seeks to sanitize the pain of others.

This shift demands a radical mutation in affective mechanics, moving away from the hyper-rational self-subject of the K-machine toward what Stefanie Sachsenmaier (2024) identifies as a state of receptivity and attunement. By forcing the institution into a state of "accusative attunement", the AIS creates the structural vulnerability required for the state to finally hear the combat breathing of the substrate, a process that leverages the *Tameside* duty to inquire to execute an immanent critique of the state's own rationality. We do not merely petition for a hearing; rather, when the state inevitably ignores the AIS in favour of its own closed, artifactual sensors, it deliberately blinds itself to a highly relevant material consideration. In this moment, the state fails the Reason Test, and the AIS forces a definitive procedural impasse: the K-machine must either shatter its own monological closure to process the wound or reject the evidence and prove, once and for all, that its mandate is fundamentally arbitrary.

The Lexicographic Triage Rule and the Apophenia Veto

Because proving the mandate arbitrary effectively transfers jurisdictional authority to the substrate, we must confront the profound risk of parochial tyranny, acknowledging, as Alpa Shah (2024) demonstrates, that the language of decolonization is highly susceptible to being hijacked by authoritarian forces who co-opt the vocabulary of local sovereignty to subjugate internal minorities. To prevent a reactionary or nativist or liberal blockade from romanticizing the local or claiming that the arrival of the "stranger" destroys the *fūdo*, RLP establishes a normative political boundary through the Lexicographic Triage Rule, secured by the Apophenia Veto. By critically appropriating the distinction made by Dagan and Dorfman (2024) between ground projects, the material conditions required for self-determination, and mere preferences, we verticalize this into a strict public law admissibility filter that establishes an unyielding hierarchy of normative weight.

Within this hierarchy, Level 1.5 Systemic Relational Severance, the destruction of the material and spatial capacity of the *aidagara* to

sustain life, such as toxic cladding or border pushbacks, constitutes the collective ground projects of the substrate. Whereas, Level 4 Reciprocal Intelligibility, the maintenance of shared meaning or cultural comfort, registers merely as preference. Acting as a structural firewall against exclusionary populism, the Apophenia Veto (*kū*) dictates that any claim structurally dependent on an essentialist duality, such as "citizen versus alien", lacks the material footprint of a survival claim and is automatically discarded as inadmissible noise. While orthodox critics may argue that such a veto constitutes an arbitrary moral stop, this critique relies on the "hubris of the zero point" (Castro-Gómez 2005) and ignores a space already violently fractured by the abyssal line: we resolve this by grounding the veto in a strict material audit, ensuring that cultural anxiety can never equate to the literal loss of respiratory or caloric access, thereby categorically subordinating the nativist scream to the absolute, verifiable baseline of biological survival.

Ultimately, the AIS serves as the primary mechanism for enforcing this hierarchy, as it provides the material proof that a claim possesses the necessary transcorporeal residue to trigger a suspensive remand. While a nativist grievance relies on the "shield of words" to construct a symbolic threat, a Level 1.5 survival claim offers the lithic friction of a locked fire door or a poisoned lung, material facts that are objectively legible to any stranger and which demand immediate, present-tense answerability. By grounding the Apophenia Veto in this undeniable materiality, we move beyond the "hubris of the zero point" (Castro-Gómez 2005) and the liberal illusion of a neutral playing field, recognizing instead that the law is a physical environment where biological survival must always supersede the psychological comfort of the existing order.

Through this Lexicographic Triage Rule, the framework achieves a "compelled agonistic settlement" that is neither a polite debate nor a lawless void, but a sophisticated, vertical intervention that forces the K-machine to confront its own epistemic incapacity. Having established this diagnostic and protective architecture, we turn finally to the Preston Experiment to demonstrate how these mechanics, the AIS, the triage rule, and the spatialization of the right to begin, function not as abstract theories, but as the living infrastructure of a decolonial, relational legal pluralism.

Spatial Nullification as destituent power: the *aidagara* and the application of *kū*

Operationalizing the architecture of repair demands a radical redefinition of the jury mechanism, moving beyond the liberal-individualist abstraction of disembodied minds to recognize the localized counter-tribunal as the institutional manifestation of the *aidagara*. In this framework, the community does not engage in sterile, Habermasian deliberation but operates through *aestheSis* (Mignolo & Vázquez 2013), executing a visceral, somatic registration of the wound within their *fūdo*; thus, nullification ceases to be a mere cognitive disagreement with a statute and becomes a spatial rejection of the K-machine's violence, grounded in the moral and democratic right of marginalized communities to deactivate laws enacting systemic harm (Butler 1995). To resolve the spectre of parochial tyranny, we fuse Giorgio Agamben's concept of destituent power (Agamben 2014) with the Watsujian principle of *kū* (emptiness), ensuring that Spatial Nullification does not constitute a new, exclusionary sovereign but instead deactivates and paralyses the law's false projection of absolute necessity.

This application of *kū* serves as the ultimate structural safeguard, distinguishing emancipatory nullification from fascist endocolonization by leveraging the spatial heuristics of concentric versus diametric dualities (Murphy 2021); whereas a nativist jury enforces a "diametric" binary that fails the epistemic test of interdependence, a marginalized community deactivating a lethal mandate acts within a "concentric" duality to restore the health of the *aidagara*. This is not a utopian abstraction but a measurable, somatic reality, as evidenced by the Preston Model of Community Wealth Building, where the local council rendered the extractive mandates of global capital inoperative by redirecting resources into worker-owned cooperatives. The results of this destituent reclamation are profoundly biological: a 2023 epidemiological study in *The Lancet Public Health* demonstrated that this structural reorientation led to a measurable decline in antidepressant prescriptions and increased life satisfaction (Rose & Ors 2023), proving that, while the violence of the K-machine is a physiological trauma, the destituent reclamation of the *aidagara* is a verifiable biological cure.

Consequently, the rule of law is reimagined not as a conversational achievement among peers, but as an agonistic settlement forced by the symmetrical counter-move of the suspensive remand. By reclaiming the logistical flow and economic output of their space, the substrate bypasses the "temporal cage" of administrative review to recognize itself as an independent source of rationality, transforming physical friction into a

defensive, pre-judicial necessity. The a-legal counter-tribunal, acting as a normative warrant for Spatial Nullification, does not ask the state for permission to exist; rather, it leverages the mechanics of *kū* to renovate the relationship between institutions and the individual, moving beyond redundant dichotomies to engineer a more democratic, pluralistic, and embodied way of being in the world.

Spatial Nullification and the compelled settlement

While orthodox jurisprudence assumes that the rule of law is a conversational achievement among peers, RLP shatters this illusion. It does so by recognizing that the state does not negotiate unless forced, specifically because it holds the biological survival of the substrate hostage through the temporal cage, deferring present-tense repair into endless administrative reviews. In this context, a-legal Spatial Nullification emerges as the symmetrical counter-move of the substrate. It functions as a suspensive remand that bypasses the wait for a formal judicial ruling and returns the *aidagara* to the mobilization of the locality of politics. By reclaiming the logistical flow, the economic output, and the social peace of the space, this process allows people to address problems of common concern and recognize themselves as legitimate, independent sources of rationality. The aim is to show that such physical friction is not an illegal crime but a defensive, pre-judicial necessity: a provisional material injunction designed to preserve biological life.

Orthodox critics may argue that the *Tameside* injection successfully jams the K-machine, yet relies on a utopian hope that the state will eventually concede its monopoly on reality. However, that would be to completely misunderstand the ontology of the machine and the mechanics of *kū*. Drawing on the historical precedent of nullification by jury, the a-legal counter-tribunal does not function as a temporary protest committee awaiting state permission to exist; rather, it operates as an independent source of rational legitimacy, issuing a normative warrant for Spatial Nullification to actively reclaim the *fūdo* and to find a relationship between their lives and the law. It does not ask the state to share power, for the state does not possess a true monopoly on reality to concede; instead, it provides the ground for renovating the relationship between institutions and the individual, moving beyond the redundant, dichotomized duality between self and other to create open, distinct communities. Ultimately, this framework provides a pluralistic, creative, and embodied source of legitimate rationality, engineering a more democratic way of being and acting in the world that is grounded in the material present rather than the state's deferred future.

[G] CONCLUSION: THE DESTITUTION OF THE K-MACHINE

The silence suspended in that Liverpool train carriage in 1980 did not signify a failure of articulation on the part of my father. It operated as the visceral registration of absolute biopolitical capture. The state trapped my father as a Kelsenian fictitious physical person and structurally voided him as a reason-bearing participant. It captured his life specifically to neutralize it into the *formce*. Viewed through the lens of RLP, he confronted a topologically closed legal space that maintained a maximum degree of resistance to his lived reality. This engineered silence functions as the constitutive pathology of contemporary governance. The admissibility audit traces a mobile architecture of foreclosure operating with lethal efficiency. Translation capture strips the scream of its accusative weight. Credibility downgrading pathologizes the messenger. Epistemic insulation seals the forum. The temporal cage displaces urgent survival into managed futurity. The machine sanitizes the pain of others. All are aimed at ensuring that the affective, bodily reality of the governed remains permanently unobtrusive.[22]

However, that embodied silence, in dialogue with the decolonial imagination, and the work of a Buddhist-informed thinker, rebuilds an architecture, RLP, that aims to set out a topological and spatial-ethical inversion to propose a "Law in the Accusative". It abandons the jurisprudence of sovereign rights granted from above in favour of a jurisprudence of material demands exacted from below. Because the orthodox rule of law asks a tautological question, inquiring only whether the state followed its own paperwork, the K-machine is permitted to execute severe harms, legitimizing the ashes of Grenfell and the lethal borders of the Aegean by pointing to compliant risk assessments or algorithmic logs. To disrupt this monological closure, we must abandon the liberal reformism that Scraton (2016) warns provides a mere rights-compliant veneer for institutional violence. Instead, the law must become an exacted idiom of answerability, for any legal system requiring the barbarian to become a lawyer before achieving audibility fails the test of universality and collapses into naked coercion.

[22] Murphy (2026) established the diagnostic framework of RLP by identifying the state's retreat into "closed epistemic resources", and it remained anchored in the pursuit of relational repair through institutional attunement. This current work marks a definitive shift from repair to destitution. It recognizes that, where the K-machine operates through topological closure and managed futurity, the threshold is no longer a site of dialogue but a front line of Spatial Nullification.

Facilitating this encounter requires a specific tactical and philosophical methodology whereby the substrate weaponizes the AIS to inject the immaterial archive and the transcorporeal residue of combat breathing directly into the documentary apparatus of the state. Functioning as an epistemic trip switch, the statement forces an affective rupture that drags the visceral reality of the *fūdo* into the obtrusive foreground. The aim is the disruption of the algorithmic treadmill while the Apophenia Veto erects a structural firewall against parochial tyranny by normatively prohibiting nativist co-optation. By deploying *kū* (emptiness) as a destituent power, these transmodern deliberative forums, acting as a parallel polis (Havel 1985 [1978]), strip the state's mandate of its groundless authority and identify the absolute material limit of orthodox jurisprudence. While Krentos (2026) provides a harness for legal safety through a theory of interpretation, RLP provides a theory of destitution, detailing exactly how to stop the writing when that harness becomes a lethal noose and the conditions for horizontal interpretation evaporate under the weight of institutional violence.

Consequently, the jurisprudence of the threshold asserts an absolute necessity of breathability that exists independent of the law's permission. This frames the physical withdrawal of compliance through a-legal Spatial Nullification not as a crime, but as a provisional material injunction, the modern, spatialized descendant of the community's historical right to jury nullification. By erecting a logistical barricade to secure the *aidagara*, the substrate forces the sovereign into a compelled Logistical Treaty, where the cost of maintaining foreclosure becomes politically and economically bankrupting. This strike functions to mend the relational fabric rather than win a court case, forcing the state into the material dirt of the threshold to ensure the rebuilding of legality as an agonistic institutional design. Ultimately, by abandoning the architecture of the static, closed epistemic fortress, we compel a transmodern settlement where governance remains processual, collective, and contestable, destroying the architecture of foreclosure to secure a rigorous, spatial practice of present-tense survival.

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The Algorithm and the Tribunal: Philosophy to the Rescue and the Threat from Within

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Abstract

This article asks whether English law should extend party autonomy to recognize the output of a fully autonomous artificial intelligence (AI) system as a binding resolution of a construction dispute. It argues that the real issue is not current technical weakness, but whether algorithmic decision-making can ever satisfy the conditions of legitimate adjudication so as to justify state-backed enforcement. Drawing on philosophy and doctrine, the article contends that adjudication is a human practice of responsible judgment and that the existing routes to enforcement are unlikely to succeed. It further argues that the greatest threat comes from within: hybrid human-AI decision-making, which risks hollowing out the very conception of judgment itself.

Keywords: AI; algorithmic decision-making; statutory adjudication; arbitration; expert determination; party autonomy; natural justice; construction disputes; public policy.

[A] INTRODUCTION

We stand at a threshold in the history of adjudication. For centuries, the tribunal's legitimacy has rested on the human capacity for judgment. That capacity was never defined solely by efficiency or technical accuracy. It includes moral discernment, the ability to act impartially, listen, weigh competing narratives and accept responsibility for the decision. The emergence of artificial intelligence (AI) systems now poses a fundamental question: if an algorithm can apply law to fact with greater speed, lower cost, greater consistency and apparent freedom from bias, what remains to justify the human tribunal? This article focuses on construction disputes falling within the jurisdiction of the English courts, although its implications are wider.

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The question is no longer speculative. Courts, tribunals and arbitral institutions already employ algorithmic tools. In the Online Civil Money Claims, where a defendant admits a debt but seeks time to pay, an algorithm orders the instalments. Dissatisfied parties may ask a judge to reconsider, but the first decision is made by code (Birss 2024: paragraphs 7 and 8). Government policy papers openly project further automation, speaking of AI transforming the public's experience of the justice system (Ministry of Justice 2025).

The development is even more striking in the private dispute resolution sphere. The American Arbitration Association-International Centre for Dispute Resolution (AAA-ICDR) has developed the "AI Arbitrator", currently available for use in two-party, documents-only construction cases (AAA-ICDR November 2025). Under that model, the parties submit their claims and evidence, then confirm that their submissions have been accurately summarized by the AI arbitrator. The AI arbitrator then parses the claims, analyses the evidence, applies the law and drafts a proposed award, which is subsequently reviewed, revised where necessary, finalized and issued by an AAA-trained human arbitrator (AAA-ICDR October 2025).

Existing critiques of AI in adjudicative adversarial dispute resolution tend to focus on current technical limitations: misinterpretation of evidence, misapplication of legal principles or hallucinated authorities (Socol de la Osa & Remolina 2024; Ashraf 2025). Those are serious problems, but they are also likely to be transient. It is only a matter of time before systems emerge that are better constrained, better trained on legal material and empirically more accurate than many human decision-makers. If the case against fully autonomous AI tribunals rests on present-day malfunction, it will be a short-lived objection.

This article argues that public policy is the final meaningful obstacle to the full algorithmic replacement of human tribunals. Properly understood, that public policy rests on a set of philosophical commitments about what adjudication is. Those commitments are not always made explicit outside jurisprudential scholarship. Yet, they sit silently beneath the rules of natural justice, the common law's treatment of private ordering, and the statutory architecture of legislation such as the Arbitration Act 1996 (AA) and the Housing Grants, Construction and Regeneration Act 1996 (HGCRA). Taken together, they express a conception of adjudication as a human practice of responsible judgment.

The article develops this argument against two broad objections. The first is functionalist: if an AI system can produce an output equivalent to

that of a competent human tribunal, why should the law care whether the source is machine or person (Eidenmüller & Varesis 2020)? The second is the realist objection: human adjudication is itself often opaque, *post hoc* and symbolic; so why insist on some supposedly pure moral or philosophical core that human tribunals do not always display (Zerilli & Ors 2018)?

The article proceeds in five stages. First, it explains the philosophical foundations of human adjudication, drawing on Aristotle, Dworkin, Fuller and Habermas. Secondly, it identifies the minimum non-waivable conditions of legitimate adjudication and distinguishes those threshold requirements from the more aspirational virtues of excellent judging. Thirdly, it identifies a threat from within: the institutional embrace of hybrid human-AI decision-making, which undermines the very conception of human judgment invoked to resist full automation. Fourthly, it turns to doctrine, asking whether an AI output might be enforced as an arbitrator's award or adjudicator's decision, as an expert determination, or as a purely contractual mechanism. Finally, it draws the threads together in conclusion.

In this article, the term "ChatGPT" is used as shorthand for any fully autonomous AI system. That is, a system that receives rival submissions, identifies issues, evaluates evidence and law, issues procedural directions and generates a dispositive outcome. The defining feature is the absence of any human decision-maker in the process and of any human acceptance of personal responsibility for the result.

Furthermore, "adjudication" generally refers to the act of judging between disputed rights and obligations, whether in court or in a private decision-making process. Where necessary, however, it is also used in the narrower statutory sense of the HGCRA, under which a construction dispute is referred to an adjudicator for a temporarily binding decision, typically within 28 days. Where that narrower meaning is intended, it is referred to expressly as "statutory adjudication".

[B] THE NORMATIVE FOUNDATIONS OF HUMAN ADJUDICATION

The question is not simply whether ChatGPT can make decision-making more efficient; it may. The real question is whether ChatGPT can perform the kind of activity the law recognizes as adjudication, so that its output may properly attract state-backed enforcement. This section argues, by reference to philosophy, that adjudication is a distinctively human

practice. It involves a responsible decision-maker exercising *phronesis* about what legal norms require in complex and contested circumstances, interpreting those norms in light of underlying values, hearing and answering the parties' reasons, and giving an account of the result for which the decision-maker can be held to answer.

The aim is not to rehearse large tracts of jurisprudence. It is instead to identify a set of core ideas which, taken together, support the proposition that adjudication is, and ought to remain, a distinctively human practice.

Judgment as *phronesis*

Construction disputes are commonly resolved under conditions of urgency, incompleteness and complexity. Adjudicators and arbitrators must decide issues on the balance of probabilities, often on partial information, against a background of cogent rival pleadings, conflicting expert reports and sharply contested witness evidence. Their task is not merely to apply rules to facts in a mechanical way. It is to exercise what Aristotle called *phronesis*, or practical wisdom, in determining how legal norms should operate proportionally within the messy particularities of real disputes.[1]

That exercise involves not only logical reasoning but also moral perception: an ability to see which facts matter most, which arguments prevail, and where the parties' conduct or equity might temper apparent contractual rights. It also involves courage, in that the decision-maker must commit to a view in the face of uncertainty and the knowledge that someone will be aggrieved.

ChatGPT does not exercise judgment in that sense. It identifies patterns in data and produces outputs that resemble reasoning. It does not perceive salience, experience uncertainty or commit itself to a conclusion as an exercise of practical wisdom. However sophisticated its performance may become, it does not possess the quality that makes adjudicative judgment distinctively human (Sharp 2025).

Interpretation and moral authorship

For Ronald Dworkin, hard cases in law are not solved by prediction or pattern-matching. They are resolved by *constructive interpretation*. The decision-maker must present the law in its best moral light by offering a

[1] For a judicial discussion of the term "phronesis" with particular regard to proportionality, see *Main v Scottish Ministers* (2015: paragraph 46) and *Bank Mellat v Her Majesty's Treasury* (2013: paragraph 68). For a modern extensive commentary, see, Reeve (2013).

view that both fits and justifies the community's practice, making it the best it can be (Dworkin 1986: 255-258; Ross 1991; Wacks 2006: 40-51).

The outcome is therefore not a mere extrapolation from data. It is a moral judgment about which principles best explain and justify the resolution of contested rights and obligations in that community. On this view, the authority of an adjudicative decision depends on authorship. The decision-maker must be able, in good faith, to say: this is my best judgment about what justice requires, given the law and the facts. That claim of sincerity and accountability matters because it turns adjudication into an exercise in integrity rather than mere regularity. It is also part of what justifies the state in enforcing the outcome against the losing party (Dworkin 1986: 227; Wacks 2006: 45).

ChatGPT, however well trained, cannot make that claim in any meaningful sense. It does not believe the reasons it gives. It has no conception of justice or fairness to which it seeks to be faithful. Its outputs come from matching patterns in data, not from moral deliberation (Boucher 2020; Bronner-Martin 2025). The point is not simply that ChatGPT may reach the wrong answer. It is that, even where it reaches the right answer, it lacks the kind of authorship that makes an adjudicative decision something to which the parties may be required to submit as a matter of principle.

Fidelity to law's internal morality

Lon Fuller's account of the internal morality of law consists of requirements such as generality, publicity, clarity, prospectivity and congruence between declared norms and official action (Fuller 1969: chapter 2). These are not merely technical niceties. They express respect for human agency, because people can plan their affairs only if they are able to know the rules, understand how they will be applied and trust officials to act in accordance with them.

Law's internal morality therefore presupposes a human official who understands law as a purposive enterprise, can be criticized for failures of fidelity and can adjust future conduct in light of that criticism. ChatGPT may simulate compliance through reason-like text and a statistical appearance of consistency. But it cannot inhabit Fuller's internal morality because its "reasons" are not commitments of a responsible agent. They are outputs produced by pattern-matching across prior material. It does not understand itself as bound by a legal order, nor can it be answerable for failures of fidelity to that order.

Deliberative legitimacy and the right to be heard

For Jürgen Habermas, legitimate decision-making arises from discursive processes in which parties present reasons to one another through an institutional structure of reciprocal recognition. In the adjudicative setting, parties place their arguments before a decision-maker, who in turn offers a justification that they could, in principle, regard as reasonable even if they lose (Habermas 1996).

When a court enforces such an outcome, it does not merely honour a bargain. It backs a determination of rights with state force. To claim that such coercion is exercised in the name of law rather than brute power, there must at least be a guarantee that the parties' claims have been considered within a recognizably human practice of giving and answering reasons.

This point is reinforced by empirical work on procedural justice. Parties are more willing to accept adverse outcomes when they believe the decision-maker listened, treated them with respect and took their arguments seriously (Tyler 2006). That legitimacy-enhancing function presupposes a human being who can listen, respond and be criticized. It is not satisfied by a system that merely simulates dialogue.

ChatGPT may generate text that resembles a reasoned answer. However, it cannot participate in the reciprocal practice of justification that deliberative theories treat as a condition of legitimate coercion. By contract alone, parties cannot transform that simulation into a sufficient basis for state-backed enforcement.

Responsibility and institutional symbolism

Finally, a distinction must be drawn between liability and responsibility. Statutory and contractual immunities mean that decision-makers are rarely liable in damages for the way they perform their functions. That immunity exists not for their own benefit, but "for the sake of the public, and for the advancement of justice, that being free from actions, they may be free in thought and independent in judgment" (*Garnett v Ferrand* 1827, quoted in *Gaultier v Four Judges* 2025: paragraph 8.2).

Authorities therefore recognize that independence of judgment requires protection from collateral attack. Yet decision-makers are still treated as responsible for their decisions. The act of signing an award, of having one's name and credentials on the front page, symbolizes that someone has

undertaken to answer, professionally and normatively, for the reasoning and result.

This symbolism matters. It marks the decision as the product of human judgment rather than anonymous output. It is part of what allows parties to treat even adverse decisions as instances of justice rather than mere calculation. ChatGPT cannot "answer" for its outputs in that way. Any attribution of responsibility to a developer or institution is a legal fiction, not the moral agency of the decision-maker itself.

Taken together, these ideas support a simple proposition. Adjudication, properly understood, is a human practice of responsible, reason-giving judgment between persons. That does not mean law must reject all technology. It does, however, mean that when a mechanism is asked to perform the core tasks of hearing, reasoning and deciding, the law is entitled to insist that the mechanism be human.

[C] THRESHOLD CONDITIONS AND ASPIRATIONAL VIRTUES

The preceding section set out the normative foundations of human adjudication. Not every feature of that practice, however, is a non-waivable condition of legal legitimacy. It is well established, for example, that parties may agree that an arbitrator's award or an adjudicator's decision need not include reasons. In such cases, the courts will generally enforce the outcome in accordance with party autonomy, subject only to established exceptions such as fraud, lack of jurisdiction or material breach of natural justice.[2]

Some qualities of private dispute resolution are therefore aspirational virtues. They may render the outcome clearer, wiser, more thorough, more economical, more humane or more admirable. Others are threshold requirements of legitimacy: absent them, the process should not be treated as a lawful basis for state-backed enforcement.

The threshold conditions defended in this article are two. First, there must be a responsible human author of the outcome, that is, someone who can own the result as their judgment and answer for it institutionally and normatively. Secondly, the process must remain sufficiently within the realm of judicial supervision that the court can treat the result as a legal determination rather than as an output it is merely being asked to ratify.

[2] Section 52(4) of the AA; paragraph 22 of part I of the Scheme for Construction Contracts (England and Wales) Regulations 1998) (the Scheme).

These threshold conditions are distinct from the aspirational virtues of excellent judging. One may reasonably hope for wisdom, empathy, moral imagination, rhetorical elegance and commercial realism. All of these qualities improve adjudication, but none needs to be proved for the office to remain legitimate. The present argument does not depend on saying that human decision-makers are always wise, always sincere or always transparent. It depends on the more modest claim that there remains a categorical difference between human judgment and autonomous machine output.

That distinction matters because much of the literature comparing human and AI decision-making misses the real point. The case against the fully autonomous AI tribunal does not depend on proving that ChatGPT is less clever, less accurate or less consistent than a human tribunal. It depends on showing that, even if ChatGPT became all of those things, it would still fail to satisfy the threshold conditions of legitimate adjudication.

A realist or functionalist may object that this account is too idealized. Human adjudication is itself often opaque, decision-makers may rationalize after the event and responsibility may be said to be merely symbolic. Why, then, insist on a categorical distinction between human judgment and algorithmic output, especially where the latter appears plausibly equivalent, or even superior, in practical terms?

The answer is not that humans are neutral whereas ChatGPT is not. Our legal system has never proceeded on the fiction that decision-makers are free from personal beliefs, perspectives, ideology or background (*Locabail v Bayfield* 1999: paragraph 25). Rather, the point is that human bias is personal and variegated. It is spread across many individual decision-makers, each of whom must disclose conflicts, can be challenged and may be criticized or corrected.

By contrast, ChatGPT's "bias" is embedded in its training data, model architecture and alignment policies in ways that cannot be meaningfully inspected or contested (Bathaee 2018). Its behaviour reflects the values and preferences of its developer, yet no individual stands behind the decision as its author. This risks legitimizing a single, inscrutable arbiter replicated at scale, without the ordinary mechanisms of disclosure, challenge and responsibility that govern human decision-makers.

This is why the argument does not depend on proving that humans are better. Machine output, however impressive, cannot merit state-backed enforcement unless it is adopted and owned by a person.

Human minds, despite their flaws, are still the minds of agents who can occupy office, understand themselves as bound by norms, receive criticism as criticism, revise future conduct and stand publicly as the bearers of decisions. Human judgment remains the judgment of a person who can be treated as responsible. That is enough for law's purposes.

The opacity of ChatGPT is different in kind. It is not the opacity of a person whose reasoning may be questioned, institutionally assessed, criticized and owned. It is the opacity of an artefact with no first-person standpoint and no normative relation to the office it is said to fill. A human adjudicator may fail to live up to the ideals of judgment. ChatGPT cannot meaningfully stand in relation to those ideals at all.

[D] HYBRID AI AND THE SELF-SUBVERSION OF ADJUDICATION

The case against the autonomous AI decision-maker should now be clear. ChatGPT cannot be the responsible author of a binding decision in the sense required by law and philosophy. More troubling, however, is the growing use of AI as an assistant within ostensibly human adjudication.

There is a spectrum of potential uses. At one end lie clerical tasks such as checking for typographical or arithmetical errors. Subject to confidentiality and data protection concerns, there is little reason to object. At the other end are tasks that go to the heart of judgment: identifying the principal issues, summarizing the parties' cases, weighing evidence and drafting the structure and substance of the reasons.

Consider a familiar scenario. An adjudicator receives hundreds of pages of submissions and exhibits under acute time pressure. ChatGPT offers to read them, extract the issues and suggest a draft decision. The appeal is obvious.

It goes without saying that a decision-maker cannot call an old friend for a "freebie" view on a live issue without telling the parties and giving them an opportunity to comment (*Highlands & Islands v Shetland Islands* (2012): paragraphs 8, 9, 20, 31 and 34). The same must be true of ChatGPT. A decision-maker cannot quietly enlist ChatGPT to perform cognitive tasks without the parties' knowledge and opportunity to respond.

The AAA-ICDR model implicitly recognizes the problem because it asks parties to confirm that the AI-generated summary accurately reflects their submissions (AAA-ICDR October 2025). In practice, however, parties to contested proceedings seldom agree on anything, least of all on whether

their carefully constructed case has been fairly captured in a short synopsis. Institutional pressure in favour of speed and economy is likely, over time, to erode even this limited safeguard.

Once ChatGPT is used to generate the initial summary and structure, the adjudicator's understanding of the dispute is already being framed by the system's selection of what is important. ChatGPT has made interpretive choices: which delays matter, which notices are central, how each party's position is paraphrased, which themes are foregrounded and which are pushed to the margins. Human psychology being what it is, such frames anchor subsequent reasoning and are difficult to dislodge.

Over time, repeated reliance on ChatGPT creates a risk of epistemic dependence. If the system consistently produces plausible summaries and draft reasons, the decision-maker has less incentive and, given ordinary pressures of time and cost, less practical ability to reconstruct the dispute independently. The adjudicator's role begins to shift from author to editor, or, worse still, to mere publisher. The substantive work of understanding and shaping the dispute is performed elsewhere.

The tribunal that invites ChatGPT into the core of its reasoning dismantles the very philosophical architecture that could otherwise be deployed in its defence. The accounts developed earlier proceed on a common premise: that there is a human subject who perceives meaning in legal materials, weighs reasons, interprets norms and bears responsibility for the outcome. Once that subject delegates central elements of this cognitive labour to ChatGPT, the predicates of interpretation, fidelity and responsibility no longer apply in the same way. The activity begins to resemble assisted computation rather than judgment.

In those circumstances, philosophy can no longer rescue the tribunal, because the conceptual distinction between judging and computing has been blurred by decision-makers themselves. If, in practice, judgment has been redefined as a hybrid human-AI process in which ChatGPT frames the issues, filters the arguments and drafts the reasons, while the human reviews the result only at the margin, the basis for insisting that adjudication must remain human is materially weakened. The adjudicative office has, in substance, been eroded from within.

The paradox is that proponents of AI assistance often believe they are preserving adjudication, and the profession more broadly, by modernizing it. Yet in presenting ChatGPT as a neutral tool that enhances speed, consistency and objectivity, they also recast judgment as something that can safely be co-produced by an algorithm. Once that premise is accepted,

the principled objection to full automation becomes increasingly difficult to articulate. When AI systems eventually outperform most human tribunals on metrics such as accuracy, consistency or efficiency, those who championed AI assistance will struggle to explain why a human final sign-off remains necessary. If quality has already come to be measured by alignment with machine analysis, the insistence on a human decision-maker will appear sentimental at best, opportunistic at worst.

Emerging regulatory responses do not resolve this concern. For example, Recital 61 of the European Union (EU) Artificial Intelligence Act (Regulation (EU) 2024/1689) states that AI systems used by judicial authorities, or in a similar way in alternative dispute resolution, to assist in researching and interpreting facts and law and in applying law to facts should be classified as high-risk. It also states that AI can support decision-making, but should not replace it: final decision-making must remain a human-driven activity. High-risk systems are accordingly subject to requirements of human oversight and, in certain cases, affected persons have a right to clear and meaningful explanations of the AI's role (Article 86).

However, although the Act currently stands squarely against the full algorithmic replacement, it does not confront the deeper danger identified in this article. The Act's premise is that the risks of adjudicative AI can be managed by keeping a human in the loop. The risk, however, as explained, is that hybrid human-AI decision-making erodes the cognitive substance of judging itself. The danger is gradual hollowing-out, by which the human decision-maker remains in place formally while ceasing to function as the true author. In time, that hollowing-out may itself generate pressure to revise the legal framework, as the principled objection to full algorithmic replacement becomes harder to articulate.

The conclusion is not that decision-makers and their institutions must reject all technology. It is that they must draw a principled line. AI may be used for genuinely trivial, clerical or presentational aspects of the process. At most, it may assist in the articulation of conclusions already independently reached by the decision-maker. It should not, however, be used to summarize submissions, identify issues, weigh evidence, choose between competing arguments or generate the substance of the reasons. Those tasks are constitutive of judgment itself. If they are ceded to machines, there will soon be little left of adjudication that philosophy can plausibly defend as human.

[E] ENFORCEMENT

The preceding sections have argued that adjudication is a human practice of responsible judgment, and that both fully autonomous and hybrid AI decision-making threaten the normative foundations on which its legitimacy depends. The question now becomes doctrinal. However strong the philosophical objection may be, would English law nevertheless enforce ChatGPT's output if commercial parties agreed to use it as the mechanism for resolving their dispute? It is at the enforcement stage that the conflict between contractual innovation and the law's conception of adjudication comes into sharpest focus.

Consider a construction contract providing that any dispute may be referred to ChatGPT, which is empowered to issue procedural directions, receive the parties' submissions and documentary evidence, and produce a written, reasoned decision. The contract may provide either that ChatGPT's decision is final and binding, or that it is temporarily binding until the dispute is finally determined by litigation or arbitration, thereby mimicking statutory adjudication.

A dispute duly arises. The parties upload their submissions, and ChatGPT generates a decision directing the responding party to pay a substantial sum. The responding party refuses to pay. The referring party then applies to the Technology and Construction Court seeking to enforce ChatGPT's output.

Real disputes may involve additional complications. The clause may be poorly drafted or ambiguously incorporated into the contract. The responding party may have objected from the outset to the legitimacy of the process and reserved its rights. ChatGPT may have misread a figure, misunderstood a document or been fed false material. These issues are important, but they are not the focus here. The present question is more fundamental: as a matter of principle, should the English courts treat ChatGPT's output as binding and enforceable?

No reported case appears yet to answer that question directly. The analysis must therefore proceed from first principles. The party seeking enforcement would need to persuade the court to characterize ChatGPT's output as:

1. an award or decision of an arbitrator or adjudicator; or
2. an expert determination; or
3. a purely contractual risk-allocation device, analogous to an indexation clause.

The next three sections examine each route in turn.

[F] WHETHER AN AI OUTPUT COULD BE TREATED AS AN ARBITRAL AWARD OR ADJUDICATOR'S DECISION

The first and most attractive route for a party seeking enforcement is to argue that ChatGPT's output should be treated as the decision of an arbitrator or adjudicator. That is because, subject to limited grounds of challenge or refusal, the courts readily enforce arbitral awards and adjudicators' decisions. If ChatGPT could be brought within either statutory framework, enforcement would become markedly easier.[3]

At first sight, the argument may appear plausible. ChatGPT could be programmed to apply the same procedural rules to both parties, enforce timetables, receive submissions and documents, and afford each side an apparently equal opportunity to present its case and answer that of its opponent. On that basis, it might be said, at least superficially, to satisfy the general duty of fairness, impartiality and procedural suitability under section 33 of the AA and section 108 of the HGCRA.

That, however, is to read the law in an unduly thin and mechanistic way. ChatGPT merely executes pre-set instructions over given inputs. It cannot exercise judgment about what fairness demands in context, adapt procedure to the developing circumstances of the case, or recognize when a party has, in substance, already had a fair opportunity to be heard (Bender & Ors 2021; Grizzard & Ors 2025). Nor can it respond to procedural difficulty by drawing on the kind of practical judgment that natural justice often demands. Talk of its impartiality is therefore metaphorical: it has no consciousness, no intentions and no capacity to be criticized as a moral or professional subject (Waltermann 2021; Ayres & Balkin 2024). It therefore cannot act as the responsible decision-maker that the statutory schemes assume.

For the same reason, ChatGPT cannot satisfy the deeper demands of natural justice, which are not exhausted by the mere absence of bias (*RSL v Stansell* 2003: paragraph 31). They also require a tribunal capable of genuinely considering the parties' cases, making context-sensitive procedural judgments and deciding in a way that can be recognized as the product of a responsible adjudicative mind. A non-human system standing in place of the tribunal is therefore difficult to reconcile with

[3] For arbitration, under the AA and, where relevant, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), see eg *Lesotho v Impregilo* (2005: paragraphs 17-18); *Dallah v Pakistan* (2010: paragraphs 101-102). For statutory adjudication, under the HGCRA, see *Macob v Morrison* (1999: paragraphs 19 and 37); *Carillion v Devonport* (2005: paragraph 52).

Lord Hewart's classic statement that "justice should not only be done, but should manifestly and undoubtedly be seen to be done" (*R v Sussex Justices* 1924: 259).

There is also a direct doctrinal obstacle. Section 26(1) of the AA expressly treats the arbitrator's authority as personal. While the HGCRA contains no equivalent provision, the authorities make clear that an adjudicator performs "personal professional services … [which] must be undertaken by a person … [and] cannot be performed by someone else" (*Christopher Linnett Ltd v Harding* (2017): paragraph 53, Nissen J). ChatGPT cannot satisfy that requirement. It is not a person and cannot personally discharge adjudicative functions.

Faced with ChatGPT's output, the better view is that a court should refuse to treat it as an arbitral award or adjudicator's decision. The clause does not, in the author's view, provide for a tribunal recognized by law. In the arbitral context, the parties will have to submit their dispute to the courts (subject to any new agreement), or, if the court accepts that the arbitration clause is severable, it may conclude that it amounts to a valid arbitration agreement which must be given effect by appointing a human tribunal pursuant to section 18 of the AA. In the statutory adjudication context, the contractual machinery would fall away and the Scheme would apply in its place (*Yuanda v WW Gear Construction* 2010: paragraph 61).[4]

Therefore, under the existing statutory schemes, ChatGPT's output is unlikely to be treated as an arbitral award or adjudicator's decision. Recognition under the present statutory framework would be difficult to sustain absent express legislative intervention.

[G] WHETHER AN AI OUTPUT COULD BE ENFORCED AS AN EXPERT DETERMINATION

The second route is to argue that ChatGPT's output should be enforced, not as an award or adjudicator's decision, but as an expert determination. This route is more formidable. Expert determination is governed by contract and common law rather than by statute. It is a private mechanism by which parties agree to entrust the resolution of a dispute to an expert whose determination is binding, subject only to narrow grounds of challenge such as actual partiality, fraud or departure

[4] The effect is that the referring party shall request an adjudicator nominating body to select a person to act as adjudicator pursuant to paragraph 2(1)(c) of part I of the Scheme.

from the contractual mandate (*Bernhard v Nile* 2004: paragraph 98; *Homepace v Sita* 2008: paragraphs 18 and 19).

That route may appear attractive to the party seeking enforcement because, unlike arbitration and statutory adjudication, an expert's determination is not generally vulnerable to challenge on the basis of alleged breach of natural justice, due process or manifest error, unless the contract itself so provides (*Bernhard v Nile* 2004: paragraph 95; *Barclays v Nylon* 2011: paragraphs 36-38). Furthermore, there is no requirement that the expert's authority be personal: the clause may, for example, appoint a firm of chartered accountants as the expert rather than a named individual (*Jones v Sherwood* 1992: 174).

The response begins with the ordinary definition of the term "expert": "a person with a high level of knowledge or skill relating to a particular subject" (Cambridge Dictionary nd). The fact that the named expert may be an organization does not show that expert determination is compatible with non-human processing. ChatGPT is not an expert but a tool. To treat it as the determining mind would require a deliberate departure from both the ordinary meaning of the term and the assumptions that underpin the jurisprudence on expert determination.

In every reported case, the expert, whether acting in their own name or through a firm, remains a natural person or group of persons exercising professional judgment. The judicial deference to expert determiners rests on confidence in the skill, judgment and accountability of human experts, which ChatGPT lacks. It has no expertise of its own, no professional standing and no capacity to answer for the determination it produces.

To extend the same deference to a fully autonomous AI system would therefore mark a qualitative shift. It would move expert determination away from human professional judgment and toward a computational mechanism that cannot bear responsibility. It would displace human judgment altogether, not merely house it in a corporate shell.

On an argument derived from the existing doctrine of expert determination, the better view is that a court should decline to enforce ChatGPT's output on the basis that the agreement lacks an expert in both the ordinary and the doctrinally relevant sense. This route, though stronger than the first, is likewise unlikely to succeed.

[H] WHETHER AN AI OUTPUT COULD BE ENFORCED AS A MATTER OF CONTRACT

The final and strongest argument is to retreat from all adjudicative labels and say:

- ◊ This was not arbitration, statutory adjudication or expert determination.
- ◊ We simply agreed that whatever output ChatGPT produced would bind us.
- ◊ ChatGPT is neither tribunal nor expert; it is the agreed machinery of performance.
- ◊ The court should enforce our bargain.

This argument seeks to assimilate ChatGPT to self-executing contractual formulas tied to non-human indices. For example, parties commonly agree to, or are otherwise subjected by statute to, interest on late payment accruing at a fixed percentage above the Bank of England (BoE) base rate current at the relevant time.[5] No tribunal fixes the interest rate; the contract simply bites on whatever the base rate happens to be.

Likewise, standard construction contracts enable parties to agree that prices will be adjusted by reference to inflation or commodity indices.[6] Such index-linked mechanisms are routinely relied on in practice and, where litigated, the courts have treated them as enforceable in principle, subject to clear drafting errors (*Monsolar v Woden Park* 2021: paragraphs 3-7).

The party seeking enforcement would therefore say that ChatGPT's output is no more than another external reference point. Just as the parties in an interest clause agree to be bound by whatever the BoE announces as the base rate, so here they have agreed to be bound by whatever ChatGPT announces as the outcome. On this characterization, the court is not being asked to recognize a tribunal or expert. It is simply being asked to enforce an agreement to treat ChatGPT's output as dispositive.

In doctrinal terms, this is the strongest available argument for enforcement. It does not depend on persuading the court that ChatGPT is an arbitrator, adjudicator or expert. It depends only on the proposition that party autonomy extends this far. The response has three stages.

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5 Late Payment of Commercial Debts (Interest) Act 1998, which implies statutory interest at 8% above the BoE base rate unless the contract provides a "substantial remedy".

6 See eg NEC (2017), Option X1 (Price adjustment for inflation); Joint Contracts Tribunal (2024), Fluctuations Option C.

Index versus adjudication

An index or interest clause answers a factual question: "What is the BoE base rate on date X?" or "What is the value of Index Y on date Z?" Once that factual state of the world is identified, the contract prescribes the consequences. The BoE or index provider does not hear rival submissions, weigh competing narratives or choose between conflicting claims. It simply reports a publicly ascertainable fact.

By contrast, ChatGPT is asked to receive rival submissions, weigh legal and factual arguments, and pronounce on disputed rights and liabilities. It does not supply an external factual input to an agreed contractual mechanism; it substitutes the tribunal in resolving the underlying dispute. To describe that as mere machinery of performance is to overlook the crucial difference between fixing a contingent fact and outsourcing the act of judgment.

Limits of contractual autonomy

The second step is to recognize that party autonomy, though extensive, is not unbounded. The courts have long refused to give effect to certain private arrangements, not because they are unclear, but because they are incompatible with the court's role and public policy (*Lee v Showmen's Guild* 1952: 342, cited in *Charles Stanley v Adams* 2013: paragraph 13). Statute and common law have since refined that public policy boundary, carving out regulated spaces for arbitration, statutory adjudication and expert determination.

What has remained constant is judicial resistance to clauses that, in substance, seek to oust the court's supervisory role. Even Parliament may displace the courts only in the clearest terms, and not so far as to undermine the rule of law itself (*Privacy International v IPT* 2019: paragraph 119). Even more so, private parties cannot by contract require the court to act as a rubber stamp for an unreviewable output that lacks responsible authorship, thereby stripping away any meaningful supervisory function. Labelling the mechanism "pure contract" cannot immunize it from public policy scrutiny if, in substance, it amounts to a private redesign of adjudication.

A distinction must therefore be drawn between two kinds of clause. On the one hand are clauses that fix inputs (interest rates, indices and commodity prices), which are then fed into an agreed contractual framework. On the other are clauses that purport to fix outcomes (decisions about who is right and who is wrong), without any human tribunal in

between. The former are part of the machinery of performance. The latter are attempts to computerize the act of adjudication.

Settlement versus pre-commitment

There is, however, an important nuance. If the parties submit their dispute to ChatGPT, consider its output, and then enter into a settlement agreement, the court should enforce that compromise like any other. ChatGPT's role is incidental; the binding act is the subsequent human agreement.

What is objectionable in the present scenario is the pre-commitment to accept whatever ChatGPT decides, with no further human ratification once its output is known. It is this pre-commitment, rather than the mere use of AI, that should trigger public policy concern. A court sensitive to the distinction can coherently say:

- ◊ We will enforce genuine settlements, even where AI has informed the parties' assessment of their positions.
- ◊ We will enforce neutral machinery clauses tied to factual indices.
- ◊ We will not, however, enforce a pre-commitment to accept the output of a non-responsible system as a binding resolution of a dispute over rights and liabilities.

The pure contract route is therefore, on the better view, also unlikely to succeed if courts are willing to look past labels and classify mechanisms by their function rather than their drafting. The question then comes full circle: why should the law insist that adjudication remains human, and why should it resist contractual attempts to normalize algorithmic decision-making in construction disputes? The answer lies in the normative foundations of adjudication and in the non-waivable conditions of legal legitimacy already explained.

[I] CONCLUSION AND IMPLICATIONS

This article has argued that the advance of AI into construction dispute resolution raises a deeper question than whether current models hallucinate cases: should the law recognize fully autonomous AI outputs as legitimate resolutions of disputes about rights and liabilities, and therefore capable of attracting state-backed enforcement?

The doctrinal analysis suggests that English law is unlikely at present to enforce that output. Under the existing statutory schemes, ChatGPT cannot plausibly be treated as an arbitrator or adjudicator. It cannot

satisfy the statutory assumptions of personal appointment, responsible judgment and compliance with the demands of natural justice. Nor is it consistent with the doctrine of expert determination, which presupposes a human professional whose personal skill and professional accountability justify judicial deference.

The pure-contract route, treating ChatGPT's output as no more than an agreed external machinery of performance, is the strongest route to enforcement. However, it becomes difficult to sustain once one distinguishes between clauses that fix factual inputs and clauses that attempt to fix adjudicative outcomes. The former are part of ordinary contractual machinery; the latter amount, in substance, to an attempted private redesign of adjudication and are, on the better view, vulnerable to refusal on public policy grounds.

Beneath those doctrinal conclusions lies the article's central claim. Adjudication is a human practice of responsible judgment. The philosophical traditions considered in this article, though different in emphasis, converge on that point. Whether expressed through Aristotle's *phronesis*, Dworkin's moral authorship, Fuller's fidelity to law's internal morality or Habermas's account of legitimacy through reason-giving and reciprocal justification, the underlying idea is the same: when the state lends its coercive force to the resolution of a dispute, the decision must be one for which a person can answer. That is why the law is entitled to insist that when rival claims are heard, evaluated and resolved, the tribunal must be human.

Finally, the article argued that the greatest threat to the human tribunal, and to the law's existing conception of adjudication, comes from the uncritical embrace of hybrid human-AI decision-making. Once ChatGPT is permitted to frame issues, summarize submissions and draft reasons, the human decision-maker risks becoming the outcome's publisher rather than its author. Delegating those cognitive tasks hollows out the very conception of judgment that distinguishes it from computation. If that occurs, decision-makers and their institutions would have undermined the normative foundations on which human adjudication depends.

The practical implications are twofold. First, courts, when the inaugural AI enforcement case reaches them, have an opportunity to set a principled marker that adjudication remains a human responsibility. Secondly, professional institutions for decision-makers should articulate clear guidance on permissible uses of AI, drawing a line between clerical assistance and cognitive delegation. This article has argued against the hybrid human-AI decision-making trend.

Philosophy can still explain why disputes must be resolved by humans; why human flaws may be compatible with legitimacy, while machine opacity is not; and why being judged by someone, rather than processed by something, is a virtue. But philosophy cannot rescue a practice that has already surrendered its core. When the algorithm becomes the tribunal, justice may not cease to exist. What may disappear is the human judgment that has long been treated as a precondition of state-backed coercive force.

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Shaping the Law Curriculum with Authentic Assessment: Online Dispute Resolution (ODR) Simulation and Dispute System Design (DSD) in Legal Education

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Abstract

This article updates the author's earlier study, "Online Dispute Resolution Simulation: Shaping the Curriculum for Digital Lawyering" (Wang 2021a), while advancing a distinct pedagogical contribution: it extends the original online dispute resolution (ODR) simulation framework to incorporate dispute system design (DSD) as a means of teaching students not only to participate in dispute resolution, but also to design, evaluate and govern technology-enabled dispute systems. The original study demonstrated how ODR simulation workshops create a virtual learning environment in which students develop both legal and digital competencies for future professional practice. Conducted since 2007 with undergraduate and postgraduate law students at Brunel University of London and other institutions and initially supported by funding from the Nominet Trust in 2010, these workshops promote active participation, intercultural communication and reflective practice, while strengthening skills in legal reasoning, problem-solving and digital communication. Building on this foundation, the article evaluates DSD as a new teaching initiative implemented within the University of London distance learning Alternative Dispute Resolution (ADR) module and Brunel University of London's Internet Law module. While ODR simulation and DSD differ in emphasis—practical dispute resolution versus system design—both employ authentic assessment, requiring students to apply knowledge and skills to realistic scenarios. Together, these approaches deepen engagement, foster critical reflection and enhance professional readiness for technology-enabled dispute resolution and digital lawyering.

Keywords: online dispute resolution; dispute system design; artificial intelligence; authentic assessment; team-based learning; student-centred learning; research-informed teaching.

[A] INTRODUCTION

Globalization has created a demand for law graduates equipped to operate in international and multijurisdictional contexts, with law firms increasingly requiring lawyers with cross-border expertise (Faulconbridge & Muzio 2009: 1358). Legal professionals are now expected to handle international cases and cross-border disputes, requiring both basic global competence and strong problem-solving abilities (Kim 2018: 907–908). International commercial arbitration has become a preferred method for resolving such disputes, mainly due to the enforceability of arbitral awards under the New York Convention on Arbitral Awards 1958 (Wang 2010: 159). At the same time, pressures arising from increasing caseloads and court backlogs have prompted a shift at the domestic level toward greater reliance on alternative dispute resolution (ADR); in the United Kingdom (UK), mediation has increasingly moved from a voluntary option to a mandatory or court-directed step under the Civil Procedure Rules, reflecting a policy emphasis on early, cost-effective settlement and the efficient management of judicial resources (Wang 2026).

ADR modules have become widely integrated into law school curricula, initially in the United States and subsequently in Australia (Australian Law Reform Commission 1997), incorporating interdisciplinary elements such as communication, social sciences, management, psychology and game theory (New South West Law Reform Commission Report 1991: 41; Douglas 2008: 126). In recent years, law schools have recognized the value of stand-alone ADR modules and the use of online dispute resolution (ODR) simulations in teaching (Ainsworth & Ors 2019: 95), with calls to incorporate ODR elements into ADR teaching due to their practical differences (Goldberg 2014: 13). With the increasing importance of digital competency, graduates are expected not only to possess basic digital literacy but also to adapt to evolving technologies within legal professions, including roles such as lawyers, judges, arbitrators and mediators (Wang 2021a: 218).

ODR encompasses various forms of ADR and e-courts, using digital communication technologies such as emails, telecommunication applications and other online platforms. While ODR can be applied to most civil and commercial disputes, it is particularly suited to electronic transactions and internet-related cases, where evidence can be submitted digitally with ease (Wang 2018: 8). Compared with traditional methods, ODR offers greater efficiency, cost-effectiveness and flexibility in resolving disputes (Wang 2009). In the era of artificial intelligence (AI), ODR systems are gradually incorporating automation, including AI-assisted

negotiation through chatbots, with human intervention engaged when automated processes are insufficient. Partly AI-assisted environments can, for example, transcribe audio evidence and generate provisional outcomes for human review. In the longer term, fully AI-enabled ODR systems, in particular AI-enabled mediation and arbitration, may autonomously collect and analyse case data, interpret relevant rules and deliver outcomes without human involvement (Wang 2018: 98). Initiatives such as "arbitrator intelligence" aggregate historical arbitral decisions to inform decision-making in digital dispute resolution (Arbitrator Intelligence Questionnaire 2015). Moreover, service-oriented computing and blockchain technologies provide opportunities for automating transactional tasks, executing smart contracts and supporting efficient dispute management (Wang & Griffiths 2010: 156; Daniel & Guida 2019: 46-53; Qiu & Ors 2020).

However, surveys have shown that many workers lack basic digital skills, prompting initiatives to enhance digital literacy across education and the workforce and foster lifelong learning skills (European Commission 2010; Cedefop 2018; Thanaraj 2018: 67; Cedefop 2019; European Commission DESI 2020). Digital literacy in legal education encompasses professional, social, cultural and personal communication practices using diverse digital media, as well as general data literacy for quantitative legal analysis, which is essential for participation in a data-driven economy and society (Galloway 2017: 6; European Strategy for Data 2020). ODR simulation workshops support these goals by enabling students to use current technologies, consider potential AI applications in filing, processing and decision-making, and develop both legal and digital competencies through a blended learning platform (Wang 2021a: 220). These workshops move beyond digital literacy to foster digital empowerment by enabling students—particularly those from diverse or disadvantaged backgrounds—through flexible, accessible learning environments that enhance self-efficacy, collaboration and informed engagement with technology to improve access to justice (Wang 2021a: 220-221).

ODR simulation workshops prepare students for digital lawyering by immersing them in realistic, technology-mediated dispute resolution environments where they apply legal knowledge, use digital tools and reflect on their effectiveness. In doing so, they operationalize digital lawyering—understood as the effective, appropriate and safe use of digital technologies in legal practice (Thanaraj 2017: 11)—and align legal education with the profession's increasing reliance on advanced tools (Frostestad Kuehl 2019: 2), including AI, blockchain, cloud computing

and electronic evidence systems, while encouraging critical reflection on future technological developments in legal services.

As a form of experiential learning, these workshops provide a practical means of developing legal reasoning, problem-solving, digital literacy and intercultural communication skills. Students engage in realistic dispute scenarios, taking on different roles of complainants, respondents and arbitrators or mediators and producing outputs such as arbitral awards, mediation settlements and reflective observations (Wang 2021a: 222), which support the transfer of skills to professional practice through collaborative problem-solving and reflection (Ryan 2017: 138-139). Evidence suggests that, as part of a blended-learning approach, ODR simulations enhance information exchange, collaboration and trust-building among students (Grant & Lestrell 2020: 92, 100–101). While challenges such as uneven participation may arise (Simmons & Thompson 2017: 222, 240–241), these can be addressed through careful task design, strategic group formation and preparatory instruction (Wang 2021a: 225-227), with platforms such as Modria proving particularly effective in supporting the development of dispute resolution skills (Ainsworth & Ors 2019: 101).

Building on the earlier study (Wang 2021a), this article extends the pedagogical framework by introducing dispute system design (DSD) as a complementary teaching initiative implemented within the University of London distance-learning ADR module and the Brunel University of London Internet Law module, particularly for time-poor learners. DSD requires students to move beyond participation in online dispute processes and instead engage in the structured design, evaluation and governance of dispute resolution systems for emerging technological environments, thereby fostering system-level thinking, strategic design capabilities and critical engagement with ethical and regulatory dimensions of digital justice.

Foregrounding DSD while drawing on the earlier insights from ODR simulation as an experiential foundation, this article examines how students can be supported to develop not only practical dispute resolution skills but also the ability to design and critically assess AI-enabled dispute resolution systems. In doing so, it situates DSD within broader developments in digital justice, including platform-based dispute resolution, algorithmic decision-making, AI-assisted mediation and arbitration, and increasing cross-border regulatory complexity. It further highlights the pedagogical value of authentic assessment across both ODR simulation and DSD, where students undertake realistic, practice-

oriented tasks that develop legal, digital and intercultural competencies, with DSD placing particular emphasis on anticipatory design and critical foresight. The article argues that, when integrated, ODR simulation and DSD form a coherent, future-oriented framework that enhances student engagement and inclusivity while equipping learners with the adaptability, reflective capacity and professional competencies required for digital lawyering in the age of AI.

[B] PEDAGOGY OF INTEGRATING DSD WORKSHOPS TO ADVANCE TIME-POOR LEARNING

Since 2007, the author has conducted ODR simulation workshops across undergraduate and postgraduate modules in Internet Law, ADR, International Commercial Arbitration and International Trade Law, using online conferencing tools to create an interactive and flexible online mediation and arbitration environment in which participants resolve cases in a way that enhances legal and technological skills, fosters debate and analytical engagement, and provides realistic experience of digital dispute resolution in virtual settings. Feedback indicates that the workshops are well received by students from diverse cultural backgrounds, particularly those for whom English is not a first language, as the online environment allows more relaxed communication than face-to-face settings (Wang 2021a: 219).

Technologically assisted learning combines traditional group work with e-learning to support flexible and personalized learning (Rossen & Hartley 2001: 109; Armitage & O'Leary 2003; Sharma & Mishra 2007: 3). Supported by clear instructional guidance, structured curriculum planning and minimum technical standards, these workshops ensure consistency while maintaining flexibility. Through scenario-based tasks, students develop both substantive and procedural legal understanding while enhancing digital competence, problem-solving skills, and adaptability to evolving technologies. The design of such workshops encourages students not only to operate within institutional platforms but also to explore and evaluate a range of software, fostering independent digital capability alongside legal reasoning (Wang 2021a: 221). Between 2007 and 2025, ODR simulation workshops have employed a range of communication tools, including MSN Messenger, Skype, Zoom, Google Chat and Slack, to deliver dispute resolution exercises and explore digital legal practice. Skype, in particular, proved especially effective for teaching and learning in this context. Its discontinuation in May 2025,

however, highlighted ongoing challenges in replicating stable, multi-session, video-enabled functionality for multiple groups on a single platform. The availability of such tools is one of the factors that has led to the development of alternative simulation approaches, such as DSD workshops.

Moreover, ODR simulation workshops are particularly effective in well-prepared learning environments where sufficient time is available, but they are less suited to time-constrained (also known as "time-poor") settings. Prior to 2025, students typically completed Internet Law (Part I – substantive law) before undertaking ODR simulation workshops in Internet Law (Part II – procedural law) within a year-long structure. This sequencing allowed carefully designed, realistic scenarios to build on students' substantive legal knowledge while enabling them to develop practical skills and an understanding of legal procedures. Moreover, ODR simulation workshops function most effectively where students have first developed prior interaction and a sense of academic community, often through preliminary face-to-face engagement before moving to online hearings conducted via instant messaging or video-conferencing platforms. This early in-person contact helps build trust, familiarity and confidence among participants, which in turn supports more active and effective collaboration in virtual dispute resolution exercises. However, when this structure is compressed into a single semester, students often find the demands of the simulation significantly more challenging.

Time-poor learners thus face constraints due to academic structures, such as compressing a year-long module into a single semester, or personal circumstances, such as balancing work alongside study or living in different time zones. Time-poor learning significantly impacts both learners and educators, as high communicative demands, continuous feedback and digital content creation under limited time and resources place persistent pressure on instructional practices, wellbeing and engagement with pedagogical innovation (Zhou & Ors 2025: 15). In this respect, it is important to distinguish between two implementation contexts developed in the 2025/2026 academic year: the University of London distance learning ADR module and Brunel University of London's Internet Law module. At the University of London, DSD was implemented within a fully distance-learning ADR module, where all teaching and interaction take place online, making it particularly suitable for time-poor learners as it accommodates geographically dispersed, professionally engaged students operating across different time zones and requiring flexible, asynchronous access to learning activities. By contrast, at

Brunel University of London, the DSD and ODR simulation components were specifically adapted for time-poor learners within a hybrid learning model, where the module structure is compressed into a single semester rather than delivered over a full academic year.

When a module is compressed from a full year to one semester, adapting teaching pedagogy and content becomes critical. Traditional linear, clock-based curriculum structures and overcrowded content create time constraints that fail to accommodate diverse learning paces, limiting students' ability to engage in deep understanding and critical thinking (Leek & Ors 2026: 82). In such time-poor settings, more flexible and responsive approaches to educational pedagogy are required.

DSD workshops offer an effective pedagogical approach for advancing learning in time-poor educational contexts. Unlike traditional teaching, DSD requires students to undertake self-directed research and apply knowledge and skills acquired earlier in the module, integrating substantive and procedural learning into a real-world task. In these workshops, students learn to develop structured systems for managing and resolving disputes, incorporating core principles of the ODR process. Embedding ethical considerations—including those relevant to ODR and AI-assisted arbitration—ensures that system design reflects professional standards while promoting inclusivity and due process (Wang 2025c: 798). By engaging with a concrete problem and designing an ODR system, students actively consolidate prior learning, develop strategic and critical thinking, and manage their time efficiently, which is particularly beneficial for learners operating under compressed schedules or other time constraints.

The DSD workshop pedagogy draws on real-world examples of technology-driven dispute resolution platforms to contextualize learning and enhance practical understanding. For instance, YouTube's Content ID and copyright strike system illustrates a highly automated ODR environment optimized for high-volume digital content, while eBay, courts and tribunals, NextDoor and Kleros demonstrate diverse approaches to user engagement, procedural complexity, and sustainability in dispute system design (Martinez 2020; Wang 2022). The recent discontinuation of the European Union Single-Entry ODR Platform in 2025 and the proposed next-generation guidance tool illustrate how platform design, accessibility and user-centred functionality are critical to effective dispute resolution (Wang 2025a). Comparing these platforms allows students to examine factors such as platform goals, accessibility, cost and time burden, case suitability, stage of proceedings and the extent of self-

execution in outcomes. Through this applied, problem-based learning, students experience the operational realities of designing dispute systems while practising time management, collaborative decision-making and digital literacy skills—all essential competencies for time-poor learners preparing for contemporary legal practice.

[C] DESIGNING AN EFFECTIVE AND FLEXIBLE LEARNING ENVIRONMENT

Both ODR simulation and DSD workshops are particularly well suited to the teaching of ADR, Internet Law and other subjects involving digital law because they mirror the very contexts in which contemporary disputes arise and are resolved. As ODR extends traditional ADR mechanisms into digital environments using electronic communications, it reflects the increasing prevalence of online consumer transactions, cross-border disputes and platform-based interactions where electronic evidence and asynchronous communication are central (Wang 2021b: 225). These features align closely with the subject matters of internet, contract and digital copyright regulations, where disputes frequently involve online conduct, digital assets and jurisdictional complexity. Moreover, the integration of emerging technologies allows students to engage critically with both the legal and technological dimensions of dispute resolution, including issues of trust, due process and enforceability (Wang 2021b: 226). DSD workshops further complement this by enabling students to design and evaluate dispute resolution systems that balance efficiency, accessibility and fairness—core concerns in ADR and digital regulation—thereby equipping students with the practical, analytical and digital competencies required for legal practice in increasingly technology-mediated environments.

An optimized ODR simulation-learning environment combines flexible, student-centred pedagogy with structured task design, clear procedural guidelines and appropriate IT support, allowing students to engage in role-play, problem-based activities and reflective practice while accommodating diverse learning paces and locations (Matthew & Butler, 2017: 152; Wang 2021a: 225-227). Such workshops enable students to identify legal issues, select and apply ODR methods (ie negotiation, mediation, arbitration), debate arguments and present outcomes, supported by peer and instructor feedback, creating a dynamic environment that fosters cognitive development, critical thinking and collaborative skills (Lustbader 1997: 859; Ponte 2006: 169-171). Team-based learning is embedded through strategically formed groups, application exercises, role allocation,

peer evaluation, and reflective presentations, drawing on evidence-based approaches adapted from other disciplines to enhance both individual and collective learning outcomes (Michaelsen & Sweet 2011; Weresh 2019: 304). ODR workshops enhance digital literacy, procedural competence and critical reflection on the role of technology in legal services by requiring students first to select and evaluate software and then choose the mediation or arbitration procedural rules for hearings, thereby further cultivating digital empowerment and professional readiness (Costa & Ors 2018: 150; Wang 2021a: 221). These workshops also integrate research-informed teaching, in which instructors' expertise in substantive and procedural law informs students' tasks, and students' investigations, reflections, and suggestions feed back into teaching practice, creating a continuous, curiosity-driven learning cycle (Griffiths 2004: 722; Zhu & Pan 2017: 437).

DSD workshops build on these qualities by transplanting ODR simulation's flexibility, problem-based learning and reflective practice into a time-poor environment, requiring students to research, design and critically evaluate dispute resolution systems that integrate ethical, procedural and technological considerations while consolidating prior learning, developing strategic and collaborative skills, and efficiently managing limited study time. Digital platforms or tools such as Padlet, Miro or Discussion Boards foster inclusive participation by enabling learners, particularly those less confident or with English as their second language, to share ideas asynchronously and engage more freely. DSD workshops emphasize active learning, peer-to-peer feedback and co-creation of knowledge, with students contributing concise, attributable responses and engaging in cross-group critique. By incorporating elements of design thinking, problem-based learning and digital collaboration, it develops essential legal skills such as systems thinking, digital literacy and ethical reasoning, while promoting inclusive participation through flexible and asynchronous contributions.

In the hybrid Internet Law module (2025/2026), DSD workshops use Padlet to support structured, visually collaborative, multi-stage group design tasks involving comparative platform analysis, stakeholder evaluation, ethical assessment and iterative peer feedback. Students are organized into structured groups and engage in iterative tasks that combine comparative analysis, stakeholder mapping and ethical evaluation to design a functional ODR system. On Padlet, students collectively brainstorm, organize ideas, and visually map system components, enabling real-time collaboration and iterative refinement of their ODR designs. That is, DSD workshops in a hybrid learning environment proceed in two structured

stages using Padlet, combining guided inquiry with collaborative design tasks. In the first stage, students are divided into groups and subgroups, each responsible for a thematic component of the worksheet. Subgroups respond to targeted design questions in concise written posts (eg up to 100 words), either individually or collaboratively, ensuring accountability through named contributions. The tasks begin with comparative analysis of existing platforms such as YouTube, eBay, and Taobao to identify differences in dispute resolution goals, users, processes, automation and evaluation mechanisms. Students then apply their insights to a practical scenario by designing an ODR platform system for self-driving taxi services, considering consumer disputes such as passengers contesting automated fare charges. Subsequent tasks guide students to identify key stakeholders, including passengers, operators, platform providers, insurers and regulators, analyse their priorities, and propose system features that balance efficiency, fairness and accessibility. The workshop further incorporates ethical evaluation, prompting students to define principles such as transparency, accountability and procedural fairness, ensuring that AI-driven components comply with these standards. In the second stage, students review another group's contributions and provide structured peer feedback, reinforcing reflective learning, comparative analysis and iterative improvement of dispute system design.

In the fully remote ADR module (2025/2026), DSD workshops are delivered via structured discussion boards on platforms such as Moodle, Brightspace or Blackboard Learn, requiring more sequential, text-based interaction in which students progressively build an ODR system design through guided posts, responses and reflective prompts. That is, unlike Padlet, which provides a highly visual, flexible and often asynchronous collaborative space, discussion boards require more structured posting and threaded responses, encouraging students to engage in sequential dialogue and develop coherent argumentation while still allowing academic peer interaction and co-creation of knowledge. In this setting, students are tasked with designing an ODR platform for automated self-driving taxi services, addressing disputes over payment, service quality, accidents, malfunctions, safety and operational issues. They are guided to consider essential elements of system design, including goals (eg speed, fairness, transparency, cost-efficiency), stakeholders (eg clients, service providers, ODR administrators, or third-party mediators), processes and rules (eg negotiation, mediation, arbitration, or hybrid approaches), resources (technology, staff, or financial investment), evaluation criteria (user satisfaction, resolution speed, or reduced conflict recurrence), and design considerations (automated, human-facilitated, or a combination).

Using the discussion board, students post concise design plans, respond to peers' contributions in an academic and constructive manner, and iteratively build a collective ODR system design, guided by a structured worksheet comprising comparative practice (eg analysing YouTube and eBay ODR systems), stakeholder perspectives (identifying priorities and resolving conflicts), ethical and design principles (fairness, transparency, accessibility, and accountability) and procedural rules for handling both simple and complex disputes. A set of academic reflection questions is embedded to focus strictly on students' personal learning and development, prompting them to consider their engagement with the task, the challenges they encountered and strategies used, the academic skills they developed or strengthened, and how the exercise influenced their understanding of collaboration as a method of learning and problem-solving. Students are expected to comment on peers' contributions constructively but explicitly prohibited from making personal criticisms or evaluative judgements about others. This approach balances structured engagement with iterative peer interaction, ensuring that students develop practical legal and digital competencies, critical thinking and problem-solving skills, while maintaining inclusive participation even in a fully remote learning environment.

When constraints relating to time and resources are alleviated, the integration of ODR simulation and DSD workshops can further enhance teaching and learning, reflecting broader developments at the intersection of legal education and digital transformation, where increasing attention is given to the ethical, procedural and regulatory implications of technology-assisted dispute resolution. Scholarship on AI in online commercial arbitration emphasizes core principles such as fairness, transparency, accessibility, competence and accountability, which serve as essential normative benchmarks for students designing dispute systems (Wang 2023: 540). Related work on online content dispute resolution highlights how digital platforms and automated moderation tools interact with legal norms, exposing complexities in liability, procedural safeguards and the harmonization of cross-border notice-and-takedown mechanisms (Wang 2022: 505-507), while comparative studies of administrative copyright enforcement in China and Europe further demonstrate how algorithmic tools operate within broader dispute infrastructures, shaping access, efficiency and consistency across jurisdictions (Wang 2025c: 786-788, 798-801).

By linking experiential ODR simulation with DSD exercises, the curriculum encourages students to engage not only with the practical operation of dispute resolution processes but also with the design, evaluation and governance of AI-enabled systems. Both approaches

incorporate instruction on AI not as a technical specialism to be mastered, but as a professional tool requiring critical and functional understanding. This is increasingly essential for lawyers who must evaluate outputs, manage risks, meet professional obligations and interact effectively with evolving technologies. At the same time, these workshops are designed as student-centred, team-based and research-informed learning environments that emphasize authentic learning and reflection, enabling students to apply knowledge in realistic contexts, identify gaps in their competencies and develop them collaboratively.

Within the evolving legal education landscape, including the introduction of the Solicitors Qualifying Examination (SQE) in the UK (Solicitors Regulation Authority May 2020; June 2020), there is a growing need to align curricula with both legal and digital competencies. SQE1 assesses functioning legal knowledge, including dispute resolution, while SQE2 evaluates six practical skills: (1) client interview and attendance note/legal analysis; (2) advocacy; (3) case and matter analysis; (4) legal research; (5) legal writing; and (6) legal drafting. Although digital skills are not formally assessed, they underpin the effective development of these abilities in practice. From a curriculum perspective, this requires the integration of doctrinal knowledge, interdisciplinary content and practical exercises. ODR and DSD workshops respond directly to this need by embedding authentic assessment, requiring students to apply legal knowledge, digital skills and critical thinking to professional tasks rather than merely recalling information. Empirical evidence suggests that such approaches enhance engagement, purpose and the connection between academic study and professional practice (Collins 2022: 2).

In the era of AI, the design of authentic learning is particularly critical, as learners must be guided by instructors to make effective use of generative AI tools (such as ChatGPT, Copilot, or Gemini) to generate prompts, summarize information and provide personalized support through learner-driven AI training, all while maintaining academic rigour, creativity, curiosity and authenticity. Higher education must therefore balance the use of AI technologies with essential human guidance to ensure meaningful and ethical learning (QAA 2024). Graduates are increasingly expected to be familiar with generative AI tools in professional contexts, while also recognizing their limitations and the importance of using them responsibly, especially given that AI outputs can appear credible even when inaccurate (QAA 2023a). Accordingly, assessment design should move away from tasks easily replicated by AI and towards synoptic and authentic assessments that require application of knowledge in real-

world contexts, sometimes incorporating AI in a controlled and reflective manner (QAA 2023b).

Taken together, ODR simulation and DSD workshops cultivate legal, digital and critical-thinking skills while fostering the ability to engage ethically and creatively with emerging technologies, thereby preparing students for professional practice in an increasingly digital and AI-enabled legal landscape. Their shared emphasis on authenticity, applied learning and reflective practice provides a coherent foundation for the systematic design and implementation of authentic assessments, which the following section examines in greater detail through their role, structure and pedagogical value in contemporary legal education.

[D] SHAPING THE LAW CURRICULUM WITH AUTHENTIC ASSESSMENT IN THE AGE OF AI

In legal education, authentic assessment has been widely used to promote students' engagement in various forms since 1969 (Hart & Ors 2011: 105). For example, authentic assessment was embedded within first- and second-year law courses in the formal curriculum, rather than as extra- or co-curricular activities (ECCAs), to enhance student engagement and develop professional skills (ibid: 106-109). Tasks such as court visits, advocacy exercises, oral debates, problem-based legal files and work-based assessments replicated real-world legal practice, requiring students to apply knowledge, problem-solve, communicate and reflect, thereby connecting classroom learning to professional contexts (ibid: 113). It was argued that authentic assessment is most effective when "structured and scaffolded", allowing students to practise tasks, receive guidance or exemplars, and complete progressively complex assessments across courses and developmental stages, supporting both engagement and skill acquisition (ibid: 119).

In a British university, authentic assessment is embedded in the Procurement and Contract Practice module through a year-long email exercise set within a fictional construction project scenario (Silbereis 2020). Students assume the role of a client's contracts advisor and receive four unannounced emails from a fictional client seeking practical advice on emerging project issues (Silbereis 2020: 4). Responses are submitted directly by email, without word limits, formal submission portals, or advance notice, while the scenario is integrated into weekly tutorials, allowing students to build contextual understanding and mirror professional communication, time pressures, and uncertainty (Silbereis 2020: 4-5). Following a successful pilot, the exercise was

formally incorporated into the module specification, contributing 20% of the module grade and serving as a summative, curriculum embedded authentic assessment (Silbereis 2020: 4). This approach develops applied judgement, communication skills and professional readiness for future roles in the construction industry.

In an Australian law school, law reform participation is embedded as a formal, curriculum-based authentic assessment in both compulsory and elective law subjects, where students draft submissions to inquiries or committees on real or simulated law reform issues, such as administrative law (Bedford & Ors 2024: 67). These tasks develop critical thinking, advocacy, interdisciplinary and professional skills by requiring students to analyse current law, identify gaps, propose reforms, and consider ethical, social, and practical implications, while technology assists research, access to law reform materials and the simulation of inquiries resistant to AI-generated answers (ibid 2024: 71). By integrating law reform across the curriculum, legal education simultaneously fosters vocational skill development, broader liberal learning, student engagement, professional readiness, and an understanding of law's potential for social improvement.

Another Australian example comes from the University of Sydney, where first-year Contract Law students complete an authentic drafting assessment as part of the formal curriculum, requiring them to draft or amend contract clauses for a simulated client scenario (McNamara 2017). Unlike the scaffolded, lecture-supported approach described in the previous case, this exercise emphasizes peer review and iterative revision, encouraging collaboration and critical evaluation alongside individual drafting. It is unique in integrating structured feedback and reflective self-assessment, enabling students to identify strengths and weaknesses in their drafting while linking doctrinal knowledge to professional practice. This approach was adopted by providing realistic contract problems, embedding multiple stages of feedback, and including brief reflective tasks to consolidate learning, with the drafting assessment constituting between 10% and 20% of the assessment of the overall course mark (ibid 2017: 487, 491).

Authentic assessment has also been adopted as ECCAs in other educational settings such as in another British university, which allows students to engage in real-world legal tasks, develop critical reasoning and practise professional judgement in a supportive, formative environment (Berger & Wild 2017). By combining ongoing feedback with practical tasks, ECCAs have been shown to enhance academic performance and

help prepare students for the challenges of professional legal practice and improve graduate employability rates (ibid: 428, 437-439).

Both ODR and DSD workshops, embedded in Internet Law and ADR modules, have further exemplified the shaping of authentic assessment within the formal law curriculum. Both ODR and DSD assessments embed reflection exercises, prompting students to critically evaluate their decision-making and performance. These reflective tasks either contribute 15% to the final mark or function as unclassified assessments evaluating originality, authenticity and independent application of skills within the broader module framework. Importantly, these exercises can also operate as optional ECCAs, offering flexibility for skill development when the module focus or student cohort needs require it. By integrating reflective, applied and strategic skills alongside doctrinal learning and authentic drafting assessments, ODR and DSD exercises strengthen professional readiness, independent thinking and engagement, equipping students to navigate both conventional and technology-driven legal practice in an AI-impacted landscape.

[E] CONCLUSION AND REFLECTIONS

ODR simulation workshops immerse students in realistic dispute resolution scenarios where they apply substantive and procedural law, while DSD workshops require students to design, evaluate and enhance dispute resolution systems under time-constrained conditions, integrating ethical, procedural and technological considerations. Both operate as technologically enhanced authentic assessment environments that develop digital legal competencies for the age of AI.

While ODR simulation prioritizes experiential, scenario-based learning to develop practical legal and procedural skills in hybrid settings, DSD adapts these principles for time-constrained or fully distance-learning contexts by guiding students to design, analyse and evaluate dispute resolution systems at a conceptual and system-wide level.

Drawing on experience from ODR simulation (2007/2025) and DSD workshops (2025/2026), both approaches demonstrate that careful pedagogical design enhances engagement, decision-making, contextual understanding, student autonomy and collaborative learning. They are particularly effective for diverse and multicultural cohorts, including students facing language barriers, reinforcing the importance of cultural context in global legal education (Cownie 2025: 93).

Together, ODR simulation and DSD workshops support the development of legal reasoning, digital competence and professional awareness of AI-enabled dispute processes, while encouraging critical reflection on the evolving role of technology in legal practice. Collectively, they provide a coherent pedagogical framework for preparing students for digital lawyering in a rapidly changing legal landscape.

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Legislation, Regulations and Rules

New York Convention on Arbitral Awards 1958

Online Resources

Arbitrator Intelligence Questionnaire, 2015

Caseload Manager

Decider: Online Dispute Resolution Platform

Fireflies

Google Live Transcribe (to capture audio and transcribe them as text on the screen)

LOOM

Microsoft Teams Transcription (Live Captions)

Barriers to Medical Cannabis in the UK: Human Rights Implications of Criminalization and Inequitable Access

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Abstract

Although legislative amendments in 2018 legalized medical cannabis in the United Kingdom, access remains severely limited. Private prescriptions have increased, but National Health Service treatment is exceedingly rare. As a result, individuals using cannabis to manage health conditions are often forced to risk criminalization, undermining their rights and deepening existing inequalities. The discriminatory effects of drug law enforcement are well documented, particularly the disproportionate targeting of ethnic minorities. Similar inequalities affect women and those with disabilities, who may be more likely to experience health conditions treatable by medical cannabis yet face barriers to lawful access. This reflects not only the injustice of ongoing criminalization but also a broader failure to uphold core human rights, particularly autonomy and equality. This article examines the legal and systemic barriers to medical cannabis through a combined doctrinal and socio-legal approach. Analysed in light of Articles 8 and 14 of the European Convention on Human Rights, the article shows how current laws constrain access, entrench disadvantage and perpetuate harm, and argues that decriminalizing possession of cannabis for personal use is the most practical step towards addressing these inequalities.

Keywords: medical cannabis; decriminalization; human rights; Article 8 ECHR; Article 14 ECHR; equality; autonomy; drug policy.

[A] INTRODUCTION

Medical cannabis was legalized in the United Kingdom (UK) in 2018, yet it remains inaccessible.[1] Official National Health Service (NHS) data indicates that fewer than five patients have received prescriptions for unlicensed cannabis-based medicines, despite estimates that more than 1.5 million people in the UK use cannabis for medical purposes (Centre for Medicinal Cannabis 2020; UK Parliament 2024; NHS Business Services Authority 2025). In response to limited NHS provision, many have turned to expensive private clinics, where costs can reach hundreds of pounds a month (Wickware 2019). As a result, the majority are left reliant on the illegal market to manage their health, exposing them to criminalization and raising serious concerns about the protection of fundamental rights.

This article argues that, once the state has recognized cannabis as a legitimate medical treatment, continued criminalization of those who use it for medical purposes but cannot access lawful prescriptions becomes increasingly difficult to justify under Articles 8 and 14 of the European Convention on Human Rights (ECHR). The article calls for urgent reform to introduce formal decriminalization of possession for personal use in order to address the immediate harms and begin correcting the unequal enjoyment of rights. These harms are not evenly distributed but fall disproportionately along lines of disability, ethnicity and gender, reinforcing existing structural inequalities (Shiner & Ors 2018; Centre for Medicinal Cannabis 2020). Using a combined doctrinal and socio-legal approach, the article examines how the existing legal framework undermines equality from a human rights perspective. A rights-based perspective is particularly valuable given the stark divide between those protected by private prescriptions and those subject to the criminal law. Multiple rights are engaged, but the focus here is on the right to private life and protection from discrimination, arguing that criminalization unjustifiably interferes with personal autonomy in health and produces disproportionate harm.

To make this argument, the article first outlines the legal and medical context, including the 2018 reforms and the impact of restrictive NHS guidance. The second section examines the unequal impact of criminalization, especially on disadvantaged groups, framing the issue as one of substantive equality. The third section demonstrates how criminalization constitutes an unjustified interference with autonomy protected by Article 8. This is followed by an analysis of Article 14, arguing

[1] Misuse of Drugs (Amendments) (Cannabis and Licence Fees) (England, Wales and Scotland) Regulations 2018, SI 2018/1055; Misuse of Drugs Regulations 2001, SI 2001/3998.

that the inequalities in access to prescriptions and the distribution of criminalization harms amount to unjustifiable indirect discrimination. The final section recommends formal decriminalization as a necessary first step, alongside longer-term measures to rectify the systemic inequalities maintained by the present system.

[B] LEGAL FRAMEWORK AND MEDICAL ACCESS

Despite the identical nature of the substance, there is a stark divide between lawfully prescribed cannabis and cannabis used for comparable therapeutic purposes that remains criminalized. This section outlines how medical access operates in the UK and how all other use, regardless of medical necessity, remains a criminal offence. The regulatory divide exposes the arbitrariness embedded in the existing legal structure, leaving individuals who rely on cannabis for therapeutic purposes vulnerable to criminalization and underscoring the urgency of reform.

Following the 2018 amendment, cannabis-based products for medicinal use (CBPMs) were rescheduled under schedule 2 of the Misuse of Drugs Regulations 2001. In practice, the framework consists of three categories. The first, "licensed CBPMs", are effectively irrelevant, as none have received marketing authorization from the Medicines and Healthcare Regulatory Agency. Second, "licensed cannabis-based medicines", such as Epidyolex, Nabilone and Sativex, have received authorization and may be prescribed on the NHS. However, their use remains highly limited due to strict adherence to National Institute for Health and Care Excellence (NICE) guidelines, which constrain prescriptions primarily to certain cases of multiple sclerosis, chemotherapy-induced nausea and treatment-resistant epilepsy (NICE 2019, updated 2021). The third and most notable category is unlicensed CBPMs, such as cannabis flowers and oils. These offer wider therapeutic potential and are closer to the forms commonly used on the illicit market. NHS provision is essentially non-existent, as these products can only be issued by specialists and NICE does not recommend them. NICE's cost-efficiency model requires evidence from randomized controlled trials, which are generally unsuited to cannabis as a natural plant, as its variable effects and psychoactive properties make double-blind testing difficult. As a result, NHS data indicates that fewer than five patients have received prescriptions for unlicensed CBPMs (Case 2020; UK Parliament 2024; NHS Business Services Authority 2025). This drives many patients to private clinics,

where access remains tightly controlled, requiring medical records, proof of diagnosis and failure of at least two conventional treatments.

The framework disproportionately disadvantages those with chronic and often underdiagnosed conditions. For example, endometriosis, which affects a significant number of women, has been shown in several studies to be managed by patients using cannabis (Armour & Ors 2019: 21; Armour & Sinclair 2023). Yet the average eight-year wait for diagnosis presents a serious obstacle to accessing lawful prescriptions (Endometriosis UK 2024). These rigid eligibility criteria, which typically require formal diagnoses and evidence of failed treatments, exclude vulnerable groups from safe and effective pain relief, compounding inequality. A more patient-centred model, valuing lived experience alongside clinical discretion, would better uphold rights. Until NHS access is expanded, the disparity between those who can obtain legal prescriptions and those who cannot remains a serious rights concern. The regulatory divide entrenches injustice and requires reform through formal decriminalization of possession for personal use.

Cannabis remains a Class B substance under the Misuse of Drugs Act 1971 (MDA) (sections 4-6), with possession punishable by up to five years' imprisonment and supply offences carrying a maximum sentence of 14 years. Although some police forces have informally deprioritized enforcement through diversion schemes, reliance on discretionary decision-making creates inconsistency and risks enabling discrimination (Stevens & Ors 2025). This is particularly evident in supply-based offences, where enforcement decisions may depend on how police interpret the circumstances of possession (Transform Drug Policy Foundation nd). Though aimed at organized crime, enforcement can capture medical users' possession of larger quantities (O'Reilly & Ors 2022). In practice, many purchase large quantities to minimize both costs and contact with criminal markets. The absence of clear protections, coupled with discretionary policing, creates legal uncertainty and systemic inequality (Coomber & Ors 2018). Similar problems arise in the policing of drug-driving. Unlike alcohol, cannabis impairment cannot be reliably measured with a breathalyser (Rolles 2022: 309). Current drug-driving tests detect trace amounts of tetrahydrocannabinol (THC) rather than impairment, meaning that THC may remain detectable after the psychoactive effects have subsided (Desrosiers & Ors 2014; Arkell & Ors 2021). This can disproportionately affect those who use cannabis consistently for chronic conditions, as regular therapeutic use increases the likelihood of returning a positive test (Rolles 2022: 314-315). Furthermore, many officers remain unaware of the legal status of medical cannabis, reinforcing stigma and discrimination. The challenges faced by lawful patients are beyond the

scope of this article, but these issues remain an important area for future research (Busby 2023; London Drugs Commission 2025: paragraphs 11.72, 11.74).

Given the growing body of evidence supporting medical cannabis and its legal recognition in 2018, it is increasingly clear that criminalization is not grounded in a rational assessment of harm but reflects the paternalistic legacy of prohibition (Nutt & Ors 2010). A rights-respecting approach must prioritize individual autonomy, particularly for those excluded from lawful access. The inconsistency and arbitrariness of the system undermine equality and erode trust in the criminal justice system. A more coherent and equitable model would centre human rights and individual freedoms, recognizing that much of the damage stems from criminalization itself. The next section explores how the criminal law interferes with fundamental rights and why human rights-led reform is essential to address entrenched social inequalities.

[C] CRIMINALIZATION AND SOCIAL INEQUALITY

In practice, the scale of medical cannabis use, combined with the lack of NHS provision, leaves people choosing between potential criminalization and costly private prescriptions for unlicensed CBPMs. This creates significant inequality. Private clinics are prohibitively expensive, with lawful medication often exceeding illicit market prices. Patients have limited choice, must purchase larger quantities, and face additional fees for consultations, clinic membership, and repeat prescriptions. The result is an inequitable, two-tiered system that disadvantages those unable to afford legal treatment (Busby 2019).

The situation not only maintains existing inequalities but actively exacerbates them. The harms of criminalization are unequally distributed, raising serious human rights concerns. It has long been recognized that the most significant harms of cannabis derive not from the drug itself but from its prohibition (Rolles & Murkin 2016: 18). A criminal record carries lifelong consequences for employment, housing and social inclusion. Chin (2002) described these as “collateral consequences”, particularly lost earning potential, which disproportionately impacts those with chronic illnesses, who already face economic hardship. Stigmatization further compounds these effects. Steve Rolles and colleagues (2016: 104) argue that prohibition is “socially corrosive” because it perpetuates stigma, “the burden of which is carried primarily by already marginalized or vulnerable populations”. Research consistently shows that policing

disproportionately targets ethnic minorities, meaning they are more likely to be harmed by both unequal medical access and criminal enforcement (Shiner & Ors 2018). Evidence on drug law enforcement shows that Black individuals are far more likely to be stopped, searched and prosecuted for drug offences despite broadly similar patterns of use. When lawful medical cannabis is effectively restricted to those able to navigate private healthcare systems, these existing patterns of uneven enforcement risk being reproduced within the emerging medical framework (Shiner & Ors 2018). These dynamics reveal how the system produces disproportionate and predictable harm to vulnerable groups. As discussed in the following section, this evidence demonstrates how the law conflicts with key principles of necessity and proportionality under Articles 8 and 14.

People with disabilities are similarly affected. They are more likely to self-medicate due to shortcomings in conventional care and often cannot afford private prescriptions, particularly at higher doses required to manage chronic conditions. Professor David Nutt (2012: 83) has described the criminalization of people who are sick or disabled as “inhumane”, forcing them into criminal markets and leaving them in avoidable pain and anxiety. Axel Klein and Gary Potter (2018: 67-68) likewise highlight how these patients are “criminalised by government, denounced by their doctors and cheated in the underground markets”, resulting in an ongoing “sense of fear and betrayal”. Stigma is also experienced in health settings, especially by those with poorly researched and understood conditions. As the London Drugs Commission (2025: paragraph 4.66) notes, NHS delays in diagnosis and treatment may leave many to self-medicate, placing them outside of legal protection. Such legal vulnerability deepens inequalities in access to healthcare, protection of rights, and exposure to harm

There is also a gendered dimension. Women are disproportionately affected by chronic pain conditions such as fibromyalgia and endometriosis, which may benefit from this medication (Clauw 2014: 1548; Zondervan & Ors 2020). Yet systemic and financial barriers persist. Diagnostic delays, dismissive treatment, and limited conventional treatment options disproportionately affect women, adding another layer of disadvantage (Dusenbery 2018). Cannabis has been shown to be highly effective in relieving pain, often outperforming conventional medications (Armour & Ors 2019: 21). As Mike Armour and Justin Sinclair (2023: 118) explain, existing pharmaceuticals are frequently ineffective and may carry significant addictive potential. They also highlight that both female-specific conditions and the role of the endocannabinoid system are under-researched, reflecting a broader medical gender bias (Armour & Sinclair 2023: 118-119). In light of the higher prevalence of these

conditions among women, combined with obstacles to lawful access to cannabis-based treatments, women are disproportionately exposed to criminalization when seeking to manage chronic pain. This matters for Article 14 because exclusion from lawful access is shaped not only by income, but also by whose pain is taken seriously, diagnosed promptly and treated adequately within mainstream healthcare.

This illustrates how social identity and structural disadvantage intersect. Coined by Kimberlé Crenshaw, the term intersectionality describes how overlapping characteristics, such as race, gender, disability and class, can produce intensified forms of marginalization (Crenshaw 1989). For example, a woman with a disability from an ethnic minority background may face greater barriers to obtaining legal prescriptions and a higher level of criminalization. These disparities require a substantive view of equality. Even though the criminal law may appear neutral, its real-world impact can deepen existing vulnerabilities and undermine the equal protection of rights (Fredman 2016: 279). Structural barriers are not experienced uniformly and are amplified at the intersections of race, gender, disability, and class. Human rights-based reform must therefore not only decriminalize possession but actively tackle the barriers that exclude marginalized groups from legal protection and medical care. The next section examines these issues through Articles 8 and 14 ECHR, arguing that decriminalization of possession for personal use is the necessary first step, alongside broader reforms aimed at repairing these inequalities.

[D] INTERFERENCE WITH AUTONOMY AND EQUALITY RIGHTS

Human rights set minimum standards of protection grounded in equality, making them central to this issue. As outlined above, the regulatory divide between lawfully prescribed cannabis and the criminalization of the same substance outside the prescription system gives rise to the issues examined in this section. Human rights limit excessive deference to state discretion, ensuring that public interest arguments do not automatically override individual rights. This is relevant where the public health justification for criminalizing unlawful medical cannabis use appears neither proportionate nor convincingly achieved. Focusing on rights under the ECHR is the most practical approach, as it is incorporated into domestic law through the Human Rights Act 1998. The European Court of Human Rights (ECtHR) has recognized positive obligations owed by the state, such as duties to safeguard life and ensure access to

healthcare, but these fall outside the scope of this article (*Lopes de Sousa Fernandes v Portugal* 2018). The core question under Article 8 is therefore whether the state can continue to criminalize therapeutic users once it has accepted that cannabis may constitute legitimate medical treatment while maintaining an exceptionally narrow framework for lawful access. Once lawful access is structured so narrowly that many therapeutic users remain outside legal protection, the resulting pattern of criminalization raises serious issues under Article 14 read with Article 8.

Article 8 safeguards the right to private life, imposing a negative obligation on states to refrain from unjustified interference. Its scope has been interpreted expansively to encompass autonomy, self-determination and bodily integrity (*Pretty v UK* 2002: paragraph 61). Criminalizing cannabis use represents a serious intrusion into an individual's autonomy in decisions relating to health (*X & Y v the Netherlands* 1986: paragraph 22; *Glass v UK* 2004). Even the threat of sanctions can cause considerable anxiety, particularly for those using cannabis to manage chronic pain. Studies of UK medical cannabis patients show that criminalization contributes to stress, stigma and fear of legal repercussions (Beckett Wilson & Metcalf McGrath 2023; Metcalf McGrath & Beckett Wilson 2024). However, Article 8 is not absolute. Under Article 8(2), interference may be permitted if done in accordance with law, pursuant to a public interest aim, and necessary in a democratic society. The first two requirements are satisfied, as criminalizing possession has a clear basis under the MDA (*Vavřička & Ors v Czech Republic* 2021: paragraph 269). These restrictions are justified on public health grounds because of concerns about unregulated illicit cannabis and lack of clinical supervision. The crucial question is then whether the current approach strikes a fair balance between competing interests and is no more intrusive than necessary.

States are generally afforded a wide margin of appreciation, particularly in areas lacking European consensus or involving complex health policy. That said, principles from case law suggest that criminalization may be disproportionate and unjustified in this context. In *Herczegfalvy v Austria* (1993: paragraph 82), stricter scrutiny was required in relation to psychiatric patients due to their vulnerability and position of "inferiority and powerlessness". In *Dickson v UK* (2008: paragraph 85), blanket restrictions violated Article 8 because they failed to conduct individual assessments and therefore imposed disproportionate interference with fundamental rights. On this basis, the continued use of criminal law against therapeutic users who cannot access prescriptions is a disproportionate interference, particularly given their vulnerability, the

lack of harm to others, and inequitable medical access. Less restrictive alternatives, such as Portugal's decriminalization model, illustrate that the present UK model is not the least intrusive means of protecting public health (Eastwood & Ors 2016; Greer & Ors 2022). The state's public health justification also becomes increasingly difficult to sustain once the law itself accepts that cannabis may be used legitimately for therapeutic purposes. This reveals a clear inconsistency. Cannabis is recognized as having legitimate medical uses, yet people who rely on the same substance for similar therapeutic reasons remain exposed to criminal sanctions when they cannot access the narrow prescription framework. As such, the present system constitutes a disproportionate interference with Article 8.

The current system also results in indirect discrimination, contrary to Article 14. Structural disadvantages mean that some individuals are more likely to require medical cannabis but less likely to access it lawfully, exposing them to disproportionate harm. Article 14 must be read in conjunction with Article 8, although a breach of Article 8 is not required provided the issue falls within its scope (*Rasmussen v Denmark* 1984: paragraph 29). This requirement is satisfied because criminalization directly engages bodily integrity and autonomy in medical decision-making. Strasbourg has interpreted Article 14 widely to protect individuals from discriminatory treatment in the enjoyment of Convention rights, even where the underlying right is not itself infringed (*Stec & Ors v UK* 2006: paragraph 55; *Guberina v Croatia* 2016: paragraph 67). Not all distinctions constitute discrimination. A violation requires differential treatment between individuals in "relevantly similar" positions based on personal characteristics (*DH & Ors v Czech Republic* 2008: paragraph 175). The grounds are interpreted flexibly and include race, gender, and disability. Lawful and unlawful medical cannabis users who rely on the substance for health reasons are in relevantly similar situations. The only distinguishing factor is their ability to secure prescriptions, which is often shaped by inequalities linked to personal characteristics. The Court has recognized disability and health status as grounds requiring strict scrutiny due to the vulnerability of these groups (*Glor v Switzerland* 2009: paragraph 84; *Kiyutin v Russia* 2011: paragraph 57). Given that medical cannabis use is inherently health-related, the discriminatory impact of criminalization requires heightened scrutiny.

Indirect discrimination arises where policies that appear neutral have "disproportionately prejudicial effects on a particular group" by wrongly failing to "treat differently persons whose situations are significantly different" (*Thlimmenos v Greece* 2000: paragraph 44; *Hugh Jordan v UK*

2001: paragraph 154; *DH & Ors v Czech Republic* 2008: paragraph 184). Evidence on drug law enforcement in England and Wales reveals how ostensibly neutral laws can produce differential outcomes in practice, disproportionately affecting marginalized groups (Shiner & Ors 2018). The effect of the existing framework is therefore not simply unequal outcomes but unequal protection from criminal sanction. Individuals using cannabis for therapeutic purposes remain subject to criminal law largely because they cannot access the narrow prescription structure, a distinction closely linked to structural inequalities such as disability, income and access to healthcare. The ECtHR's interpretation of Article 14 therefore extends beyond formal equality to look at the real impact of laws on disadvantaged groups. Although the 2018 reforms legalized medical cannabis, it was done in a manner that remains highly unequal in effect. The most severe consequences are suffered by those unable to obtain lawful prescriptions, often those who are already disadvantaged, leading to considerable disparities in respect of human rights. This reinforces the need for a substantive equality approach, as a narrow focus on formal equality risks entrenching disadvantage (Fredman 2016: 279).

As with Article 8(2), the key question under Article 14 is whether the lack of differential treatment is objectively and reasonably justified. States may restrict individual rights to pursue legitimate public interest objectives provided there is a "reasonable relationship of proportionality" between the measure and the aim of protecting public health (*DH & Ors v Czech Republic* 2008: paragraph 175). The margin of appreciation doctrine grants states a degree of discretion in determining the extent to which differential treatment is justified, particularly in complex policy areas where there is no clear European consensus. This introduces an element of uncertainty, as outcomes depend on the specific issue. Strasbourg is generally reluctant to intervene if the policy is considered proportionate, as its role is not to determine whether the policy "represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way" (*Šaltinytė v Lithuania* 2021: paragraph 77). This creates a challenge for arguing that the UK has exceeded its margin of appreciation in criminalizing unlawful medical cannabis users. However, the absence of individualized assessments, combined with the disproportionate burden on marginalized groups, raises serious concerns regarding the compatibility of the current regime.

The margin of appreciation introduces uncertainty, but it also allows flexibility in how Convention rights are interpreted. It provides room to argue that the fundamental nature of the rights involved, combined with entrenched inequality, justifies a narrower margin. Discrimination on

grounds of disability and health demands stricter scrutiny, requiring stronger justification from the state and narrowed discretion. For example, in *DH & Ors v Czech Republic* (2008: paragraphs 181-182), the Court held that "special consideration" was required to protect those part of a "disadvantaged and vulnerable minority". As such, the vulnerable position of unlawful medical cannabis users, particularly where disadvantage intersects with race, gender, and disability, warrants enhanced protection. This was reinforced in *Kiyutin v Russia* (2011: paragraph 74), where the state exceeded its narrow margin because the applicant's HIV health status placed him in a "particularly vulnerable group". The Court also stressed that states must correct the "lasting consequences" of stigma and "social exclusion" resulting from past discrimination (*Kiyutin v Russia* 2011: paragraphs 63-64). This reflects a substantive equality approach requiring states to take active steps to address structural disadvantage. In this context, the combined impact of limited medical provision and criminalization is magnified along multiple lines of disadvantage. The Court has also started to recognize more explicitly how different forms of disadvantage interact, suggesting that intersectional forms of disadvantage may play an increasingly important role. In *FM & Ors v Russia* (2024), the ECtHR acknowledged the relevance of intersectional discrimination, recognizing that overlapping forms of vulnerability and disadvantage may shape the enjoyment of Convention rights. The case involved trafficking under Articles 4 and 14, but it reflects a broader willingness by the Court to recognize that multiple axes of disadvantage may require a more nuanced equality analysis.

Recognition of positive obligations under Articles 8 and 14 is a crucial area for future investigation. Once the negative obligation to avoid unjustified discriminatory interference is satisfied through decriminalization, attention can turn to positive duties. Article 8 requires not only refraining from interference but also ensuring effective protection of rights, which may require a regulatory system that facilitates genuine access to treatment (*Tysiac v Poland* 2007: paragraph 110; *P & S v Poland* 2012: paragraphs 99, 108). This does not mean the state must provide specific medications, but breaches may arise where state inaction directly interferes with Article 8 (*Botta v Italy* 1998: paragraph 29; *Hristozov & Ors v Bulgaria* 2012: paragraph 108). When read with Article 14, Article 8 may also require the state to actively prevent and address discrimination relating to health and disability. In this context, the margin of appreciation narrows due to the vulnerability of affected groups and the history of disadvantage (*Jivan v Romania* 2022: paragraph 42; *Guberina v Croatia* 2016: paragraph 73).

In *Cam v Turkey* (2016: paragraph 65), the Court affirmed that failure to make adjustments may constitute discrimination but was careful to recognize limits in order to avoid placing a "disproportionate or undue burden" on states. Universal NHS-funded medical cannabis remains a long-term goal, but decriminalizing possession for personal use does not create such a burden. It represents an essential step towards reducing immediate harms and social disparities, forming the foundation for further rights-based reform.

In summary, the proportionality requirement under Article 8(2) is not met, meaning that the criminalization of unlawful medical users constitutes an unjustified interference with the right to private life. Likewise, the unjustified failure to distinguish between unlawful medical and recreational cannabis use amounts to discrimination contrary to Article 14 read with Article 8, particularly due to the vulnerability and structural inequalities involved. Future reform arguments may rely more heavily on the state's positive obligations. The broad margin of appreciation in complex areas of evolving health policy makes this harder to establish at present. The relatively recent legal status of medical cannabis and its high cost also raise resource allocation difficulties within the NHS, meaning that universal provision could currently be viewed as an excessive burden (Bone 2019: chapter 4). Courts have historically been reluctant to intervene in healthcare resource allocation decisions, recognizing the need for discretion in the distribution of limited resources. However, decriminalization would be a proportionate and effective means of addressing the discriminatory impact of current laws, reducing harm and preventing the entrenchment of social and health inequalities. Maintaining the *status quo* not only fails to protect health and rights but actively undermines them.

[E] TOWARDS HUMAN RIGHTS-BASED REFORM

Reform from a human rights perspective must be grounded in equality and autonomy. The current framework produces both a disproportionate interference with autonomy under Article 8 and unequal protection of rights under Article 14. Decriminalization responds directly to these concerns by removing criminal penalties for possession and reducing unequal exposure to sanctions faced by those unable to access lawful prescriptions. The first step towards meaningful change should therefore prioritize negative rights through decriminalization. Removing criminal penalties for possession would lessen the harmful effects of the regulatory

divide on those unable to access lawful prescriptions, while also addressing the disproportionate interference with rights identified above. Once decriminalization is implemented, attention can shift towards positive rights, including the development of enforceable obligations to facilitate access to treatment and address systemic inequalities.

Decriminalization therefore follows directly from the proportionality concerns identified under Article 8 and the unequal protection of rights under Article 14. Until the NHS adequately funds this treatment, the immediate priority is ending the harms of criminalization. Decriminalizing possession for personal use would protect individuals using cannabis medicinally but unable to afford private prescriptions, ensuring more equal enjoyment of rights. To achieve this, Alex Stevens and colleagues (2024) propose repealing sections 5(1) and 5(2) of the MDA. Repealing these provisions would constitute formal decriminalization in law, providing legal clarity and reducing the discriminatory effects of informal, discretionary policing. A similar proposal has recommended regulating cannabis under the Psychoactive Substances Act 2016 (PSA) rather than the MDA, because possession is not criminalized except in custodial settings (London Drugs Commission 2025: paragraphs 10.301-10.303, 10.311). This highlights an inconsistency in the existing framework. Possession of substances falling within the scope of the PSA is not criminalized, whereas possession of cannabis under the MDA remains a criminal offence.

It is also necessary to distinguish between different forms of decriminalization. *De jure* decriminalization involves formal legislative change removing criminal penalties for possession and would signal that possession should no longer attract stigma, reinforcing protection from discrimination and equal respect for rights. By contrast, *de facto* decriminalization describes situations in which criminal offences remain in place, but enforcement is softened through diversion schemes, warning systems, or discretionary police outcomes. In the UK, elements of *de facto* decriminalization already exist in some police forces through diversion schemes and informal responses to minor possession (Stevens & Ors 2022; Transform Drug Policy Foundation nd). However, reliance on discretion may reproduce the same inconsistencies and inequalities identified earlier in this article. Where criminal offences remain in place, individuals continue to face legal uncertainty and the anxiety associated with potential prosecution. That uncertainty itself constitutes an interference with private life under Article 8, and discretionary enforcement also risks reinforcing discriminatory outcomes. Formal decriminalization therefore provides more reliable protection for autonomy and equality.

Reform must also allow for an individualized assessment of therapeutic use. Individuals should be able to explain their medical use without needing formal proof of diagnosis, particularly given the barriers many patients face in obtaining medical recognition of chronic pain disorders. Policies that depend on strict evidential requirements, such as proof of diagnosis, may reproduce the same inequalities identified earlier in this article. Furthermore, therapeutic and recreational cannabis use do not always form a clear binary and attempts to impose strict distinctions within criminal law risk creating new forms of arbitrariness and discrimination (Hakkarainen & Ors 2019). A narrow medical exemption requiring proof of diagnosis would be likely to replicate many of the same difficulties that currently restrict access to lawful medical cannabis.

These issues are particularly relevant in relation to possession thresholds and supply offences. Individuals using cannabis therapeutically may purchase and store larger quantities in order to minimize contact with illicit markets and maintain a reliable supply to manage their health (O'Reilly & Ors 2022). Yet this may be treated as evidence of an intent to supply. A fixed threshold above which possession is automatically treated as supply would risk recreating the same harms for those with chronic illnesses or disabilities whose health circumstances may require larger quantities. This raises the same Article 14 concerns discussed earlier, as discretionary enforcement practices would continue to disadvantage those using cannabis because of health-related needs. A more equitable system would allow individuals to explain the context of their possession, including situations where larger quantities are held for personal therapeutic use.

The form that decriminalization takes varies significantly across jurisdictions. As Alissa Greer and colleagues (2022) emphasize, decriminalization is not a single model but a category encompassing a range of legal models. Key questions include which offences are removed from criminal law, how possession thresholds are defined, and whether administrative or health-based responses replace criminal sanctions. Stevens and colleagues similarly distinguish between depenalization, diversion, and full decriminalization as different responses to simple possession offences (Stevens & Ors 2022). These distinctions demonstrate that there is no single model of reform, and the detailed design of such policies requires further research. The central point for this article is that the current framework of criminalization is incompatible with the protection of autonomy and equality for those using cannabis therapeutically. Formal decriminalization of possession for personal

use represents the minimum reform necessary to address these harms, leaving more detailed regulatory questions for future development.

International experience provides useful insight into both the benefits and the challenges of decriminalization. Portugal is the clearest example. In 2001 it removed criminal penalties for possession of small quantities of drugs for personal use and replaced them with administrative responses. Crucially, this reform was accompanied by sustained investment in treatment services, harm reduction and wider social support. Research on Portugal's experience suggests that fears of dramatic increases in drug use did not materialize, and engagement with treatment and health services improved (Gonçalves & Ors 2015; Eastwood & Ors 2016: 28). The Portuguese model therefore shows how decriminalization can mitigate the impact of criminalization while shifting responses towards health-based support where appropriate.

Decriminalization is "not a panacea" yet the evidence clearly shows "the harms of criminalization far outweigh those of decriminalization" (Eastwood & Ors 2016: 9). At the same time, recent developments elsewhere demonstrate that the design and implementation matter. In Oregon, Measure 110 decriminalized possession of small quantities of drugs in 2020, but political backlash and implementation difficulties led to partial reversal in 2024 (Oregon Judicial Department 2024; Good & Ors 2025; Oregon Secretary of State 2025). British Columbia introduced a similar exemption in 2023, later narrowing its scope and subsequently allowing the measure to expire in 2026 (Ministry of Mental Health and Addictions 2021; Government of British Columbia 2026). These examples do not undermine the case for decriminalization itself. Rather, they show the importance of coupling legal reform with adequate public health infrastructure, clear communication about policy objectives and realistic expectations about outcomes (Ali & Ors 2026). They also highlight the need to learn from implementation challenges elsewhere so that UK reform is carefully designed and not vulnerable to reversal. These examples concerned the decriminalization of possession of all drugs, whereas this article focuses specifically on cannabis within the context of a partially legal medical framework.

In the UK, the case for reform is strengthened by the regulatory divide between lawful and unlawful medical use. CBPMs are legally available in principle, but access remains extremely limited. Many individuals managing chronic conditions therefore rely either on expensive private prescriptions or on the illicit market. Decriminalization of possession for personal use would not eliminate this divide entirely, but it would

substantially reduce the risk that individuals seeking relief from chronic illness face criminal sanctions. In doing so, it would mitigate the disproportionate interference with autonomy and the unequal protection of rights identified earlier in this article.

Decriminalization alone cannot resolve the wider embedded inequalities associated with medical cannabis. A rights-based approach must also deal with the limitations preventing individuals from accessing lawful treatment. Expanding NHS access, improving clinician education, and increasing investment in health and social services are essential components of meaningful reform. Criminal records for past possession offences can also create long-term barriers to employment, housing, and social participation, perpetuating stigma and structural disadvantage (Chin 2002). Expungement of previous possession convictions would be an important step in repairing the harms caused by this regulatory divide and its unequal effects (Garius & Ali 2022). Evidence from jurisdictions such as Portugal also suggests that decriminalization is most effective when accompanied by sustained public health investment and social support (Gonçalves & Ors 2015). Human rights-based reform must remove criminal penalties and begin dismantling the barriers faced by those who use cannabis.

Drug-driving law is another area that requires reform. Current legislation relies on *per se* THC limits that do not necessarily correspond to actual impairment.[2] Because THC can remain detectable long after intoxication has passed, those who use cannabis therapeutically will often exceed these thresholds despite not being impaired (Desrosiers & Ors 2014; Arkell & Ors 2021). This is especially significant for people who use cannabis regularly to manage chronic conditions. Impairment-based offences clearly serve a legitimate public safety purpose, but the same cannot easily be said of very low *per se* THC limits. Fully analysing this issue falls beyond the scope of this article but remains an important area for future research and policy reform.

Formal decriminalization of possession for personal use represents a proportionate and necessary first step towards a more coherent and equitable drug policy. By removing criminal penalties for individuals who use cannabis to manage their health, decriminalization would reduce the immediate harms produced by the current regulatory regime while allowing space for more comprehensive health-focused reforms to develop over time. A rights-based perspective on drug policy must prioritize the

[2] Drug Driving (Specified Limits) (England and Wales) Regulations 2014, SI 2014/2868, regulation 2; Road Traffic Act 1988, section 5A.

protection of autonomy and equality under Articles 8 and 14 and remain responsive to evolving medical knowledge and social needs. As global drug policy continues to shift, including growing interest in the therapeutic use of substances such as MDMA and psilocybin, the experience of medical cannabis should inform future reforms (Nutt 2023). Ensuring that individuals are not criminalized for seeking relief from illness must remain central to the development of effective and rights-respecting drug policy.

[F] CONCLUSION

The legalization of medical cannabis in 2018 marked a symbolic shift in UK drug policy, but in practice it has offered limited and uneven protection. NHS access remains highly restricted, leaving many patients reliant on private prescriptions or criminalized for self-medicating. The gap in access and the continued harms of criminalization have serious real-world consequences for individuals managing their health. Far from safeguarding public health, the current framework undermines key human rights, particularly autonomy and protection from discrimination. This article has shown that criminal law disproportionately interferes with Article 8, intruding on personal health decisions without sufficient justification. By failing to distinguish between medical and recreational use, blanket criminalization lacks sufficient objective justification and results in indirect discrimination contrary to Articles 14 and 8. This is particularly harmful for those already facing systemic barriers to access, such as women, people with disabilities, and ethnic minorities, whose marginalization is compounded by unequal enforcement.

Future developments may involve recognizing stronger positive obligations to address these inequalities. However, immediate reform must begin with formal decriminalization of possession for personal use. Such reform would not only reduce harm and prevent rights violations but also begin to dismantle stigma and structural barriers. Ultimately, the 2018 reforms risk concealing a system that continues to punish those it purports to protect. A human rights-based approach to cannabis policy must prioritize autonomy and substantive equality. Without such a shift, the law will continue to criminalize conduct it already recognizes may be medically legitimate, leaving the promise of medical cannabis reform largely illusory.

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Lydia Kitchen *is a PhD candidate at the University of Leicester. She holds an LLB (Hons) and LLM from the University of Leicester, where her research focused on human rights and medical cannabis. Her work explores the intersection of drug policy, human rights and access to treatment, with particular emphasis on structural inequality. Her doctoral research focuses on human rights and healthcare decision-making, particularly rationing practices during the Covid-19 pandemic.*

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Evaluation of the Efficacy of the Corporate Insolvency and Restructuring Act 2020 (Act 1015) of Ghana: A Comparative Analysis with the Insolvency Legal Framework of the United Kingdom (Part I)

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Abstract

Before 2020, corporate insolvency in Ghana was governed by a liquidation-focused framework under the Bodies Corporate (Official Liquidations) Act 1963 (Act 180), which was criticized for its limited capacity to rescue distressed companies. The enactment of the Corporate Insolvency and Restructuring Act 2020 (Act 1015) (CIRA) marked a shift towards a rescue-oriented regime aligned with international best practices. This study evaluates CIRA's effectiveness after its introduction through a comparative analysis with the United Kingdom. The article finds that, while CIRA represents significant progress, challenges remain in judicial specialization, procedural efficiency, and institutional capacity, necessitating targeted reforms to enhance corporate rescue outcomes.

Keywords: corporate insolvency; corporate rescue; restructuring agreement; administration; liquidation; moratorium; creditor rights; judicial oversight; cross-border insolvency; comparative insolvency law; insolvency framework; creditors; insolvency practitioners; courts.

[A] INTRODUCTION

The corporate insolvency landscape in Ghana has evidently undergone a radical transformation in accordance with the changing global trends with the introduction of the Corporate Insolvency and Restructuring Act 2020 (Act 1015) as amended by the Corporate Insolvency and Restructuring (Amendment) Act 2020 (Act 1031) (hereinafter referred to as CIRA).

The introduction of CIRA is an attempt to elevate Ghana's insolvency regime to meet international best practices and to protect companies during their vulnerable moments. The passage of CIRA marked a shift

from the previous liquidation-focused regime under the Bodies Corporate (Official Liquidations) Act 1963 (Act 180) for a more modern rescue-oriented insolvency regime.

Historically, the passage of Act 180 came on the wings of the rapidly changing economic scene, fuelled by the exponential growth in commerce after colonial rule. Act 180 was founded on the recommendations of the Insolvency Commission which was appointed under the Commission of Enquiry Ordinance (Cap 249) to review the applicable insolvency law in Ghana and provide recommendations for reforms. The recommendations were contained in the Report of the Commissioners Appointed to Enquire into the Insolvency Law of Ghana (1961: 15, paragraphs 419-422).

The primary aim of Act 180 was to eliminate dishonest and unreliable traders, subjecting such individuals to the duties and disabilities of bankrupts, and to assist in reviving or restructuring the honest debtor. Act 180 was criticized over the years for its procedural rigidity, absence of corporate rescue mechanisms, and overemphasis on liquidation (Adarkwa 2017: 198-210). Although the reforms proposed by Professor L C B Gower (1961), who played a central role in Ghana's post-independence company law reform process during the early 1960s, culminated in the Companies Act 1963 (Act 179) and modernized company law while introducing insolvency mechanisms, the regime remained predominantly liquidation focused.

The promulgation of CIRA was largely practitioner-led and championed by the Ghana Association of Restructuring and Insolvency Advisors (GARIA) (Date-Bah 2022: 17).

To what extent is this realignment of Ghana's insolvency regime effective when compared with the insolvency frameworks of other countries? Research indicates that Ghana's experience in insolvency advancement mirrors broader regional struggles with insolvency law reform, particularly regarding implementation, institutional capacity, creditor–debtor balance, and corporate restructuring efficacy. It is therefore imperative for a comparative insolvency legal analysis to be conducted.

The United Kingdom (UK) provides a useful comparator because its insolvency law has evolved from punitive origins into a sophisticated, rescue-oriented system. Early legislation, such as the Bankrupts Act 1542, treated insolvency as misconduct while introducing collective distribution principles that later developed into the *pari passu* rule. By the nineteenth century, insolvency law had shifted away from moral blame as business failure came to be understood as a commercial risk. These

developments culminated in the Cork Report of 1982, which laid the foundation for a modern framework centred on rescue, creditor fairness, and accountability.

Today, the UK's insolvency framework is anchored by the Insolvency Act 1986 and its subsequent reforms and decades of refined judicial interpretation. It offers one of the most comprehensive restructuring frameworks. It combines flexibility with strong institutional support and has developed into a leading venue for cross-border restructuring. Empirical indicators reinforce this position, as reflected in high recovery rates and strong global rankings reported in the World Bank's *Doing Business* 2020 (2019) and *Business Ready (B-READY) Index* (2025). These features justify its use as a benchmark for evaluating Ghana's insolvency regime.

This article analyses the insolvency frameworks of Ghana and the UK, evaluates the effectiveness of CIRA through comparative analysis with the UK regime, and proposes policy recommendations for reform in Ghana.

This is Part I of a two-part publication. It provides an overview of CIRA and UK insolvency legal framework by examining the principal insolvency mechanisms and institutional frameworks in both jurisdictions. The exposition forms the basis for the detailed comparative analysis undertaken in Part II (this issue, pages 974-998).

[B] THE INSOLVENCY FRAMEWORK OF GHANA

Insolvency mechanisms

The framework of CIRA is designed to give distressed but potentially viable companies an opportunity to continue as going concerns, while ensuring more efficient and fair outcomes for creditors than an immediate liquidation would deliver.

CIRA recognizes insolvency primarily through a cash-flow test based on a company's inability to pay its debts as they fall due (section 169), irrespective of whether its assets exceed its liabilities. In addition, statutory indicators permit assessment of the company's financial position by reference to its liabilities and assets where relevant for administration (section 1(2)) or liquidation proceedings (section 83(5)(a).

Section 83 sets out the statutory indicators of inability to pay debts for liquidation as where: (a) a creditor owed at least 10,000 currency

points serves a written demand and the company fails within 30 days to pay, secure, or compound the debt; (b) execution on a judgment debt is returned unsatisfied in whole or in part; or (c) it is proved to the satisfaction of the Registrar that the company is unable to pay its debts, taking into account contingent or prospective liabilities. Regulation 4 of the Corporate Insolvency and Restructuring Regulations 2025 (LI 2502) supplements this framework by providing balance-sheet and cash-flow solvency tests for assessing a company's financial position.

Administration is the most significant innovation under CIRA. It is positioned as the first formal legal process for managing a company in distress. Section 1(2) sets out the purpose of administration as a rescue mechanism. It operates as a temporary intervention aimed at stabilizing a distressed company, preserving its business as a going concern where possible, and achieving outcomes for creditors that are better than an immediate liquidation. Under section 3(7), a company may voluntarily appoint an administrator where its directors resolve that the company is insolvent or likely to become insolvent. The administrator must be an insolvency practitioner as provided under section 154(1)(c). Once an administrator is appointed, the administration formally commences and continues until it is terminated by restructuring, liquidation, or court order as set out under section 2(2) and (3).

On appointment, the administrator, under sections 10 and 11 assumes control of the company's business, property, and affairs. Directors remain in office but are effectively inactive unless authorized and may not exercise management powers without the administrator's consent. This centralizes decision-making previously exercised by the directors in an administrator, who may (1) investigate the company's viability, (2) operate or realize assets of the company, (3) defend proceedings on behalf of the company, and (4) exercise the company's corporate powers, in order to preserve value and prevent fragmented creditor action while maintaining the company as a going concern.

Although control rests with the administrator, which reduces coordination failures, its effectiveness ultimately depends on the administrator's judgement and access to reliable information. However, these are matters that are beyond the scope of the statute.

During administration, CIRA, through sections 30 to 34, imposes a moratorium that stays enforcement and recovery actions against the company's assets and restricts dealings with those assets. This moratorium is not absolute but is subject to judicial oversight.

The administrator must convene a first creditors' meeting within 10 days of commencement of administration to establish a creditors' committee and to consider the administrator's replacement (section 21(1) and (2)).

A defining feature of administration under CIRA is creditor participation through the watershed meeting, which serves as the principal decision-making stage of the administration process. At this meeting, creditors consider the administrator's proposals and vote on the future course of the administration under sections 20-21 of CIRA, supplemented by regulations 20-27 of LI 2502, which govern the convening and conduct of creditor meetings. Creditors may resolve to pursue a restructuring agreement where the company appears capable of rehabilitation, or they may terminate the administration, potentially resulting in liquidation proceedings. Under section 25(4), the High Court retains supervisory authority and may intervene where resolutions of creditors are oppressive or unfairly prejudicial to the interests of the general body of creditors.

This majority-based mechanism enables swift decision-making and reduces the risk of deadlock among creditor groups. However, it also creates potential risks for minority creditors in the absence of effective judicial oversight. By allowing creditors to assess the viability of the company by reviewing the administrator's proposals, the framework promotes efficiency based on creditor incentives and direct knowledge of the company's financial position. Its success thus depends on how information is disclosed timeously and how the courts can effectively control the influence of majority creditors.

If creditors opt for restructuring at a watershed meeting, section 44 requires a detailed, implementable restructuring agreement which must be prepared by the restructuring officer.

A restructuring agreement is approved by creditors at the watershed meeting by a vote of creditors holding at least 51% of the value of the debt, voting in person or by postal vote or proxy (section 28). Upon approval, the agreement must be executed within 21 days or such further period as extended by the court under section 45(2). Where the proposed agreement is not fully approved at the watershed meeting, section 48 prescribes a structured completion and execution timetable, subject to limited extensions by the court within the specified periods. Where the company fails to execute the restructuring agreement within the deadline for execution, the restructuring officer must apply to the court for leave to convert the administration into official liquidation. This moves the restructuring agreement from being aspirational into practical operation.

By requiring early commitment to concrete and enforceable terms, it helps minimize avoidable disputes and risks involved in implementation.

Once executed, the restructuring agreement binds the company, the officers and shareholders, the restructuring officer and the creditors (to the extent provided by section 50). During its subsistence, creditors are restrained from enforcing claims except in accordance with its terms or with the leave of the court. The company is released from pre-administration obligations only to the extent provided in the agreement. Guarantors and third parties are not released unless the restructuring agreement expressly provides otherwise (sections 49-51). This approach promotes coordinated resolution by preventing individual creditor enforcement that could undermine the restructuring process, while ensuring that third-party obligations are not discharged unless expressly provided for.

Liquidation is the final insolvency mechanism under CIRA. Section 169 defines liquidation as the winding-up of a company. Although sections 80-149, which govern the liquidation of insolvent companies, are mainly a re-enactment of Act 180's provisions on liquidation, CIRA introduced significant innovations in the context of liquidation process, including the revised creditor priority scheme and the provision of a new class of post-commencement financing. However, unlike Act 180, CIRA positions liquidation primarily as the consequence of a failed rescue process, although liquidation may still commence independently through the statutory modes set out under section 81(1).

Liquidation centralizes control under the Registrar of Companies as the official liquidator or appointed insolvency practitioners. It may be commenced by: (1) a special resolution of shareholders; (2) a court order on a petition by the Registrar of Companies, creditors, shareholders, contributories, or the Attorney-General; (3) conversion from private liquidation where it becomes evident the company is insolvent; (4) conversion following a failed administration or restructuring (section 81, 84(1A)); or (5) conversion following failure to execute a restructuring agreement approved at the watershed meeting within the statutory period, upon application to court by restructuring officer (section 48).

Upon the commencement of official liquidation, the powers of directors cease, the company's business may continue only to the extent necessary for its beneficial winding-up, and the company's property comes under the custody and control of the liquidator (sections 90, 91, and 102). Any transfer of shares or alteration of members' rights after commencement is void unless sanctioned by CIRA or by the court under section 94, and

civil proceedings against the company are stayed, except with the leave of the court under section 93.

A liquidator, typically nominated by creditors, acts as an officer of the court and is required to exercise their functions independently in the interests of all the creditors. They are empowered to collect and realize the company's assets, recover debts owed to the company, sell company property, and admit or reject creditor claims under sections 97, 101-104, 107, and 120.

The Act further provides mechanisms of investigation and accountability. Liquidators may require the submission of statements of affairs (section 108) and examine directors, officers, and other persons with relevant knowledge of the company's affairs (section 116).

Under CIRA section 97(e)-(f), the liquidator is mandated to enter into compromises during official winding-up proceedings. The liquidator may agree settlements with creditors or persons claiming to be creditors in respect of present or future claims, whether certain or contingent, ascertained or unliquidated, against the company, as well as matters relating to calls, contributories, debtors, or other persons potentially liable to the company.

CIRA equips the liquidator with avoidance powers to challenge or recover certain pre-liquidation transactions entered into during the relevant period as defined in section 122(2). After the realization of assets, the liquidator must distribute proceeds in accordance with the statutory order of priority provided in section 107.

The liquidation process concludes with the submission of audited final accounts to the court. Once approved, the Registrar strikes the company from the register and publishes a notice of dissolution. This terminates the company's legal personality, subject to the preservation of its books and records for a prescribed period and the possibility of restoration within a prescribed period on application by specified persons (sections 134 to 137).

The Cross Border Insolvency framework is also introduced under CIRA by sections 150-152 and the schedule. Cross-border insolvency arises where assistance is required in Ghana by a foreign court or foreign representative, or conversely where Ghanaian proceedings require cooperation abroad. The schedule reproduces the 1997 Model Law developed by the United Nations Commission on International Trade Law (UNCITRAL).

Under paragraph 6 of the schedule, a foreign representative is granted direct access to the court, enabling engagement with the Ghanaian insolvency framework without first commencing domestic proceedings. Recognition is formally initiated under paragraph 12, which allows a foreign representative to apply for recognition of the foreign proceeding in which that representative has been appointed.

Following recognition, the schedule provides mechanisms to preserve the debtor's assets as one pool rather than being sold off piecemeal through individual creditor actions. This ensures all creditors are treated fairly in a collective process.

Where both Ghanaian and foreign proceedings are ongoing, paragraph 26 requires the court to ensure that relief granted is consistent with the domestic proceeding. Similarly, where multiple foreign proceedings exist, paragraph 27 mandates coordination to ensure that relief granted in Ghana aligns with the recognized foreign main proceeding. These provisions aim to: (1) avoid conflicting judicial outcomes; (2) minimize duplication; and (3) support coherent cross-border administration.

The cross-border regime under CIRA performs three core systemic functions: (1) it facilitates recognition of foreign proceedings through structured judicial oversight; (2) it enables protective relief to preserve the debtor's assets and uphold collective insolvency principles; and (3) it promotes coordination between domestic and foreign proceedings, ensuring orderly administration across jurisdictions.

These functions collectively support international insolvency cooperation while preserving the autonomy of Ghanaian courts. This balance is reinforced by the public policy exception in paragraph 4, which allows the court to refuse action that would be contrary to Ghana's public policy.

As complementary rescue mechanisms, financially distressed companies may also utilize procedures under the Companies Act 2019 (Act 992), independently of the framework established under CIRA. These include court-sanctioned schemes of arrangement under sections 239-240.

Under sections 239-240, a company may propose arrangements or compromises with its creditors, members, or any class of them through a judicially supervised restructuring process. This mechanism facilitates restructuring negotiations under court supervision, although without the automatic statutory moratorium associated with administration under CIRA. Where such an arrangement is proposed, the company,

creditors, members, or liquidator may apply to the High Court for an order convening a meeting of the relevant class to consider and approve the proposed arrangement or compromise. Approval requires creditors or members representing at least 75% in value of those present and voting, either in person or by proxy.

Following the meeting, the Registrar of Companies may recommend the appointment of an independent reporter, whom the court may appoint to assess the fairness and feasibility of the proposed arrangement or compromise. After considering the report and hearing objections by dissenting parties, the court may confirm the arrangement or compromise, with or without modifications, rendering it binding on all affected parties.

A certified true copy of the court's sanction order must be delivered to the Registrar, who registers the order and publishes notice in the Companies Bulletin. Section 240 further requires court sanction where the arrangement or compromise involves the transfer of the whole or part of the undertaking or assets of the company.

Institutional framework of CIRA

CIRA identifies the Office of the Registrar of Companies (ORC), insolvency practitioners, creditors, and the courts as central institutional actors, assigning supervisory, regulatory, and stakeholder consultation functions.

The Insolvency Services Division (ISD) operates under the ORC as established by CIRA. The ISD supervises insolvency practice, regulates the qualification and registration of insolvency practitioners, maintains a statutory register, and monitors professional conduct, although it does not directly oversee insolvency proceedings. The Chartered Institute of Restructuring and Insolvency Practitioners (CIRIP) Ghana website listed 295 practitioners in good standing as of 7 May 2026. In response to an enquiry by CIRIP dated 27 February 2026, the ORC subsequently indicated that, as of 30 April 2026, it had recorded 1,571 insolvency proceedings between 2021 and 2026, compared with 1,447 proceedings recorded between 2021 and 2025, suggesting a modest increase in the use of the insolvency framework.

CIRA requires qualified insolvency practitioners to manage insolvency proceedings under sections 154-155 and accordingly regulates their appointment, remuneration, and removal. LI 2502 further supplements this framework through provisions governing matters such as remuneration, reporting obligations, creditor meetings, and the administrative responsibilities of insolvency practitioners and

liquidators. Practitioners may assume control of company affairs, investigate the financial position, convene creditor meetings, and implement restructuring or liquidation while balancing interests of stakeholders. The Chartered Institute of Restructuring and Insolvency Practitioners Act 2024 complements this framework by introducing licensing and professional regulation that strengthens accountability.

Creditors are placed at the centre of the process as they influence outcomes through meetings, including the watershed meeting, where majority decisions bind dissenting creditors, subject to safeguards and court oversight (section 25). Creditors may replace an administrator, approve or reject restructuring proposals, nominate a liquidator, and establish creditor committees (sections 21-28). Voting mechanisms—including proxy and postal voting—facilitate participation, enabling collective decision-making without direct management control.

CIRA treats secured creditors differently depending on the insolvency procedure in issue. Under administration, a general moratorium applies to both secured and unsecured creditors (sections 33-36). However, a secured creditor may enforce its security with the leave of the court (section 37). During restructuring, secured creditors may realize or enforce their security only where: (1) the restructuring agreement permits such enforcement and the secured creditor voted in favour of it; or (2) the court grants leave under section 52. In determining whether to grant such leave, the court considers whether enforcement would adversely affect the purpose of the restructuring agreement and whether refusal would prejudice the secured creditor more than other creditors. Under liquidation secured creditors may enforce independently, subject to proof for any shortfall.

The treatment of secured creditors thus reflects a collective approach that seeks to preserve value for all creditors while protecting the rights of secured creditors. It must be noted, however, that priority and enforceability of security depend on compliance with the Borrowers and Lenders Act 2020, which governs registration and priority of security interests.

The High Court plays a supervisory and facilitative role, ensuring compliance, resolving disputes, regulating meetings, and overseeing conduct of practitioners. Its powers include appointment and removal of insolvency practitioners, inquiry into misconduct, and enforcement of statutory safeguards. The Court balances rights of creditors with collective rescue objectives, including decisions on lifting the moratorium,

regulating participation of creditors, extending timelines, and supervising liquidation.

Directors, before the commencement of insolvency proceedings, are governed by fiduciary duties under common law and the Companies Act 2019. CIRA introduces additional accountability. Where a company's business is carried on with intent to defraud creditors prior to winding-up, any person, including a director, who knowingly participated commits an offence and is liable on summary conviction to a fine, imprisonment, or both (section 118). Further, directors must not continue trading or incur debts where insolvency is likely, with criminal liability if there is breach (section 119).

Employees and shareholders are also recognized stakeholders during the insolvency process. Under CIRA, employment continues during administration unless terminated. Rights of shareholders are preserved but restricted, with transfers or alterations requiring approval of the court.

[C] THE INSOLVENCY FRAMEWORK OF THE UK

Insolvency mechanisms

The insolvency framework of the UK is primarily governed by the Insolvency Act 1986, as amended by subsequent legislation, particularly the Enterprise Act 2002 and the Corporate Insolvency and Governance Act 2020 (CIGA), and supplemented by the Insolvency (England and Wales) Rules 2016 and the Companies Act 2006.

Section 123 of the Insolvency Act 1986 establishes two principal statutory tests to determine when a company is to be deemed insolvent and when formal procedures may be invoked. A company is insolvent under a cash-flow test if "unable to pay its debts as they fall due" or is likely to reach that position in the near future. The phrase "unable to pay its debts as they fall due" refers to short-term liquidity pressures, such as overdue wages, tax liabilities, creditor petitions, or unpaid supplier invoices, even if assets have substantial value but are unable to be converted into cash immediately.

Under the balance-sheet test, a company is insolvent where its liabilities exceed its assets. This includes contingent and prospective liabilities such as litigation or future warranty claims to assess long-term financial health. Importantly, it requires realistic commercial appraisal

of assets and liabilities. In *BNY Corporate Trustee Services Ltd v Eurosail* (2013: 28), the court emphasized that the assessment of insolvency is not a mechanical calculation. It requires a fact-based valuation of the company's financial position. Courts must avoid treating remote or speculative risks as indicators of present insolvency. For most practical purposes across the insolvency regime, the decisive issue is whether the company is currently able to pay its debts as they fall due.

The analysis of the UK insolvency toolkit begins with the mechanism of Administration. Administration is a formal collective rescue procedure available where a company is insolvent or likely to become insolvent. Its statutory basis is schedule B1 of the Insolvency Act 1986. Paragraph 3(1) provides that the administrator must seek to (1) rescue the company as a going concern; if that is not reasonably practicable, (2) to achieve a better result for the company's creditors than would be likely on an immediate winding-up; or, failing both, (3) to realize property for distribution to secured or preferential creditors where doing so does not unnecessarily harm the interests of creditors (Insolvency Act 1986, schedule B1, paragraph 3(3)).

Overall, administration is designed to manage the company's affairs, business, and assets in a manner that prioritizes rescue of the company as a going concern where viable but otherwise seeks to achieve a better result for creditors than would be obtained on immediate liquidation. Paragraph 3(2) reinforces this collective orientation by requiring the administrator to perform their functions in the interests of the company's creditors.

Among the most significant effects of placing a company into administration is the operation of a statutory moratorium. Paragraph 43 of schedule B1 to the Insolvency Act 1986 restricts creditor enforcement upon the commencement of administration. During administration, no step may be taken to enforce security, repossess goods under hire-purchase agreements, commence or continue legal proceedings, or exercise a right of forfeiture by peaceable re-entry except with the consent of the administrator or the permission of the court. Although these restrictions are extensive, the court retains discretion to grant leave where appropriate (*Re Atlantic Computer Systems plc* 1992: 542-545; Goode 2018: paragraphs 10-45).

A pre-packaged administration ("pre-pack") is another form of administration in which the principal terms of a sale of the company's business or substantially all of its assets are negotiated before the administrator's appointment, with completion occurring immediately

upon or shortly after the appointment (Goode 2018: paragraphs 1-37). Although now closely associated with the post-Enterprise Act 2002 administration regime, the practice developed from techniques previously employed in administrative receivership.

Where an administration order is sought to implement a pre-pack sale, the court must be satisfied that the statutory purpose of administration is met. In *Re Kayley Vending Ltd* (2009), the High Court emphasized that sufficient information must be provided to enable the court to assess whether the proposed transaction serves the interests of creditors as a whole and whether pre-appointment costs should properly rank as expenses of the administration.

The administrative receivership mechanism historically constituted an enforcement mechanism available to the holder of a floating charge over the whole or substantially the whole of a company's assets (Insolvency Act 1986, section 29(2)). The administrative receiver—typically a qualified insolvency practitioner appointed by the charge holder—assumed extensive managerial control over the company's undertaking for the purpose of realizing the secured creditor's security under section 42 of the Insolvency Act 1986.

The Insolvency Act 1986 consolidated and regulated this regime. However, the Enterprise Act 2002 substantially curtailed its availability by inserting sections 72A-72H into the Insolvency Act 1986. Section 72A restricts the appointment of an administrative receiver under qualifying floating charges created after 15 September 2003, subject to specified statutory exceptions.

Liquidation or winding-up is another insolvency mechanism in the UK insolvency toolkit. The terms "winding-up" and "liquidation" are used interchangeably. The Insolvency Act 1986 (sections 84-96, 122, 143 and 165) provides that, upon a winding-up order or the commencement of liquidation, a liquidator is appointed to realize the company's assets and distribute them in accordance with the statutory scheme. Proceedings against the company are stayed, and the directors' management powers are effectively displaced as administration of the company passes to the liquidator (sections 107, 175 and 176A; *Ayerst v C & K (Construction) Ltd* 1976: 177-178; *Carvill-Briggs v Reading* 2025).

The Insolvency Act 1986 provides two principal routes into liquidation: compulsory liquidation by court order and voluntary liquidation initiated by shareholder resolution. Compulsory liquidation occurs where the court makes a winding-up order, typically under section 122 of the Act.

Voluntary liquidation, governed by part IV of the Act, may proceed either as a members' voluntary liquidation where the directors make a statutory declaration of solvency under section 89, or as a creditors' voluntary liquidation where the company is insolvent.

Creditors' claims are addressed collectively through the proof and distribution process prescribed by the Insolvency (England and Wales) Rules 2016, part 14. A statutory cut-off date governs the admission and valuation of claims, and subsequent events occurring before distribution may be taken into account in valuing contingent debts, as affirmed by the Court of Appeal in *MS Fashions Ltd v Bank of Credit and Commerce International SA* (1993).

Liquidation operates as a collective enforcement mechanism. As Lord Hoffmann explained in *Buchler v Talbot* (2004: paragraph 28): "The winding up of a company is a form of collective execution by all its creditors against all its available assets." The statutory scheme does not alter proprietary rights; rather, it regulates their enforcement and ranking. Although liquidation restrains individual enforcement through the statutory stay in compulsory winding-up, secured creditors generally retain their proprietary rights and may enforce their security outside the statutory order of distribution.

Upon completion of liquidation, in cases of voluntary liquidation, dissolution occurs under section 201 of the Insolvency Act 1986 following the filing of the liquidator's final account. Where the company is wound up by the court, dissolution occurs under section 205 once the registrar receives notice that the winding-up has been completed. This brings the company's legal existence to an end, subject to the possibility of restoration to the register within a prescribed period upon application by specified persons to the court (section 1029 of the Companies Act 2006).

A company voluntary arrangement (CVA) is another insolvency mechanism provided for under part I of the Insolvency Act 1986 and supplemented by the Insolvency (England and Wales) Rules 2016 (part 2). It is designed to facilitate the restructuring and potential rescue of a distressed company while leaving management in the hands of its directors. It enables the company to propose a binding compromise or arrangement with its unsecured creditors in respect of some or all of its debts, subject to creditor approval in accordance with the statutory voting thresholds. A proposal may be made by the company's directors, an administrator, or a liquidator (Insolvency Act 1986, section 1(1)).

Under the CVA, a licensed insolvency practitioner acts initially as nominee, reporting to the court and creditors on whether the proposal has a reasonable prospect of being approved and implemented. If the arrangement is approved, the nominee becomes the supervisor, responsible for overseeing its execution under section 7.

The CVA represents a debtor-in-possession mechanism that prioritizes consensual compromise over displacement of corporate control (Anderson 2017: 84-103). There is no statutory requirement that the company be insolvent in order to propose a CVA, although in practice the procedure is typically deployed where the company is insolvent or at real risk of insolvency (Insolvency Act 1986, sections 2-4A; Insolvency (England and Wales) Rules 2016, rule 15.33).

For a CVA to take effect, it must be approved by the requisite statutory majorities of creditors and members. Approval requires at least 75% in value of creditors voting in favour of the proposal, and the arrangement will not be approved if more than 50% in value of unconnected creditors voting oppose it. A simple majority of members is also required, although where the decisions of creditors and members differ, the creditors' decision prevails. Once approved, the CVA binds all unsecured creditors who were entitled to vote, whether or not they voted or received notice of the meeting. Secured and preferential creditors are not bound without their consent (Insolvency Act 1986, sections 2, 4(1), 4A, 4(3), 4(4), 5(2)(b), and 386).

Section 6 of the Insolvency Act 1986 provides that a creditor, member or contributor may challenge the arrangement within 28 days on grounds of unfair prejudice or material irregularity. The court will assess unfair prejudice by reference to comparative treatment among creditors and the realistic alternative to the CVA, as illustrated in *Discovery (Northampton) Ltd v Debenhams Retail Ltd* (2019).

A court-approved scheme of arrangement is another identifiable insolvency mechanism that enables a company to enter into a compromise or arrangement with its creditors, or with particular classes of creditors, and where relevant its members (Companies Act 2006, section 895(1)). Unlike a CVA, which is contained within insolvency legislation, schemes are governed by part 26 of the Companies Act 2006. Their statutory location outside the Insolvency Act 1986 reflects the fact that they are not insolvency proceedings and may be deployed irrespective of the company's solvency status and do not trigger an automatic moratorium on creditor enforcement. Accordingly, a scheme does not of itself prevent creditors from enforcing their rights during the preparatory stages. Where

protection from enforcement is required, schemes have sometimes been used in conjunction with administration or other protective mechanisms.

Under section 896(2) of the Companies Act, a scheme may be proposed by the company, by a creditor or member, or, where applicable, by an administrator or liquidator. There is no requirement that the company be insolvent or likely to become insolvent under part 26 of the Companies Act. This flexibility has made schemes an important restructuring mechanism, particularly where complex capital structures or unanimity clauses in finance documents would otherwise impede consensual restructuring.

The scheme procedure is court-supervised and proceeds in two principal stages. First, the court considers whether to order meetings of the relevant classes of creditors or members (Companies Act 2006, section 896(1)). At each meeting, the scheme must be approved by a majority in number representing at least 75% in value of those present and voting (Companies Act 2006, section 899(1)). Secondly, if the statutory majorities are achieved, the court must decide whether to sanction the scheme (Companies Act 2006, section 899(3)).

Upon sanction by the court and delivery of the order for registration, the scheme becomes binding on the company and all creditors or members within the relevant classes, including dissenting minorities (Companies Act 2006, section 899(4)).

The restructuring plan, a court-supervised restructuring tool under part 26A of the Companies Act 2006 (sections 901A-901L), was introduced by CIGA 2020 to enhance the UK's rescue-oriented insolvency framework. Although structurally modelled on the schemes of arrangement under part 26, the restructuring plan departs from that framework in several material respects.

A restructuring plan may be proposed where (1) the company has encountered, or is likely to encounter, financial difficulties that are affecting, or may affect, its ability to carry on business as a going concern, and (2) a compromise or arrangement with its creditors or members is proposed to eliminate, reduce, prevent, or mitigate the effect of those difficulties. The statutory threshold under Companies Act 2006, section 901A(2)-(3), is therefore framed broadly and does not require the company to be insolvent.

The procedural structure mirrors the two-stage process applicable to schemes. First, the court determines whether to order meetings of the relevant classes of creditors or members (Companies Act 2006, section 901C(1)). In addition, the court may exclude from participation

those who have no genuine economic interest in the company in the relevant alternative (Companies Act 2006, section 901C(4); *Re Virgin Active Holdings Ltd* 2021; *Re Smile Telecoms Holdings Ltd* 2022).

At each meeting, approval requires a majority of 75% in value of those present and voting (Companies Act 2006, section 901F(1)). Unlike schemes under part 26, there is no requirement for a majority in number. If the statutory majority is obtained in each class, the plan returns to court for sanction. The court retains a discretion whether to sanction, considering compliance with the statutory requirements and the fairness of the process.

The distinctive feature of part 26A is the cross-class cram-down mechanism. Even where one or more classes vote against the plan, the court may sanction it if satisfied that (1) none of the dissenting class members would be worse off under the plan than in the event of the relevant alternative, and (2) at least one class who would receive a payment or have a genuine economic interest in that alternative has approved the plan by the statutory majority. The assessment of the "relevant alternative" and the no-worse-off condition has required judicial engagement with valuation evidence, as reflected in early authorities interpreting the provision (*Re Virgin Active Holdings Ltd* 2021; *Re DeepOcean 1 UK Ltd* 2021).

The scope of the court's discretion under part 26A was further clarified by the Court of Appeal in *Strategic Value Capital Solutions Master Fund LP v AGPS BondCo plc* (*Re AGPS BondCo plc*) (2024). The Court held that satisfaction of the statutory no-worse-off test and supporting creditor approval under section 901G merely establish the jurisdiction to impose a cross-class cram-down and do not create any presumption in favour of sanction. The decision emphasized that courts must undertake a broader assessment of fairness, including a "horizontal comparison" examining whether the restructuring distributes benefits fairly between creditor classes and whether any departure from the *pari passu* principle is properly justified.

Like schemes of arrangement, restructuring plans do not give rise to an automatic statutory moratorium (Companies Act 2006, part 26A; cf Insolvency Act 1986, schedule B1, paragraphs 42-43). Their effectiveness therefore depends upon court approval and, where necessary, the availability of separate protective measures.

Standalone moratorium (debtor-in-possession) established under part A1 of the Insolvency Act 1986, inserted by CIGA 2020, is also available

to eligible companies. The initial moratorium period is 20 business days, beginning on the business day after it comes into force.

Entry is effected by filing the prescribed documents where no winding-up petition is pending, or by court order where one is outstanding. The directors must state that the company is, or is likely to become, unable to pay its debts, and the proposed monitor, who must be a qualified insolvency practitioner, must confirm that it is likely that the moratorium would result in the rescue of the company as a going concern.

During the moratorium, most enforcement of security, winding-up petitions, and legal proceedings are restricted, subject to statutory exceptions. Management remains with the directors, but the monitor must terminate the moratorium if rescue of the company as a going concern is no longer likely or other statutory conditions requiring termination arise.

Eligibility is governed by schedule ZA1, which excludes specified categories of companies and restricts repeat use. The moratorium may be extended by the directors, by creditor consent, or by court order within statutory limits. It ends upon expiry, termination by the monitor, or entry into specified insolvency procedures.

Restrictions on *ipso facto* termination clauses under section 233B of the Insolvency Act 1986, inserted by CIGA 2020, imposes restrictions in specified insolvency contexts—set out in schedule 4ZZA—on *ipso facto* clauses, which historically permitted suppliers to terminate or vary contracts solely because the counterparty entered an insolvency procedure.

Where a company enters administration, a part A1 moratorium, a CVA, or a part 26A restructuring plan, a supplier may not terminate a contract for the supply of goods or services solely by reason of the company's insolvency; nor may the supplier rely on an insolvency-triggered term to vary the contract or require payment of pre-insolvency arrears as a condition of continued supply.

The restriction does not prevent termination for post-insolvency breaches, including non-payment for goods or services supplied during the insolvency period. Termination is also permitted with the consent of the officeholder in administration or, in other relevant procedures, with the consent of the company. In addition, a supplier may apply to the court for permission to terminate if continuation of the contract would cause hardship.

A cross-border insolvency mechanism arises where insolvency proceedings involve a foreign element, whether relating to the debtor's place of incorporation, the location of assets, or the composition of its creditors. English law addresses such situations through three central inquiries: jurisdiction, recognition of foreign proceedings, and choice of law. These questions are informed by the doctrine of modified universalism, under which courts seek to cooperate with foreign insolvency processes so far as this is consistent with domestic law and public policy (*Re HIH Casualty and General Insurance Ltd* 2008; *Cambridge Gas Transport Corp v Navigator Holdings plc* 2006).

The UK's cross-border regime operates through three principal mechanisms: the Cross-Border Insolvency Regulations 2006 (CBIR), section 426 of the Insolvency Act 1986, and residual common law assistance. In *Rubin v Eurofinance SA* (2012), the Supreme Court confirmed that recognition and enforcement of foreign insolvency judgments remain governed by established principles of private international law. The Privy Council in *Singularis Holdings Ltd v PricewaterhouseCoopers* (2014) further emphasized that common law cooperation cannot create powers unavailable under domestic insolvency legislation.

English courts may exercise jurisdiction over foreign companies where a sufficient connection with the jurisdiction exists, a power reflected in the statutory regime governing the winding-up of unregistered companies (Insolvency Act 1986, section 221).

However, the practical reach of English insolvency proceedings remains dependent on recognition by foreign courts. Orders such as moratoria or stays do not automatically bind foreign jurisdictions unless recognized locally. Recognition under the CBIR may nevertheless facilitate cooperation and relief supporting foreign restructuring processes (*Re Videology Ltd* 2018). Cross-border distribution is further shaped by equitable principles such as the hotchpot rule, which prevents creditors from recovering more than their proper entitlement through parallel claims across jurisdictions (*Cleaver v Delta American Reinsurance Co* 2001).

The UK's withdrawal from the European Union significantly altered the cross-border insolvency landscape. From 1 January 2021, the European Union Insolvency Regulation 2015 ceased to apply to UK proceedings, ending the previous system of automatic recognition across member states. As a result, the CBIR now constitute the principal statutory gateway for recognition of foreign proceedings in the UK. Adoption of the UNCITRAL Model Law within the European Union remains limited,

meaning recognition of UK proceedings in many member states depends on national private international law rather than a harmonized regime.

Despite this fragmentation, the UK remains a prominent venue for international restructuring, particularly through schemes of arrangement and part 26A restructuring plans under the Companies Act 2006 (sections 895-901). Judicial cooperation mechanisms, including the Judicial Insolvency Network (JIN) *Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters* (2019), further support coordination in complex multinational restructurings.

Directors' duties in financial distress

While the company remains solvent, directors are primarily required to promote the success of the company for the benefit of its members. As financial distress intensifies, however, creditor interests assume increasing importance. The legal framework governing this shift derives principally from the Companies Act 2006, while the Insolvency Act 1986 supplements these duties through provisions imposing personal liability and enabling the avoidance of certain transactions undertaken before insolvency.

The Supreme Court in *BTI 2014 LLC v Sequana SA* (2022) clarified the scope of directors' duties to creditors as a company approaches insolvency. The Court confirmed that the creditor-interest duty is not a separate duty owed directly to creditors, but rather a modification of the directors' duty to act in the interests of the company. The duty arises where the company is insolvent, bordering on insolvency, or where insolvent liquidation or administration is probable, although the Court did not conclusively determine whether directors must actually know, or ought to know, that such circumstances exist. A merely remote risk of insolvency is insufficient to trigger the duty.

Importantly, the Court adopted a progressive approach to creditor interests rather than a fixed trigger point. As a company's financial condition deteriorates, directors are required to give increasing weight to creditor interests alongside those of shareholders. Where insolvent liquidation or administration becomes inevitable, creditor interests become paramount because shareholders no longer retain any real economic interest in the company's assets.

The Insolvency Act 1986, section 214, establishes liability for wrongful trading. This provision applies where, prior to the commencement of winding-up, a director knew or ought to have concluded that the company

cannot avoid liquidation or administration but failed to minimize loss to creditors. The director will be liable to compensate under section 214.

Under section 213 of the Insolvency Act 1986, liability also arises where the company's business has been carried on with intent to defraud creditors or for any fraudulent purpose. The threshold for liability is significantly higher than in wrongful trading and requires proof of actual dishonesty. Section 993 of the Companies Act 2006 establishes a criminal offence punishable by imprisonment and/or an unlimited fine. Findings of fraudulent trading frequently lead to director disqualification under the Company Directors Disqualification Act 1986.

Under the Insolvency Act 1986, section 238 allows a liquidator or administrator to challenge transactions at an undervalue entered into before insolvency. The relevant period extends to two years prior to the commencement of liquidation or administration. A transaction is considered to be at an undervalue where the company makes a gift or enters into a transaction for consideration significantly less than the value it provides.

Also, section 239 of the Insolvency Act 1986 provides a mechanism for challenging preferential transactions. A preference arises where a company does something that places a creditor, surety, or guarantor in a better position than they would otherwise have been in insolvent liquidation. The relevant period is six months prior to the onset of insolvency, extended to two years where the creditor is a connected person. A key element of the statutory test is that the company must have been influenced by a desire to prefer the creditor. This requirement distinguishes preferences from ordinary commercial transactions.

Section 245 of the Insolvency Act 1986 invalidates floating charges granted within 12 months prior to insolvency, or two years where the charge holder is connected with the company, except to the extent that the charge secures new value. New value may consist of money paid, goods or services supplied, or the discharge of existing indebtedness. The purpose of the provision is to prevent creditors from improving their position shortly before insolvency at the expense of the general body of creditors.

The institutional framework of UK insolvency law

The UK insolvency law system is implemented through a network of institutional actors. The Insolvency Service is an executive agency of the Department for Business and Trade and a central institution in the UK insolvency framework. Operating under the authority of the Secretary

of State for Business and Trade, it performs three principal functions: administration, regulation, and enforcement (Insolvency Service 2022).

The Insolvency Service administers personal insolvency procedures such as bankruptcy and debt relief orders. It also operates the redundancy payments service for employees of insolvent employers (Insolvency Service 2024-2025). It also oversees the insolvency profession by supervising recognized professional bodies that license and regulate insolvency practitioners under the Insolvency Act 1986, section 391. Additionally, the Insolvency Service investigates misconduct connected with insolvency and may pursue director disqualification under the Company Directors Disqualification Act 1986 (sections 6-7). Since 2021, its powers extend to investigating the conduct of directors of dissolved companies, strengthening enforcement against corporate misconduct and economic crime (Rating (Coronavirus) and Directors Disqualification (Dissolved Companies) Act 2021, sections 1-2, amending the Company Directors Disqualification Act 1986).

Official Receivers (ORs) are statutory officers established under the Insolvency Act 1986, part XIV, sections 399-401. Appointed by the Secretary of State, they operate both as civil servants and officers of the court, ensuring the lawful administration of insolvency proceedings. In compulsory corporate liquidation, the OR automatically becomes the initial liquidator when a winding-up order is made. Creditors or the Secretary of State may subsequently appoint a licensed insolvency practitioner to act as liquidator. If no such appointment is made, the OR continues to administer the estate and distribute assets in accordance with statutory priorities.

ORs investigate the causes of the company's failure and report on the conduct of directors. Where misconduct is identified, the OR's findings may support enforcement action, including director disqualification proceedings under the Company Directors Disqualification Act 1986 (section 7).

The Secretary of State for Business and Trade plays a central constitutional and regulatory role in the UK insolvency framework. Although many operational functions are exercised through the Insolvency Service, significant statutory powers remain vested in the Secretary of State under the Insolvency Act 1986 and the Company Directors Disqualification Act 1986.

Under the Insolvency Act 1986, the Secretary of State may make rules and regulations forming the statutory basis for instruments such as

the Insolvency (England and Wales) Rules 2016. The Secretary of State also exercises supervisory and appointment functions. In compulsory liquidations the Secretary of State may appoint a liquidator where no appointment is made by creditors, ensuring that proceedings continue without administrative deadlock (Insolvency Act 1986, section 137). The Secretary of State further oversees the regulation of insolvency practitioners through recognized professional bodies, a supervisory function carried out operationally by the Insolvency Service (Insolvency Act 1986, section 391).

Qualified insolvency practitioners are the professional officeholders responsible for administering most corporate and personal insolvency procedures in the UK. Under the framework, individuals may act as liquidators, administrators, trustees in bankruptcy, administrative receivers, or voluntary arrangement supervisors only if they are authorized as insolvency practitioners. Authorization is granted through recognized professional bodies approved by the Secretary of State, including organizations such as the Institute of Chartered Accountants in England and Wales, the Insolvency Practitioners Association, and the Institute of Chartered Accountants of Scotland (Insolvency Act 1986, sections 388-391). Only individuals, rather than corporate entities, may hold an insolvency practitioner licence, ensuring personal accountability for the exercise of statutory powers.

Creditors are placed at the centre of insolvency governance while reducing reliance on traditional in-person meetings. The Insolvency (England and Wales) Rules 2016 under part 15 establish a flexible framework for creditor decision-making designed to enable creditors to collectively supervise the insolvency process to minimize cost and delay while preserving participation rights. These include voting by correspondence, electronic voting, virtual meetings, physical meetings, and any other decision procedures that enable equal participation by all entitled creditors.

The treatment of secured creditors varies materially according to the procedure engaged. The chosen route affects (i) the timing of enforcement, (ii) the extent to which enforcement may be restricted, (iii) participation in collective decision-making, and (iv) whether secured rights may be modified.

As a general principle, secured creditors enjoy proprietary priority. A secured creditor enforces against the charged asset rather than claiming *pari passu* in the insolvent estate. That priority, however, is mediated by

statutory mechanisms designed to preserve collective value and prevent destructive individual enforcement.

Under administration the commencement of the process triggers a statutory moratorium preventing secured creditors from enforcing security without the consent of the administrator or the permission of the court (Insolvency Act 1986, schedule B1, paragraph 43).

In liquidation, secured creditors generally retain direct enforcement rights over fixed charge assets. Such assets may be realized through the exercise of a contractual power of sale or the appointment of a receiver (Law of Property Act 1925, sections 101, 109). The proceeds are applied to the secured debt, with any surplus falling into the insolvent estate.

Under a CVA, the rights of secured creditors generally are not interfered with without their consent. The binding effect of a CVA applies primarily to unsecured creditors, allowing secured creditors to remain outside the compromise and enforce their security if they choose (Insolvency Act 1986, section 5(2)). This structural limitation distinguishes the CVA from court-sanctioned restructuring mechanisms.

Under schemes of arrangement (Companies Act 2006, part 26), secured creditors vote in classes constituted according to the similarity of their rights, and approval requires a majority in number representing at least 75% in value of creditors voting in each class (Companies Act 2006, section 899(1)). Because schemes do not create an automatic moratorium, secured creditors may retain enforcement leverage pending sanction (*Sovereign Life Assurance Co v Dodd* 1892; *Re Hawk Insurance Co Ltd* 2001).

Within the context of restructuring plans, the Companies Act 2006, part 26A, introduces a cross-class cram-down mechanism that binds dissenting creditor classes, including secured creditors, without unanimous consent. The court may sanction a plan binding a dissenting class if (1) none of the members of that class would be worse off than in the "relevant alternative" and (2) at least one class with a genuine economic interest has approved the plan by 75% in value (Companies Act 2006, section 901G).

The courts in the UK remain the constitutional foundation of the insolvency regime even though many insolvency procedures operate largely out of court and are administered by insolvency practitioners. The courts supervise and enforce statutory procedures and provide authoritative interpretation of the legislation, ensuring that insolvency operates as a collective process governed principally by the Insolvency

Act 1986, CIGA 2020, the Insolvency (England and Wales) Rules 2016, and relevant Practice Directions and Practice Statements.

Judicial practice is structured in particular by the Insolvency Practice Direction 2018 (as amended), which supplements the Civil Procedure Rules and the Insolvency (England and Wales) Rules 2016. These instruments govern matters such as allocation of cases within the Business and Property Courts, service and filing requirements, listing of applications, and other aspects of the procedural management of insolvency proceedings.

The courts perform a central gatekeeping function, ensuring that statutory prerequisites for collective procedures are satisfied and preventing the misuse of winding-up petitions as debt-collection tools where the underlying debt is genuinely disputed (*Re LHF Wools Ltd* 1970). Courts also exercise protective and interim powers, including injunctions, the appointment of provisional liquidators, and validation orders authorizing dispositions of company property after the presentation of a petition where this benefits creditors collectively (Insolvency Act 1986, section 127).

[D] CONCLUSION

This article has examined the evolution, structure, and operation of Ghana's corporate insolvency framework under the Corporate Insolvency and Restructuring Act 2020 (Act 1015), as amended (CIRA), alongside that of the UK. It has demonstrated that the UK's insolvency regime provides a useful comparator due to its sophisticated rescue-oriented framework. The examination of both insolvency regimes reveals important similarities as well as significant structural differences. Both systems reflect a clear transition from liquidation-focused insolvency regimes to modern rescue-oriented frameworks that prioritize collective creditor engagement and the preservation of viable businesses over immediate liquidation, although liquidation remains the outcome where rescue efforts fail.

Administration serves as the central rescue mechanism in both jurisdictions, supported by moratoria, creditor participation, insolvency practitioners, and court supervision. Both frameworks also recognize the importance of collective insolvency processes and cross-border cooperation.

However, the UK framework is structurally broader and more sophisticated. While schemes of arrangement are also available in Ghana under the Companies Act 2019 (Act 992), the UK framework provides

a more extensive and integrated restructuring toolkit, including CVAs, part 26A restructuring plans, standalone moratoria, and pre-pack administrations. The UK also permits greater restructuring flexibility through mechanisms such as cross-class cram-down, which CIRA does not currently provide. In addition, the UK framework operates within a more developed institutional environment supported by specialized courts, extensive judicial interpretation, and a mature insolvency profession.

CIRA therefore reflects substantial convergence with the rescue-oriented approach of the UK, although important differences remain in the depth of restructuring mechanisms, the role of judicial development, and institutional capacity. Ultimately, while CIRA significantly modernizes Ghana's insolvency framework, its long-term effectiveness will depend on how successfully its institutional structures evolve to support the rescue objectives embedded within the Act.

This exposition of the insolvency regimes of Ghana and the UK forms the basis for the detailed comparative analysis and proposed reforms presented in part II of this article.

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Evaluation of the Efficacy of the Corporate Insolvency and Restructuring Act 2020 (Act 1015) of Ghana: A Comparative Analysis with the Insolvency Legal Framework of the United Kingdom (Part II)

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[A] INTRODUCTION

The first part of this article (this issue, pages 945–973) focused on an exposition of the insolvency regimes of Ghana and the United Kingdom (UK). This second part undertakes a comparative evaluation of Ghana's Corporate Insolvency and Restructuring Act 2020 (Act 1015) (CIRA), as amended, and the UK's insolvency regimes. It argues that while CIRA shares several significant similarities with the UK model, its operational effectiveness has been constrained by institutional, market, and jurisprudential limitations. The comparative analysis focuses on, among other matters, the policy orientation of both regimes, their legislative frameworks, judicial and institutional capacity, procedural efficiency, flexibility and the practical effectiveness of these systems in rescuing distressed companies. The chapter concludes by proffering policy recommendations for reform of Ghana's insolvency and restructuring regime to enhance its effectiveness.

[B] COMPARATIVE ANALYSIS OF THE INSOLVENCY FRAMEWORKS OF GHANA AND THE UK

Policy orientation and legislative framework

The insolvency regimes of Ghana under CIRA and the UK's Insolvency Act 1986 are both built around the idea of collective insolvency procedures designed to facilitate corporate rescue over liquidation. In both systems, when a company enters financial distress, control of the company is transferred to an independent officeholder, creditor enforcement actions

are temporarily stayed, and negotiations take place within a structured legal process.

In the UK, this rescue orientation is reflected in the administration regime under schedule B1 of the Insolvency Act 1986, which identifies the rescue of the company as a going concern, as the primary objective of administration, as well as in company voluntary arrangements (CVAs), which enable a debtor-in-possession compromise with creditors. The Enterprise Act 2002 strengthened this approach by significantly restricting administrative receivership and repositioning administration as the principal corporate rescue mechanism. More recently, the Corporate Insolvency and Governance Act 2020 (CIGA) further modernized the framework by introducing additional rescue tools, including the restructuring plan under part 26A of the Companies Act 2006, which permits cross-class cram-down of dissenting creditor classes, as well as a standalone moratorium procedure. Together, these reforms have reinforced the culture of corporate rescue within the UK insolvency regime.

CIRA, supplemented by the Corporate Insolvency and Restructuring Regulations, 2025 (LI 2502), reflects a broadly similar policy orientation. Like the UK administration regime, CIRA introduces administration as the principal mechanism for stabilizing financially distressed companies and preserving viable businesses as going concerns. The Act imposes a moratorium on creditor enforcement and places the company under the control of an administrator acting in the interests of creditors as a whole, while providing restructuring agreements as the primary mechanism for reorganizing the company's debts following administration. In this respect, CIRA represents a deliberate shift away from the liquidation-centred regime under the Bodies Corporate (Official Liquidations) Act 1963 (Act 180) and aligns Ghana's insolvency framework with contemporary rescue-oriented insolvency practice.

Despite this shared orientation towards corporate rescue, certain differences exist in the design and operation of the two regimes. In the UK, the rescue framework is oriented towards the rescue of viable businesses. Administration will typically only be commenced where the insolvency practitioner certifies that there is a reasonable prospect of achieving the statutory objectives of administration, including rescuing the company as a going concern. This requirement effectively operates as a viability test, ensuring that administration is used primarily where restructuring prospects exist. By contrast, CIRA does not expressly incorporate a comparable viability test prior to the commencement of rescue procedures.

As a result, distressed companies may enter administration even where the prospects of successful restructuring are uncertain.

Furthermore, while the UK insolvency regime has benefited from decades of judicial interpretation and refinement, Ghana's framework remains relatively nascent, with limited case law to guide its interpretation and practical implementation. Consequently, the emphasis on corporate rescue in Ghana remains, to some extent, aspirational, whereas in the UK it is supported by a well-developed body of jurisprudence and established restructuring practice. It is anticipated that, over time, Ghanaian courts will develop a body of case law capable of providing clearer guidance to the corporate sector and to insolvency practitioners in the application of the rescue framework.

The two systems also differ significantly in how restructuring decisions are implemented. The principal distinction lies in the extent to which each system relies on creditor consent as opposed to judicial intervention. Under Ghana's CIRA, restructuring is largely based on creditor consent. A restructuring agreement generally requires the votes of at least 51% of the creditors in value of the debt voting in person, by proxy or by postal vote and other statutory requirements. The court's role is mainly supervisory. It ensures that the process complies with statutory requirements and that creditor decisions are not oppressive or unfair by imposing a solution on dissenting creditor groups as provided in sections 43-57. This approach emphasizes creditor autonomy and protects creditor property rights. However, it may also create practical difficulties in complex financial structures. Where one class of creditors refuses to support the restructuring, it may block the entire restructuring process from proceeding, even in circumstances where liquidation would destroy the value of the business as a going concern. This situation creates what is commonly referred to as the "holdout problem".

The UK adopts a more flexible approach. It provides different restructuring options with varying levels of judicial intervention. For example, a company voluntary arrangement (CVA) under the Insolvency Act 1986, part 1, can bind unsecured creditors where the statutory majority of 75% in value of creditors voting approves the proposal, subject to other statutory requirements, but it cannot affect secured or preferential creditors without their consent. In this respect, the CVA maintains strong protection of creditor property rights within a relatively straightforward restructuring framework.

However, a restructuring plan introduced under part 26A of the Companies Act 2006 goes further. It allows the court to sanction a

restructuring even where one or more classes of creditors vote against the proposal, provided that the statutory conditions are satisfied. This mechanism, commonly referred to as cross-class cram-down, was designed to prevent dissenting creditors from blocking commercially viable restructurings and to preserve enterprise value. It therefore gives courts a more direct role in resolving conflicts between creditor groups by imposing a solution where necessary.

The UK restructuring framework therefore incorporates a court-driven mechanism capable of resolving complex restructurings where creditor consensus cannot be achieved, whereas Ghana's framework relies more on creditor consent. This distinction illustrates the broader policy difference between a consent-based restructuring model and a court-driven restructuring model.

Another important difference concerns the ease with which rescue procedures may be initiated and the extent to which they are used in practice. In the UK, administration can often be started quickly, and, in certain circumstances, without a court application. This streamlined procedure has allowed administration to develop into a routine and practical restructuring tool rather than a remedy of last resort under schedule B1 of the Insolvency Act 1986.

In Ghana, by contrast, CIRA assigns the courts a significant role in the administration process. The procedure involves structured creditor meetings and significant judicial supervision. Under section 64 of CIRA, the court possesses broad powers to issue orders during administration and to terminate the process where statutory conditions are not satisfied. While this judicial oversight enhances accountability and legal control, it also means that the effectiveness of the rescue framework depends significantly on the efficiency and capacity of the courts, particularly in urgent situations where delay may undermine restructuring efforts.

As a result, the UK framework places emphasis on procedural speed and accessibility, whereas Ghana's framework emphasizes judicial supervision and legal oversight, making the effectiveness of the rescue process more dependent on the operational efficiency of the courts.

Administration and moratorium

Both Ghana and the UK impose legal restrictions on creditor enforcement when a company enters financial distress. This temporary "pause" or moratorium preserves the company's value and gives time for restructuring negotiations. In both jurisdictions, the moratorium therefore functions as

a stabilizing mechanism within the broader rescue framework. However, the two systems differ in the way creditor protection is triggered and implemented.

In Ghana, the appointment of an administrator under CIRA triggers an automatic statutory moratorium against creditor enforcement. Enforcement and recovery actions against the company's property are stayed and dealings with company assets are restricted while restructuring efforts are undertaken. The administrator assumes managerial control of the company and must act in the interests of creditors as a whole. Courts also play an active supervisory role during this period and possess broad powers to oversee the process and protect creditor interests as outlined in sections 64-66. Although the moratorium provides substantial protection, it is not absolute. Under section 37, secured creditors may apply to the court for leave to enforce their security where continued restraint would cause prejudice. Judicial discretion therefore plays an important role in balancing the suspension of creditor enforcement with the protection of creditor rights.

A comparable moratorium exists in the UK upon the commencement of administration under schedule B1, paragraphs 42-43, of the Insolvency Act 1986. During this period, creditors are generally prevented from enforcing security, repossessing goods, or commencing legal proceedings against the company without the consent of the administrator or the permission of the court. This restriction supports rescue efforts by preventing disruptive creditor action while restructuring negotiations are undertaken. Over time, UK courts have developed an extensive body of jurisprudence clarifying how administrators should exercise their powers and balance rescue objectives with creditor interests as illustrated in *Re Atlantic Computer Systems plc* (1992: 505: Goode 2018: 10-45).

A further distinction arises from the availability of earlier intervention mechanisms in the UK. CIGA 2020 introduced a standalone moratorium under part A1 of the Insolvency Act 1986. This procedure allows companies to obtain temporary protection from creditor enforcement while exploring restructuring options without immediately entering administration. The moratorium is supervised by a monitor who must be satisfied that the company is likely to be rescued as a going concern, while management remains with the directors. This means that a company can obtain short-term protection without immediately entering full administration. In effect, the UK system offers a staged approach to rescue; early protection first, followed by full administration if necessary.

By contrast, under Ghana's CIRA, protection from creditor enforcement and entry into formal rescue generally occur at the same time, since the moratorium arises only upon the appointment of an administrator. Ghana's framework therefore ties access to rescue protection more closely to formal administration proceedings.

A further difference concerns institutional development and how creditors are treated during the protection period. Both systems rely on court supervision to balance competing interests. However, the UK moratorium operates within a well-developed system of insolvency practice supported by extensive case law and established practice. Ghana's framework, by contrast, remains relatively recent and has yet to generate a comparable body of judicial interpretation. Consequently, although the statutory regimes in both jurisdictions seek to preserve enterprise value through temporary restrictions on creditor enforcement, the UK's more developed institutional framework tends to produce greater predictability and procedural efficiency in practice.

Restructuring agreements/plans

Under the UK insolvency framework, creditor compromises such as CVAs and schemes of arrangement typically require approval by at least 75% in value of creditors voting, in addition to other statutory requirements. Similarly, Ghana's Companies Act 2019 (Act 992) permits companies to enter into arrangements and compromises approved by 75% in value of each class of members and creditors concerned.

CIRA, however, adopts a different restructuring mechanism. Although it does not provide for CVAs or schemes of arrangement, it introduces a restructuring agreement that performs a broadly comparable rescue function. A restructuring agreement adopted at a watershed meeting becomes binding where it is approved by creditors holding at least 51% in value of the debt of creditors voting, together with compliance with other statutory requirements. This simple majority threshold is comparatively low when measured against the UK framework. In practice, approval may therefore be secured by one or two significant creditors and may therefore not be sufficiently representative of the interests of the majority of creditors within the restructuring process.

Institutional framework

The role of courts

In both Ghana and the UK, effective corporate rescue depends significantly on judicial supervision at critical stages of the insolvency process. Courts may be required to restrain creditor enforcement, resolve disputes relating to creditor meetings, review restructuring plans, supervise administrators, and facilitate transitions between insolvency procedures. The success of corporate rescue therefore depends not only on statutory design but also on the speed and institutional capacity with which courts exercise these supervisory functions (World Bank 2021: Part D).

Under CIRA, court intervention is generally triggered by insolvency practitioners, creditors, or other affected persons, although the courts retain significant supervisory powers during administration and restructuring. Section 64(1)-(2) confers authority on the court to issue protective orders for creditors and terminate administration on specified statutory grounds where appropriate applications are made. This reflects a legislative intention to preserve judicial oversight and procedural fairness within the corporate rescue framework, even though day-to-day administration remains primarily practitioner-led.

Nevertheless, the practical operation of this supervisory framework depends significantly on the capacity of courts to respond efficiently when intervention becomes necessary. If courts delay at critical stages of the proceedings, the company's value as a going concern may deteriorate rapidly, just as it would if creditors were permitted to enforce their claims prematurely. The effectiveness of the framework therefore depends not only on statutory design but also on judicial expertise, procedural efficiency and institutional capacity.

The UK mitigates these risks through institutional specialization and procedural frameworks. Insolvency matters are typically handled in specialist divisions, particularly the Insolvency and Companies List of the Business and Property Courts (HM Courts & Tribunals Service nd). In addition, insolvency litigation is governed by specialized procedural rules, including the Civil Procedure Rules and the Insolvency (England and Wales) Rules 2016 supplemented by the Practice Direction – Insolvency Proceedings (as amended) and relevant Practice Statements. The judiciary also benefits from a substantial body of precedent developed over many years, which is regularly reported and is readily available to the public.

Together, these frameworks standardize the handling of insolvency cases and enable courts to issue urgent interim decisions where necessary. The

UK judiciary is therefore accustomed to managing complex restructuring proceedings and, while these features do not remove all complexity or disputes, they make the system more predictable and efficient.

By contrast, Ghana's courts do not currently operate specialized insolvency divisions, and judges frequently hear insolvency matters alongside other commercial disputes. This is so even though the Chief Justice possesses authority under section 14(3) of the Courts Act 1993 (Act 459) to establish divisions of the High Court and assign judges to them. The Chief Justice has historically exercised this authority through the creation of specialized divisions such as the Commercial Division of the High Court and other specialized courts. Insolvency matters therefore remain largely governed by the general civil procedure framework, principally the High Court (Civil Procedure) Rules 2004 (CI 47).

Judges may also lack specialized training in insolvency law, although some efforts have been made to address this gap. For instance, in October 2025, the Judicial Training Institute of the Judicial Service of Ghana, in collaboration with the World Bank Group and INSOL International, organized a capacity-building programme on insolvency law for selected judges of the Commercial Court.

These institutional limitations may restrict the judiciary's ability to fully utilize the expanded mandate provided under CIRA and may lead to procedural inefficiencies or a rigid application of statutory provisions, thereby potentially undermining the flexibility required to rescue distressed companies effectively.

Another important difference concerns procedural flexibility in judicial practice. The UK insolvency regime is recognized for its practical and adaptable approach. Courts frequently adopt procedures tailored to the specific circumstances of each case, allowing solutions that reflect the commercial realities facing financially distressed companies. Such flexibility is particularly important in insolvency law, where the complexity of corporate financial structures often requires bespoke remedies.

By contrast, Ghana's framework is procedurally rigid. Although CIRA introduces administration and restructuring mechanisms, the statutory structure leaves limited room for innovative procedural solutions or for the exercise of judicial discretion to adapt procedures to the specific circumstances of a case. This rigidity may reduce the effectiveness of the corporate rescue process where the statutory framework does not fully accommodate the complexities of particular restructuring scenarios.

In summary the key difference between the two systems in terms of role of the courts is institutional rather than purely legal. Both Ghana and the UK rely on courts to balance rescue efforts with creditor protection and to maintain the integrity of insolvency proceedings. However, the UK's specialized courts, procedural rules, and extensive jurisprudence help reduce inconsistency and delay.

In Ghana, the law clearly grants courts the powers necessary to supervise corporate rescue effectively. The more significant question is whether those powers can be exercised in a consistent and timely manner in practice. This ultimately depends on factors such as judicial expertise, court infrastructure, and the extent to which insolvency matters are routinely handled within the judicial system. Institutional capacity within the judiciary may therefore determine whether the statutory reforms introduced by CIRA translate into effective corporate rescue outcomes.

Regulation of insolvency practitioners

Both Ghana and the UK recognize that corporate rescue can succeed only if the professionals managing insolvency proceedings are competent, independent, and subject to effective regulation. For this reason, each jurisdiction has established institutional mechanisms to supervise insolvency practitioners and ensure professional accountability. However, the two systems organize this oversight in different ways.

In Ghana, the regulatory framework is centred on public institutional supervision. The Insolvency Services Division established within the Office of the Registrar of Companies oversees administration, restructuring, and other insolvency proceedings. It receives reports from insolvency practitioners, monitors insolvency practice, and cooperates with international bodies under both CIRA and the Companies Act 2019 (Act 992). In addition, the Chartered Institute of Restructuring and Insolvency Practitioners Act 2024 (Act 1117) introduced a professional licensing framework for insolvency practitioners. Together, these mechanisms create a system in which oversight is concentrated within a statutory administrative body, supported by professional regulation.

In the UK insolvency practitioners must be authorized under a statutory licensing regime, typically through recognized professional bodies. Government oversight is exercised through the Insolvency Service, which supervises the regulatory framework and the conduct of the recognized professional bodies responsible for authorization and discipline under sections 388-391 of the Insolvency Act 1986. This structure combines professional self-regulation with state supervision, creating a multi-layered system of professional accountability.

The enactment of the Chartered Institute of Restructuring and Insolvency Practitioners Act 2024 (Act 1117) has nevertheless moved the Ghanaian framework closer to the hybrid regulatory structure adopted in the UK by introducing a more formal system of professional licensing, discipline, and ethical regulation of insolvency practitioners. However, unlike the UK system of delegated professional regulation under statutory oversight, Ghana's framework continues to place substantial supervisory authority in the Office of the Registrar of Companies and the Insolvency Services Division, particularly in relation to licensing, monitoring, and disciplinary enforcement. The growing role of professional regulation therefore suggests an emerging shift away from a predominantly state-centred supervisory model rather than a complete transition to professional self-regulation.

The principal comparative difference is therefore no longer simply between public regulation and professional self-regulation, but between differing degrees of institutional centralization. Ghana's model may strengthen accountability and regulatory coherence at the developmental stage of the insolvency profession, where professional norms and institutional capacity are still evolving, by concentrating supervisory authority within a central public institution capable of enforcing consistent professional standards. However, the UK model arguably allows greater development of specialist professional expertise and professional norms through recognized professional bodies operating within a system of state oversight.

The comparative issue raises important questions such as: which model ensures stronger accountability to creditors? Which allows faster intervention when misconduct occurs? And which produces more consistent professional competence at the point of appointment?

These issues are not merely institutional design questions. They directly affect how insolvency systems function in practice (INSOL International 2018). If creditors and other stakeholders trust the competence and independence of insolvency practitioners, they are more likely to cooperate with restructuring efforts. Suppliers may continue trading with a distressed company, lenders may be more willing to provide rescue finance, and courts can rely more confidently on practitioner evidence when urgent decisions are required. In this sense, professional regulation plays a central role in determining whether statutory rescue mechanisms translate into credible and effective restructuring outcomes.

Ultimately, the effectiveness of either model depends not only on the design of the regulatory framework but also on enforcement capacity

and professional expertise. Even a well-structured statutory regime will struggle to deliver successful rescue outcomes if practitioners lack the necessary competence or if regulatory institutions are unable to enforce professional standards consistently.

Directors' liability

In the UK, case law has played an important role in clarifying the scope of directors' liability during insolvency. Under section 214 of the Insolvency Act 1986, directors may incur civil liability for wrongful trading where they knew or ought to have concluded that there was no reasonable prospect of avoiding insolvent liquidation and failed to take every step to minimize potential loss to creditors. In *Re Produce Marketing Consortium Ltd (No 2)* (1989: 520), the court clarified how a director's contribution should be assessed in such circumstances, particularly in relation to the quantification of losses attributable to continued trading. The court adopted a compensatory rather than penal approach, assessing the contribution by reference to the depletion of the company's assets caused by continued trading after insolvency was unavoidable. In doing so, it considered the directors' conduct—including the failure to heed professional advice and other indicators of worsening financial position—while focusing primarily on the loss caused to creditors.

Ghana's CIRA also imposes liability on directors for insolvent trading, but the liability is criminal and penalties imposed for breach accrue to the state rather than to the company or its creditors.

On the other hand, both jurisdictions impose criminal liability on directors in respect of trading with intent to defraud creditors.

Cross-border insolvency

Model Law framework in the UK and Ghana

Cross-border insolvency presents particular challenges for corporate rescue because distressed companies and their assets frequently span multiple jurisdictions. Both Ghana and the UK have adopted legislative frameworks based on the United Nations Commission on International Trade Law (UNCITRAL) 1997 Model Law to facilitate recognition of foreign proceedings and judicial cooperation, although the institutional contexts in which these frameworks operate differ in important respects.

The UK adopted the UNCITRAL Model Law on Cross-Border Insolvency through the Cross-Border Insolvency Regulations 2006 (CBIR). These regulations enable UK courts to recognize foreign main and non-main

proceedings, grant appropriate relief, and cooperate with foreign courts in cross-border insolvency matters. The broader principles governing recognition and judicial cooperation have also been clarified through case law. In *Rubin v Eurofinance SA* (2012: 46), the UK Supreme Court examined the limits and conditions under which foreign insolvency-related judgments may be recognized and enforced in England. Earlier, in *Re HIH Casualty and General Insurance Ltd* (2008: 21), the House of Lords considered the scope of assistance that English courts may provide to foreign insolvency proceedings under section 426 of the Insolvency Act 1986 and at common law.

CIRA also contains provisions addressing cross-border insolvency. Sections 150-152, together with the accompanying schedule, establish a framework governing cross-border proceedings. The legislation identifies several objectives, including promoting cooperation between courts, ensuring legal certainty in cross-border insolvency matters, protecting the value of assets, and preserving investment and employment.

Both regimes follow a legislative structure typical of Model Law jurisdictions. The statute articulates the guiding principles of cross-border insolvency, while an accompanying schedule or regulatory framework provides the operational rules governing recognition, relief, and cooperation. Court rules then supply the procedural detail necessary for implementation.

Judicial development and practical operation of the Model Law

The UK has developed a substantial body of case law applying the Model Law framework. UK courts have clarified issues such as what constitutes a "foreign proceeding", the characteristics required for a process to qualify as sufficiently collective, and the disclosure obligations that apply to recognition applications (*Re Sturgeon Central Asia Balanced Fund Ltd* 2020; *Re Stanford International Bank Ltd* 2010). This jurisprudence has contributed to greater predictability and has reduced opportunities for forum-shopping.

Ghana's framework aims to promote similar cooperation in cross-border insolvency matters, but its practical effectiveness will depend on the gradual development of comparable judicial guidance. Over time, the emergence of consistent case law will play an important role in clarifying how the statutory framework should operate in complex cross-border situations.

Creditor protection and judicial cooperation

Both regimes identify the protection of creditors, debtors, and other stakeholders as a central objective of cross-border insolvency while emphasizing the preservation of asset value. Courts in Ghana and the UK retain discretion over the relief granted to foreign representatives, and the regimes include a public policy exception permitting courts to refuse recognition or assistance where it would be manifestly contrary to fundamental domestic principles.

Judicial cooperation therefore remains central to the operation of cross-border insolvency regimes in both jurisdictions. When courts coordinate effectively, they can prevent conflicting orders, protect the value of assets, and facilitate orderly restructuring or liquidation across multiple jurisdictions. Where cooperation is slow or inconsistent, however, assets may dissipate and proceedings may fragment across competing legal systems. In this respect, the effectiveness of cross-border insolvency frameworks ultimately depends not only on statutory design but also on the willingness and capacity of courts to engage in coordinated international insolvency practice.

Rescue finance and market sophistication

An insolvency regime is only as effective as the financial system that supports it. The UK benefits from a well-developed restructuring finance market, in which banks, hedge funds, and specialist turnaround investors frequently provide rescue or bridge financing to distressed companies. This makes rescue financing more accessible for distressed companies to enable them to continue operations while pursuing restructuring. It has been observed that the effectiveness of insolvency law depends not only on statutory design but also on surrounding commercial infrastructure and creditor confidence.

By contrast, while CIRA recognizes the concept of post-commencement financing and addresses its classification and priority, Ghana's financial market for distressed-company financing remains relatively underdeveloped compared with that of the UK. Although the financial sector is growing, it lacks a mature distressed debt market and specialized restructuring finance providers. As a result, companies operating under a moratorium or administration may face significant difficulties in obtaining the working capital required to maintain operations during restructuring. This gap highlights a structural challenge within the Ghanaian insolvency framework and may be a major reason that explains the limited use of administration proceedings. Between 2021 and 2026, only four companies

entered administration (three in 2021 and one in 2026), compared with 98 companies placed in liquidation. These figures are as at 30 April 2026 and were provided by the Office of the Registrar of Companies in response to an enquiry by the Chartered Institute of Restructuring and Insolvency Practitioners dated 27 February 2026.

Restrictions on supplier terminations

Under the insolvency regime of the UK there are restrictions on contractual rights of suppliers to terminate supply contracts because a company entered an insolvency procedure. The law established protections designed to ensure that companies undergoing restructuring can continue to receive essential goods and services during a moratorium as per section 233B of the Insolvency Act 1986, subject to statutory exceptions under schedule 4ZZA.

By contrast, CIRA does not expressly address the treatment of essential or critical supply contracts during the period of a moratorium. While the Act provides for a moratorium that restricts creditor enforcement actions once insolvency proceedings such as administration commence, it is silent on whether contracts that are essential to the continued operation of the debtor's business, such as utilities, key supply agreements, or service contracts, must continue to be performed during the moratorium period. In particular, the statute does not contain provisions regulating the termination of such contracts solely on the ground of insolvency or restructuring proceedings. This may create uncertainty regarding the availability of critical supplies needed to sustain a distressed company during restructuring.

In summary, the comparative analysis shows that Ghana's reforms represent a shift from liquidation to corporate rescue. In design, CIRA reflects key features of the UK model, including administration, collective procedures, moratorium protection, and restructuring mechanisms, demonstrating adoption of a modern rescue philosophy. However, similarity in design does not ensure practical effectiveness. The UK regime benefits from judicial refinement, specialized courts, procedural rules, professional regulation, and a developed rescue finance market, which enhance predictability, speed, and creditor confidence.

Ghana's framework remains undeveloped. Despite robust statutory tools, effectiveness is constrained by limited judicial specialization, procedural rigidity, developing oversight, limited finance, and minimal jurisprudence. Reliance on consent of creditors and absence of cross-class cram-down features further restrict flexibility, making the rescue

framework more aspirational than operational. These findings inform the reform proposals recommended in the next section of this article aimed at improving the practical effectiveness of CIRA, by bridging the gap between its rescue-oriented design and operational performance.

[C] POLICY RECOMMENDATIONS FOR STRENGTHENING GHANA'S CORPORATE INSOLVENCY FRAMEWORK

The following policy recommendations are by no means exhaustive and are also provided without ignoring some significant challenges that must be overcome for their implementation. While previous sections have demonstrated that Ghana possesses a modern and rescue-oriented statutory framework, the long-term success and effectiveness of the regime depend on targeted institutional and procedural reforms. The recommendations proposed here are therefore designed to bridge the gap between intention of the legislation and its operational performance.

Establishment of an Insolvency List within the Commercial Division of the High Court

A key reform recommendation is the creation of a specialized Insolvency List within the Commercial Division of the High Court. Although the Chief Justice already possesses authority under the Courts Act 1993 (Act 459) to establish specialized divisions of the High Court and has exercised this power through the creation of some specialized courts, insolvency and restructuring matters currently form only part of the broader commercial caseload. Establishing a dedicated Insolvency List within the Commercial Division would enable a designated group of judges to handle insolvency matters on a regular and specialized basis. Such matters would include administration proceedings, restructuring agreements, liquidation disputes, receivership issues, and cross-border insolvency applications under CIRA.

It is further suggested that administrative case-management policies be introduced to allow matters to be transferred from the insolvency cause list to the general commercial cause list once the dispute no longer concerns insolvency issues. For example, where a matter evolves into a dispute over a contested debt rather than the conduct of the insolvency process itself, it may be more appropriately dealt with under the general commercial cause list. Such a mechanism would help prevent the

insolvency list from becoming congested and ensure that specialized judicial resources remain focused on core insolvency matters.

Judicial specialization would produce several important benefits. First, it would allow judges to develop expertise in complex insolvency matters involving corporate finance, creditor coordination, and restructuring negotiations. Second, it would promote consistency in judicial decision-making and accelerate the development of Ghanaian insolvency jurisprudence. Third, specialized case management would improve efficiency and reduce delays in the resolution of restructuring cases.

Development of insolvency Practice Directions

Modern corporate insolvency regimes require specialized procedural mechanisms capable of managing collective insolvency and restructuring processes efficiently. In Ghana, elements of this procedural structure are presently derived from both the High Court (Civil Procedure) Rules 2004 (CI 47) and the Corporate Insolvency and Restructuring Regulations 2025 (LI 2502).

While CI 47 grants the High Court broad procedural powers, particularly under Order 25 governing interlocutory injunctions and preservation of property, these provisions were designed primarily for general civil litigation rather than complex insolvency proceedings. LI 2502 complements CIRA by introducing provisions relating to solvency assessment criteria, creditor and watershed meeting procedures, insolvency practitioner regulation, proof-of-debt rules, and reporting obligations. However, matters relating to judicial case management and the conduct of court-supervised insolvency proceedings remain largely governed by the general procedural regime under CI 47 and would benefit from insolvency-specific practice directions.

The judiciary should therefore consider issuing insolvency-specific Practice Directions to supplement the existing procedural framework. These Practice Directions could provide guidance on matters such as:

- ◊ procedures for administration applications and related court hearings;
- ◊ approval processes for statutory restructuring agreements;
- ◊ creditor meeting procedures and voting mechanisms;
- ◊ filing requirements for insolvency applications;
- ◊ expedited procedures for urgent restructuring matters; and
- ◊ procedures for recognition of foreign insolvency proceedings.

Such Practice Directions would enhance clarity, reduce procedural uncertainty, and promote greater consistency in insolvency proceedings. Together, these procedural mechanisms would standardize the conduct of insolvency proceedings by providing structured guidance on filing, case management, and court procedure, thereby facilitating efficient handling of applications and enabling courts to issue urgent interim decisions where necessary.

Strengthening judicial training and capacity

The effective operation of specialized insolvency courts requires judges with expertise in complex commercial and financial matters. Insolvency cases frequently involve intricate corporate structures, valuation disputes, and cross-border issues. Consequently, continuous judicial training is essential for the development of an effective insolvency regime.

Training programmes should be organized for judges assigned to insolvency matters within the Commercial Division on a continuing basis. Such programmes could be coordinated through the Judicial Training Institute of Ghana and should focus on key areas such as corporate restructuring principles, rescue financing, cross-border insolvency cooperation, and creditor coordination mechanisms.

Comparative exposure may also prove beneficial. Judicial workshops involving experts from jurisdictions with mature insolvency systems could provide valuable insights into the management of complex restructuring proceedings. The development of judicial expertise is critical to ensuring that insolvency laws operate effectively in practice rather than merely existing as formal statutory frameworks.

Enhancing coordination with regulatory institutions

Effective insolvency administration requires close coordination between the judiciary and key regulatory institutions. Insolvency proceedings often involve interactions with regulatory authorities responsible for corporate registration, financial supervision, and tax administration.

In Ghana, important stakeholders include the Office of the Registrar of Companies, the central bank, Bank of Ghana, the Securities and Exchange Commission of Ghana, and the Ghana Revenue Authority.

Improved coordination between these institutions and the courts could facilitate information-sharing, improve enforcement of insolvency-related decisions, and support early identification of financially distressed

companies. One possible mechanism would be the establishment of inter-agency liaison committees or structured communication channels between insolvency courts and regulatory bodies.

Public awareness and credibility

Specialized insolvency adjudication mechanisms are most effective in jurisdictions where there is a sufficiently high volume of restructuring and insolvency cases. In Ghana, corporate insolvency filings remain relatively limited. Many distressed companies are still resolved informally, through negotiated settlements, or through liquidation rather than formal restructuring processes. If the volume of cases remains low, a specialized insolvency list or court structure may be underutilized, making it more difficult to justify the institutional investment required to maintain it.

To address this challenge, public awareness initiatives should be implemented to promote the use of formal restructuring mechanisms under CIRA. Such initiatives could include campaigns designed to:

- ◊ educate companies and directors about the availability of formal insolvency and restructuring procedures;
- ◊ orienting major creditors (including banks, government agencies, and utility companies) on the benefits of a collective recovery approach, which is likely to maximize value for all creditors, as opposed to fragmented individual recovery actions;
- ◊ encourage early engagement with restructuring mechanisms and voluntary compliance with reporting obligations; and
- ◊ strengthen public confidence in the efficiency and transparency of courts in handling insolvency disputes.

Strengthening corporate data systems

Effective insolvency systems also depend on access to reliable corporate financial information. The role of the Office of the Registrar of Companies should therefore be strengthened by enhancing the capacity of the Insolvency Services Division to collect and analyse corporate financial data.

Companies could be required to submit standardized periodic financial and operational reports, enabling regulators and insolvency authorities to identify early indicators of financial distress. Greater integration of corporate data between the Office of the Registrar of Companies and other regulatory institutions would further improve the effectiveness of

this system. Relevant institutions include the Bank of Ghana, the Data Protection Commission of Ghana, and the Ghana Revenue Authority.

Introduction of early-warning systems

An effective corporate insolvency framework should include mechanisms for identifying financial distress at an early stage. Early warning systems enable companies, creditors, and regulators to detect emerging financial difficulties before they escalate into full insolvency, thereby facilitating timely restructuring interventions and preserving the company.

For Ghana, the introduction of early-warning systems would involve identifying both financial and non-financial indicators of corporate distress. Such indicators may include rapid declines in revenue or profit margins, persistent loan repayment defaults, late filing of tax returns, increased litigation against the company, or unusually high turnover among directors and senior management staff. Monitoring these indicators would allow regulators and insolvency authorities to identify companies that may require restructuring support or closer supervisory attention.

Institutional warning system

The effective operation of such an early-warning system would require cooperation among key regulatory institutions, particularly the Office of the Registrar of Companies, the Ghana Revenue Authority, and other financial regulators. The Insolvency Services Division within the Office of the Registrar of Companies could play a coordinating role by analysing corporate financial information and facilitating communication between relevant authorities. The Insolvency Services Division should produce guidelines that outline common indicators of financial distress and recommend steps that institutions should take when those indicators arise.

Technological tools could further enhance these monitoring mechanisms. Data analytics systems may assist regulators in identifying patterns within corporate filings, tax records, and financial disclosures that indicate emerging financial distress. The use of such technologies should, however, be accompanied by appropriate confidentiality safeguards and compliance with applicable data protection standards.

Director early-warning obligations

Early intervention is widely recognized as a critical component of effective corporate rescue systems because the prospects of successful restructuring decline significantly once financial distress becomes severe. Modern insolvency regimes therefore increasingly encourage directors

to identify and respond to financial difficulty at an early stage through a combination of governance obligations, disclosure requirements, and potential liability rules.

Under CIRA, directors may incur liability for misconduct, breach of duty, or improper conduct in the period leading up to insolvency. However, the framework remains largely reactive rather than preventive, as it does not expressly impose a proactive obligation on directors to monitor financial distress indicators or initiate restructuring efforts when warning signs emerge. Consequently, intervention may occur only after the company's financial position has substantially deteriorated, thereby reducing the prospects of successful rescue.

Comparative experience from the UK illustrates the importance of earlier engagement with financial distress. Although UK law does not establish a single formal early-warning system, several legal and institutional mechanisms collectively encourage timely intervention. Directors are incentivized to monitor the financial position of their companies through their duties under the Companies Act 2006 and potential liability for wrongful trading under the Insolvency Act 1986 once insolvency becomes likely. In addition, corporate disclosure obligations, regulatory oversight, and professional restructuring practice create an environment in which financial distress may be identified and addressed at an earlier stage.

Ghana could strengthen its emerging rescue culture by introducing director early-warning obligations within the broader corporate governance framework, particularly through directors' duties to promote the interests of the company and to exercise reasonable care, skill, and diligence. Such measures might require directors to monitor key financial indicators, seek professional restructuring advice where signs of financial distress arise, and engage with creditors or restructuring professionals at an earlier stage. These obligations should nevertheless be designed carefully so as not to discourage legitimate commercial risk-taking or entrepreneurial decision-making.

Early warning obligations operating at the corporate governance level could also complement broader institutional monitoring mechanisms, including enhanced corporate reporting systems and regulatory coordination. Together, these reforms would encourage earlier engagement with restructuring procedures at a stage when recovery remains feasible, thereby preserving enterprise value, protecting creditor interests, supporting economic stability, and reducing the likelihood of unnecessary liquidation in line with the objectives of CIRA.

Legislative reforms

Fiduciary duties

A notable gap in CIRA relates to the absence of clearly stated fiduciary duty standards for insolvency practitioners other than liquidators. The Act provides in section 90 that "on the commencement of a winding-up, the functions of the directors of the company shall vest in the liquidator who assumes a fiduciary position to the company". However, the law does not contain an equivalent provision expressly imposing fiduciary obligations on administrators or restructuring officers. Although it may be reasonably inferred, through principles of statutory interpretation, that these insolvency practitioners are similarly required to act in a fiduciary capacity in the discharge of their duties, an amendment to bring clarity is required to ensure accountability and consistency across insolvency practitioners.

Civil liability for insolvent trading

CIRA imposes criminal liability on a director who allows or causes a company to continue doing business or to incur a debt when the director knows, has reasonable grounds to believe, or ought to know that the company is insolvent or will become insolvent as a result. A director found guilty of this offence may, on summary conviction, be fined between 500 and 1000 penalty units, imprisoned for between two and five years, or both. While aimed at deterring misconduct, this approach may be overly punitive and not necessarily beneficial to creditors or the company. Instead, reframing the liability as primarily civil would allow courts to impose compensatory remedies in favour of creditors and the company, which will align with objectives of the law.

*Restrictions on supplier termination (***ipso facto** *clauses)*

The introduction of statutory restrictions on *ipso facto* clauses within the insolvency framework should also be considered. *Ipso facto* clauses (ie contractual provisions that permit termination or acceleration of obligations solely on the ground that a company has entered insolvency or restructuring proceedings) can hinder the effectiveness of corporate rescue mechanisms under CIRA. The automatic termination of key contracts when insolvency proceedings have commenced may deprive the distressed company of essential supplies, services, or contractual relationships necessary for its continued operation. Introducing statutory restrictions would support the continued operation of the business during rescue.

Restructuring approval

The current requirement that a restructuring agreement must be approved by creditors representing at least 51% of the value of debt must be reviewed. A higher voting threshold of at least 75% (as exists under the UK framework) would ensure that restructuring agreements receive broader creditor support and reduce the risk of a small number of significant creditors determining the outcome of the restructuring process to the detriment of majority of creditors.

Viability test

Another significant legislative intervention would be to introduce a rescue viability test prior to the commencement of administration. CIRA does not require any pre-administration viability assessment. This allows all companies including those with limited prospects of rescue to enter administration. Introducing a viability test, as in the UK, would ensure that rescue procedures are used only where restructuring is realistically achievable. This will reduce delay and cost.

[D] CONCLUSION

The policy recommendations outlined demonstrate that Ghana's insolvency reform journey is at a critical developmental stage. The enactment of CIRA marked a significant legislative milestone, but meaningful transformation requires complementary institutional, procedural, and legislative reforms. Providing modifications to allow specialized insolvency adjudication, refining court structures, improving procedural rules, strengthening case-management systems and investing in judicial training will enhance efficiency in insolvency proceedings.

Judicial reforms must also be supported by greater integration between regulatory bodies, such as the Office of the Registrar of Companies, the Bank of Ghana, the Securities and Exchange Commission, and the Ghana Revenue Authority, which would facilitate more effective information-sharing and improve identification of corporate distress.

Connected to the above, the article also recommends the enhancement of corporate databases and the introduction of early-warning systems. These measures would further shift Ghana's insolvency culture toward proactive restructuring. In particular, reforms such as early-warning director obligations and data-driven monitoring mechanisms could encourage timely intervention and prevent distressed companies from being liquidated prematurely.

The legislative amendments recommended in this article must be adopted to improve the practical implementation of CIRA. Public awareness, education and stakeholder confidence are equally vital, as insolvency systems function best when businesses, creditors, and professionals trust their fairness and efficiency.

Taken together, these recommendations aim to deepen the effectiveness of Ghana's rescue-oriented insolvency regime. If implemented progressively and supported by adequate political and institutional commitment, they can enhance creditor confidence, improve business survival rates, and strengthen Ghana's attractiveness as a stable and competitive investment destination.

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Chartered Institute of Restructuring and Insolvency Practitioners Act 2024 (Act 1117) (CIRA)

Companies Act 2019 (Act 992)

Corporate Insolvency and Restructuring Act 2020 (Act 1015)

Corporate Insolvency and Restructuring Regulations 2025 (LI 2502)

Courts Act 1993 (Act 459)

High Court (Civil Procedure) Rules 2004 (CI 47)

International

United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency 1997

United Kingdom

Civil Procedure Rules: Practice Direction – Insolvency Proceedings 2018 (as amended)

Companies Act 2006

Corporate Insolvency and Governance Act 2020 (CIGA)

Cross-Border Insolvency Regulations 2006 (SI 2006/1030) (CBIR)

Enterprise Act 2002

Insolvency Act 1986

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Special Section: Justice on Display: Law, Image and Popular Culture, edited by Paolo Vargiu, pages 998-1083

Editor's Introduction

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[A] INTRODUCTION

Law has always depended on visibility to exercise its social function. Courts, robes, files, hearings, witnesses, verdicts, prisons, all belong to the visual and symbolic life of a legal system just as much as its technical operation. The law needs to be recognized as law, and therefore it depends, at least in part, on forms of appearance. The idea for this Special Section begins with that simple observation. In contemporary culture, however, the visibility of law no longer belongs mainly to the courtroom: for many people, law is actually encountered less through statutes, judgments, or legal proceedings than through films, television drama, documentaries, comics, social media, news images, popular narratives, and increasingly digital or algorithmically produced visual forms. Moreover, the public imagination of law is often limited to its criminal iteration and shaped by images of trials, lawyers, judges, police officers, victims, offenders, investigators, prisons, and punishments. These images help form expectations about what law is, what justice should look like, who deserves protection, who appears threatening, and what counts as a convincing legal truth.

The title of this Special Section, "Justice on Display", points therefore to questions on how justice is made visible, how legal authority is staged, how legal narratives are framed, and how public feelings about law are produced. Visibility can support law's authority, but it can also make injustice perceptible, and it can conceal, simplify, racialize, sentimentalize, or sensationalize problems that are, first and foremost, legal in nature. The visual life of law is therefore ambivalent: it may educate or mislead, clarify or distort, expose or obscure. The essays collected here approach this ambivalence from different directions, and examine the ways in which the visual and the narrative participate in the making of legal meaning. Comics, television drama, reality television, environmental data, literary

trials, and musical performance all appear in this Special Section as instruments to imagine, question, hide, expose, or assess the law. This Special Section, therefore, moves between different forms of display, beginning with graphic narratives and their capacity to stage the tension between legality and justice, turning to television drama and policy discourse, considering tactics of shadow and fog, and finally reflecting on the trial as a scene of exposure, in which judgment lays the defendant bare before others and before themself. The contribution of this Special Section aims to be an invitation to think about law as a cultural and visual practice, to ask what happens when justice is watched, narrated, aestheticized, obscured, or exposed, and to question who benefits from particular forms of visibility, who is harmed by them, and what remains outside the frame.

[B] THE FOUR ESSAYS

Paolo Addis and Giuseppe Martinico's contribution opens the Special Section by turning to comics, manga, anime, and superhero narratives as forms through which law can be imagined critically. Their article treats graphic narratives as a space in which questions of legality can be made visible. This is especially important as comics often place law under pressure: their protagonists frequently act in worlds where legal institutions are corrupt, absent, inefficient, compromised, or morally insufficient. Figures such as Batman, Daredevil, and the vigilantes of *My Hero Academia: Vigilantes* are narrative devices through which readers can confront the unstable relationship between law and justice. These characters ask whether legality is always a condition of justice, whether unlawful conduct may ever appear morally necessary, and what happens when a legal system no longer seems capable of protecting the values it claims to embody. The importance of this contribution lies partly in its pedagogical dimension: Addis and Martinico show that graphic narratives can be used to teach constitutional law by complicating it, as comics allow students to approach foundational legal questions through familiar cultural forms such as the rule of law, the monopoly of legitimate violence, due process, professional ethics, vulnerability, disability, and the distinction between formal legality and substantive justice. In this sense, popular culture makes law not more accessible but more questionable and more contingent.

The article also speaks directly to the broader theme of this Special Section: comics are visual narratives, but their relevance is primarily in the way they stage conflict through bodies, masks, gestures, panels, shadows, violence, and moral confrontation. Law appears in these

stories as something embodied and dramatized: in the blind lawyer who becomes a vigilante, in the masked figure who cooperates with police while remaining outside the law, in the hero who bends rules in order to preserve a justice that the rules themselves cannot secure. What emerges, then, is that graphic narratives make the conflict between law and justice more available for thought, and show that legal authority is most revealing when it is unstable, contested, or placed at its limits.

Megan Johnson's essay shifts the issue from graphic narrative to television drama and public discourse, focusing on how legal and political meanings are organized through narrative. The article revisits the BBC drama *Three Girls* alongside Baroness Casey's National Audit on group-based child sexual exploitation and abuse and examines how sexual violence, race, victimhood, and criminality become publicly intelligible. Johnson's attention to framing is quite significant: representations of group-based child sexual exploitation enter a public field already shaped by questions about race, gender, immigration, policing, and institutional failure—that is, in a context in which the visual and narrative presentation of abuse can also reproduce racialized assumptions about who appears dangerous, who appears vulnerable, and whose suffering is recognized as legally and politically significant. Johnson's analysis is especially valuable because it resists the false choice between confronting sexual violence and criticizing racialized representation, and questions how public accounts of such violence may become attached to selective images of perpetration and victimhood. When non-white men are repeatedly figured as sexual threats to white girls, and when non-white victims become less visible within the same narrative field, the result is a distorted public understanding of both harm and justice. The display of injustice can be necessary to make institutional neglect visible and demand public response; but display can also arrange attention unequally, illuminate some victims while obscuring others, expose one form of harm while reinforcing another. Johnson's essay, therefore, shows that visibility in law is always mediated by cultural and political conditions: what is seen, and how it is seen, matters. To narrate injustice is also to distribute recognition, suspicion, and credibility; the question is not only whether law sees victims, or whether the public sees institutional failure, but how such seeing is structured by race and gender. In the context of this Special Section, Johnson's article warns that justice on display may expose harm, but it may also reproduce the very hierarchies that a just legal response should resist.

Frans Willem Korsten's contribution complicates the very idea of display. If the first two articles consider how law and justice are

imagined or narrated through popular forms, this article turns to the opposite problem: what happens when law, harm, responsibility, and accountability are made difficult to see. The central concern of the essay is the management of visibility: some things are placed before the public eye, while others are delayed, dispersed, euphemized, proceduralized, or pushed into shadow. The article develops this argument through the Dutch nitrogen crisis and the broader ecological consequences of agro-industrial practice. These are not harms that easily lend themselves to dramatic representation: environmental damage is often gradual, technical, dispersed, and difficult to picture, and it does not always appear in the form of a clear victim or a visible wound. This makes it vulnerable to what Korsten calls tactics of shadow and fog: the production of doubt, delay, opacity, and partial visibility through which powerful actors can avoid responsibility while appearing to remain within the legal and political processes. Korsten rightly insists that popular culture matters not only when it represents law directly, but also when it helps sustain affective attachments, distractions, and fantasies that shape the public's relation to legality. Korsten's discussion of Dutch agricultural imagery and popular television shows how an industry can be made visible in comforting and familiar ways while the destructive material conditions of that same industry remain largely unseen. The result is that one image is made available so that another reality becomes harder to perceive. The legal dimension of this argument is equally important: Korsten shows how opacity may be produced through legal and quasi-legal forms such as information procedures, litigation, mediation, settlement, plea bargaining, regulatory delay, and technical disputes about data. These mechanisms may be legitimate in themselves, but they can also contribute to a withdrawal of law from public scrutiny. In such cases, the problem is that the processes through which responsibility might be established become slow, inaccessible, fragmented, or invisible.

Korsten's notion of juridical cohesion gives this argument its wider force: besides institutions and procedures, the rule of law depends on a shared affective attachment to legality—a sense that the law matters, responsibility can be pursued, and public wrongs can be named. When tactics of shadow and fog repeatedly frustrate that attachment, they weaken the public's capacity to care about law as a common project. In this respect, Korsten's article significantly expands the meaning of "justice on display": display is also a struggle over opacity, data, delay, environmental harm, corporate power, and the visibility of responsibility. Korsten's essay is a reminder that injustice may be produced by what is made difficult to see just as much as by what is shown.

Persio Tincani's essay brings the section to a more philosophical and literary close. If Korsten's article asks what happens when law and responsibility are withdrawn into shadow and fog, Tincani turns to the opposite movement: the trial as a scene in which the person judged is exposed. His reading of Roger Waters' "The Trial", in dialogue with Franz Kafka and Friedrich Dürrenmatt, presents judgment as a process of unveiling. Indeed, Tincani treats exposure as intrinsic to the trial: a trial does not simply determine whether a defendant is guilty or innocent; what it actually does is place a life before others. A trial arranges facts, memories, motives, failures, desires, and weaknesses into a public or quasi-public scene of judgment and, in doing so, it strips the defendant of privacy and distance. The person on trial is made visible to the court, to the public, and to themselves. This makes the trial a particularly intense form of legal display. Unlike other images of law, the trial produces visibility directly, through the very act of judging. Evidence, testimony, accusation, confession, narrative, and verdict all work to expose the subject. Tincani's essay points out that legal visibility is not always emancipatory or reassuring: to be seen by law can also mean to be laid bare, reduced, interpreted, and shamed.

One of the most interesting aspects of Tincani's analysis is the connection between trial and shame. Shame appears as more than a possible consequence of conviction; it is, in fact, something generated by the exposure itself. Even an acquittal cannot fully undo the experience of having one's life opened to judgment. The trial's display, therefore, exceeds the verdict: what the law reveals, or claims to reveal, may continue to mark the subject regardless of the formal outcome. Visibility in the law is often associated with transparency, accountability, and open justice, but Tincani shows that visibility also has a punitive dimension: the trial may promise truth, but it also produces vulnerability; it may seek judgment, but it also creates shame. Tincani's essay, therefore, closes the sequence by returning to one of the deepest problems in the idea that justice must be seen: the same visibility that allows judgment to take place may itself become part of the punishment.

[C] THE AMBIVALENCE OF LEGAL VISIBILITY

The articles of this Special Section all underscore, in different forms, the problems of visibility in the law. Making law visible does not necessarily make it clearer, fairer, or more accountable. Visibility may serve justice just as well as it can distort it. Visibility may help audiences grasp legal problems that would otherwise remain abstract, but it may also replace the sophistication of the law with recognizable plots, types, images, and

emotions; it may expose institutional failure as well as persons unequally; the same facts may invite public scrutiny or simply become a show for the masses. Arguably, the central claim emerging from this Special Section is therefore not that law should be more visible, or less visible, but that the conditions of legal visibility require critical attention. This is made particularly significant by the fact that the general public's knowledge and understanding of the law is increasingly formed outside formal legal institutions: popular culture, media narratives, political discourse, visual symbolism, and digital circulation all shape what law is imagined to be. They influence what counts as justice, what appears as injustice, who is seen as vulnerable, who is seen as threatening, and what forms of legal authority appear credible or suspect. The public life of law is hardly confined to courts, legislatures, or official documents; one may argue that it is just as much produced through images, stories, genres, performances, and acts of framing as it is in parliaments, courts and law schools. The representation of the law, therefore, cannot be treated as secondary—in fact, images and narratives do not simply come after the law, translating it for a wider audience: they participate in the formation of legal meaning; they can make law teachable, as when graphic narratives open constitutional questions to students and readers; they can make institutional failure emotionally available, as television drama often does; they can create or reinforce racialized and gendered assumptions about crime, victimhood, and danger; they can conceal responsibility through comforting images, procedural delay, euphemism, or technical opacity; they can also turn judgment itself into an act of exposure, where the subject of law becomes visible in ways that are painful, irreversible, or punitive.

The ambivalence of visibility is therefore the main contribution of this Special Section to the wider debate on law and visual culture. On one hand, legal visibility can educate and give form to abstract principles, dramatize conflicts between legality and justice, and allow non-specialist audiences to engage with questions that might otherwise seem remote. This is one of the most important functions of popular culture for the law. On the other hand, the same process can also mislead: narrative demands resolution; genre often seeks recognizable villains and victims; images can intensify emotion while narrowing understanding. What becomes visible may be compelling simply because it is partial and easy to decode.

Moreover, legal visibility can also legitimize. Courtrooms, trials, robes, official documents, public hearings, and the various rituals of the law all produce authority through appearance. Law demands to be trusted more

than obeyed, and part of that trust is generated through forms of display. Visibility, however, may also reveal the fragility of that authority: when institutions appear corrupt, absent, racially selective, environmentally ineffective, or morally insufficient, visibility becomes a mode of critique. To see the law is also to see its failures. Invisibility, though, is not simply the opposite of display. One of the broader lessons of the articles in this Special Section is that invisibility is often produced: harms may be difficult to see because they are dispersed, technical, slow, or hidden behind expertise; responsibility may be obscured through procedure, delay, settlement, data disputes, or carefully managed public images. In such cases, the problem is that visibility is organized in ways that protect some actors and expose others. The politics of display is therefore inseparable from the politics of concealment. This is why the question of justice on display cannot be reduced to the familiar formula that "justice must be seen to be done". That formula remains important, but it is insufficient: it assumes that visibility supports legitimacy. The essays in this issue show that visibility may also undermine legitimacy, manipulate public feeling, racialize suspicion, displace accountability, or punish those placed under the legal gaze. What matters is not only whether justice is seen, but how it is seen, by whom, through which media, under which conventions, and with what effects.

These essays, therefore, invite a more critical vocabulary for thinking about the visual life of law, and encourage the readership to attend to staging, framing, genre, affect, opacity, exposure, and shame. These matters are part of how law becomes meaningful in public culture. Law's authority depends not only on rules and reasons, but also on appearances, narratives, and the management of attention. To study justice on display is therefore to study the fragile relation between law, imagination, and public belief.

[D] CONCLUDING REMARKS

As stated beforehand, "Justice on Display" began from the assumption that law depends on being seen. The authority of the law is not sustained by rules alone, but also by scenes, symbols, performances, narratives, and images. To display justice is to frame it, to decide where attention should fall, what kind of story should be told, which figures should appear central, and which forms of harm should become legible. Sometimes this display can open law to criticism, pedagogy, and democratic scrutiny, reveal the distance between legality and justice, expose institutional failure, and give audiences new ways of thinking about legal authority. Sometimes this display simplifies, racializes, sentimentalizes, obscures, punishes,

and makes some subjects hyper-visible while leaving others outside the frame. This is why the visual and narrative life of law deserves sustained attention. Popular culture helps shape the conditions under which law is recognized, trusted, feared, resisted, or misunderstood. Films, television dramas, comics, reports, rituals, trials, and public images all participate in the making of the legal imagination, in what people know about law, what they expect from it and, increasingly, how they feel about it.

The articles that follow are therefore an invitation to see justice as something the visibility of which is always constructed and contested. The question is not only whether justice is seen to be done: it is how justice is made visible, who controls that visibility, who is exposed by it, and what remains unseen.

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Justice in Panels: Exploring Law's Limits and Moral Tensions through Graphic Narratives

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Abstract

This article explores the use of comics and graphic narratives as tools for teaching and studying constitutional law, with particular attention to their capacity to illuminate the "dark side" of legality. The contribution argues that graphic narratives provide a critical laboratory for reflecting on legal dysfunctions, the limits of legal regulation, and the ways in which legal norms may reproduce exclusion and discrimination. Through their visual and narrative language, comics are especially effective in dramatizing the instability and ambiguity of legality, enabling students to confront the tension between formal legality and substantive justice in a more immediate and engaging manner than conventional doctrinal approaches often allow.

Keywords: constitutional law; legal education; comics and law; graphic narratives; legal dysfunctions.

[A] INTRODUCTION

This contribution explores the use of comics as a tool for teaching and studying constitutional law. It engages in a critical discussion of legal dysfunctions, focusing in particular on the limits of legal regulation and the ways in which legal norms may perpetuate discrimination. This article argues that graphic narratives are uniquely suited to constitutional education because they dramatize the instability of legality. Beyond their utility as pedagogical aids, we contend that comics serve as a critical laboratory for exposing legal failures and the "dark side" of the law, allowing students to navigate the complex boundary between formal legality and substantive justice in ways that traditional doctrinal teaching cannot.

* This article is the result of joint work. Paolo Addis authored Sections D and F, while Giuseppe Martinico authored Sections B, C and E. Section A was written collaboratively by both authors. All electronic resources cited were accessed on 18 September 2025.

Using Michael Asimow's metaphors of the mirror and the lamp, the article shows how comics simultaneously mirror social perceptions of law and contribute to shaping shared imaginaries of justice (Asimow 2018). The tension between law and morality is often presented as a clash between distinct normative systems. While these systems may at times intersect, they seldom align fully. Each of them, whether legal, moral, or religious, provides a framework of norms intended to guide individual conduct. In this article, we will begin by sharing some details about our experience studying and teaching law through comics and other graphic narratives (such as manga and anime). We will then highlight why the dark side of legality is a particularly fitting theme to explore through these media. We will share our experience by illustrating the work of the Sant'Anna Legal Studies (STALS) project, a research initiative established in 2009 at the Scuola Superiore Sant'Anna in Pisa, which has organized various activities on law and pop culture for several years.

[B] LAW AND COMICS IN THEORY AND PRACTICE

When teaching and researching comics we should always keep in mind that they are works of fiction. We read them, first and foremost, as enthusiasts and fans, not as lawyers. A further caveat is that trying to apply real-world law to these stories makes little sense: judged under ordinary criminal law, many of the heroes we admire would quickly be convicted of multiple offences. For this reason, we have never found such an exercise particularly meaningful. Our concern is therefore not with the scholarship that examines how comics are regulated as artistic products—the *law of art*—but rather with the ways in which comics represent legal institutions, constitutional ideas, and the language of the law—the *art of law* (Gomez Romero & Dahlman 2012).

As law professors, we have often observed that students tend to be more fascinated by characters who defy the law than by those who strictly adhere to it. The category of "outlaw" in this sense goes beyond conventional villains and frequently includes superheroes—or even protagonists more generally. This is a *cliché* that we also find in Western movies—just think of the 1976 movie *The Outlaw Josey Wales* starring (and directed by) Clint Eastwood. This preference is partly explained by the corrupt or dysfunctional systems of authority within which these figures act. Against this backdrop, our contribution examines how comic books can serve as a productive lens through which to explore the darker dimensions of legal systems. Comics have the capacity to reach wide,

often non-specialist audiences, which makes them particularly effective for legal education beyond the university classroom—an especially valuable function in times of democratic backsliding and the weakening of constitutional safeguards. This area of inquiry connects with established scholarly traditions, including law and popular culture, law and movies, and cultural legal studies, as well as the broader domains of law and literature and law and humanities. Influential contributions in this field include *When Law Goes Pop: The Vanishing Line between Law and Popular Culture* (Sherwin 2000), *Law, Culture and Visual Studies* (Wagner & Sherwin 2014), *Graphic Justice: Intersections of Comics and Law* (Giddens 2015a), and *The Law of Superheroes* (Daily & Davidson 2012).

A key aspect of this scholarship lies in the distinctive visual potential of comics, which powerfully conveys legal meanings. The use of popular culture in legal pedagogy has been persuasively defended by Asimow in his 2018 contribution to the *Journal of Legal Education*, where he invoked the dual metaphors of the mirror and the lamp (Asimow 2018). According to his analysis, popular culture both reflects dominant social values, albeit in ways mediated by entertainment and profit, and simultaneously shapes public perceptions and collective imaginaries. The same ambivalence applies to comics, manga, anime, and graphic narratives more generally (Petersen 2010). On the one hand, their familiarity can support students' engagement with legal dynamics and reduce the knowledge gap between teachers and learners, providing a shared cultural background. On the other hand, the representations of law they offer are often simplified and tend to reproduce common stereotypes.

While Anglo-American academia has developed a substantial body of work in this area (Giddens 2015b), in continental Europe such contributions remain relatively rare (Goffaux-Callebaut 2024)—making interventions like the present one all the more significant.

Our interest in using comics as a teaching tool for high school and university classes on the role of law and legality has been the result of a long journey that began before the pandemic. It developed through a series of virtual and in-person seminars that allowed us to connect with a group of scholars interested in how the relationship between law and justice is portrayed in comics and other forms of popular culture.

In recent years, we have organized a series of events devoted to the intersection of law and pop culture. While primarily aimed at an academic audience, these initiatives have been open to the public and have brought together scholars and non-lawyers to discuss the relationship between

law and morality in fictional worlds, often focusing on iconic characters such as Batman and Daredevil.

The positive reception of these events led to further collaborative initiatives,[1] including an online conference[2] and a major conference organized with the Italian Society of Comparative and European Public Law (*Diritto pubblico comparato ed europeo*), which resulted in a collective volume on the representation of legal traditions in pop culture. This line of research was further developed in two recent edited books on law in graphic narratives (Martinico & Ruotolo 2024; 2025). These books were also presented at Lucca Comics and Games in 2025, including a panel discussion with the American film and comic book writer Jeph Loeb, further highlighting the dialogue between legal scholarship and the creative industries.

Building on these experiences, our research has also extended beyond academia, including outreach activities in high schools in Tuscany, in connection with Lucca Comics and Games. Across these different contexts, a common concern has emerged: the way in which popular narratives represent legal institutions, often exposing tensions, distortions, or outright dysfunctions.

The following pages build on this background and focus on these dysfunctions in selected pop culture products—primarily anime and comics—in order to highlight their broader legal significance.

[C] EXPLORING THE DARK SIDE OF LAW THROUGH COMICS (AND MANGA)

The anime *My Hero Academia: Vigilantes* is set five years before the events of the more famous *My Hero Academia* by Kōhei Horikoshi (2014-2024) and is an adaptation of the manga *Vigilante: My Hero Academia Illegals* by Hideyuki Furuhashi (2016). While it is a spin-off, it is a particularly interesting work for exploring the relationship between law and morality in the world of heroes. As is well known, the uniqueness of the *My Hero Academia* universe lies in the fact that heroes and superpowers are the rule rather than the exception. In this story, in fact, 80% of the population possesses "Quirk", or special powers, and ordinary people without Quirk are the minority. Even the villains are often endowed with Quirk and crime-fighting relies primarily (though not exclusively) on heroes who

[1] The STALS website is available here.

[2] Law, Justice, and Pop Culture: An Interdisciplinary Dialogue. See the Sant'Anna Legal Studies YouTube channel.

are registered by law and hold a special government-issued licence. Alongside them is the police force, composed mainly (but not exclusively) of ordinary people. The main characters of *My Hero Academia: Vigilantes* are Koichi Haimawari, a university student, and Kazuho Haneyama, a street artist. At the beginning of the story, they are rescued by and become apprentices to the vigilante Knuckleduster, alias Iwao Oguro, a middle-aged man without a Quirk (though we learn from the manga that he once had one).[3] Knuckleduster is fully aware that he operates outside the law and employs violent methods in an effort to fight crime, particularly the spread of a dangerous drug (the "Trigger") that has contributed to an increase in villains in the city. Some (Edmundson 2025) have compared Knuckleduster to Batman, and he does resemble the Dark Knight in his lack of superpowers and his blunt methods. However, on closer inspection, the comparison is not entirely accurate. Batman has the enormous financial resources of his *alter ego*, Bruce Wayne, at his disposal and is recognized by the Justice League (which he co-founded and of which he is a part-time member) as a highly respected hero—even if tensions occasionally arise.[4]

What makes the spin-off *My Hero Academia: Vigilantes* particularly intriguing is the role of unregistered heroes—known as vigilantes—who fight crime despite operating outside the law. For our purposes, a dialogue at the end of the first episode is especially revealing. Detective Naomasa Tsukauchi admonishes a fellow officer, Tamakawa Sansa, after he utters the line: "We can't complain if they stop a villain." The detective responds: "Be careful thinking like that. The laws are there for a reason. It doesn't matter if you're dealing with a villain or not … taking the law into your own hands demands punishment."[5] As harsh and bitter as it may sound, the detective's words make sense: from a formal legal standpoint, the law cannot be broken, regardless of the motives of those who violate it (with narrowly defined exceptions established by the legal system itself, such as defences in criminal law). From this perspective, both villains and vigilantes are outlaws. Yet in a context where legal and moral systems frequently overlap, the position of a vigilante is far more complex. These are individuals who act outside the law, yet do so in pursuit of justice. In the following sections, we will explore cases where different regulatory systems collide and examine the stances taken by famous heroes towards the law in their stories.

[3] Indeed, in the past, he operated as a professional hero, known by the alias "High-Speed Hero: O'Clock".

[4] See, for instance, *JLA: Tower of Babel* by Mark Waid.

[5] See *My Hero Academia: Vigilantes*. Season 1, episode 2, "Takeoff".

[D] WHEN NORMATIVE SYSTEMS COLLIDE. THE CASE OF DAREDEVIL

Can legality and justice ever fully coincide? What is the ideal conception of justice to which one should aspire? Is it even meaningful to think of justice in purely abstract terms? From where do judges derive the authority to administer justice, and does their work invariably fulfil the aims set by the legal system?

In Daredevil's case, the answer to this last question is clearly negative. Matthew Murdock/Daredevil repeatedly finds himself drawn into situations where his intervention is deemed necessary to deliver a form of justice distinct from that provided by the law. Daredevil provides a compelling jurisprudential case study because he embodies the procedural limitations of the law; his dual identity as a lawyer and vigilante directly interrogates the tension between procedural truth and actual justice.

This vision of justice "beyond" the law—embodied by a superhero who acts precisely to secure what he perceives as true justice—creates a connection between Daredevil and other costumed heroes. Yet their motivations often differ, shaped by the narrative decision about the formative event that defined their path—the example of Batman is very telling in this respect (Giddens 2015b).

This divergence in motivation also shapes Daredevil's own portrayal: he emerges as a tormented figure, perhaps because he appears more "human" and "real" than many other superheroes. His inner turmoil may in part stem from a religious dimension (Negri 2024)—an element largely absent from most superhero backstories—which is particularly evident in two key scenes from the 2003 film. The first, the film's opening sequence, shows the wounded hero descending into the nave of a large Catholic church. Later, we see him in the confessional, where the priest pointedly reminds him that justice can never be reduced to mere revenge.

Although this religious perspective on justice is compelling, it cannot be pursued further here. The reference to law instead calls for attention to the persistent tension between legality and justice. In Daredevil's world, the legal system is driven by the imperative to resolve cases and deliver a verdict—whatever the investigative shortcomings and regardless of whether the outcome is substantively correct, someone must be held responsible.

This dynamic will be familiar to jurists. It echoes the distinction between historical truth and procedural truth: in most legal systems,

considerations of judicial economy require that decisions be based on the available evidence, even if it is incomplete. As a result, the "actual" truth may remain elusive, replaced instead by what is merely "plausible"—a form of truth that is, at best, approximate.

Daredevil's heroic identity takes shape precisely through this stance: he resists the legal order in the name of justice and truth. This positioning invites reflection on the presumed correlation between law and justice, as well as on the relationship between evil and illegality. Put differently, unlawful acts are not inherently "evil"; in certain circumstances, they may serve the attainment of what could be called "true" justice.

From this angle, the superhero appears as an *a-legal* figure, exposing the complexity of the law–justice relationship by operating outside the law—either in its absence or in contexts where it is deeply indeterminate. In doing so, the superhero effectively acts as a surrogate for the legal order, projecting a law of justice that highlights the gaps in existing natural or positive law.

On closer examination, the tension between law and justice is already present before Daredevil's decision to act against—or in place of—the legal system. It is inscribed in his very being, most notably in his disability. His blindness makes him a living embodiment of justice, traditionally depicted as blind, symbolising impartiality and the absence of bias[6] (Prosperi 2008; Resnik & Curtis 2011).

Moreover, this very peculiarity invites reflection on the specific relationship between persons with disabilities and access to justice—a fundamental human right that is, in practice, often marked by significant shortcomings. While this issue cannot be examined in detail here, it has been the subject of dedicated studies, which reveal the dense conceptual and axiological layers that—often unconsciously—forge our (re)interpretation of the intricate nexus between justice and disability.[7]

At a broader level, the relationship between Daredevil, law, and justice is inherently ambivalent, shaped by multiple tensions and contradictions. In his civilian life, Matt Murdock[8] practises as a lawyer, observing the formalities and rituals that define the courtroom—most notably those

[6] It should be noted that although the depiction of blindfolded justice is the most widespread, it is nevertheless not the only one.

[7] Cf Dorfman (2016). In recent times, the Court of Justice of the European Union has also considered the issue: Court of Justice of the European Union, C-824/19, *Komisia za zashtita ot diskriminatsia* commented upon by Addis (2022).

[8] Consider, for example, the version of the character in *Daredevil: Yellow* (Loeb & Sale 2001-2002).

embodied in the rules of due process (Rosen 2019: 379). Nevertheless, a challenge to the law—or, more precisely, to a particular conception of it—is always present, manifesting in different ways. Daredevil/Murdock confronts the justice system both from the outside and from within. As Daredevil, he operates beyond the courtroom, openly exposing the system's partiality and, in his own way, *delivering justice* through extra-legal means, albeit not without grappling with profound ethical dilemmas.

Conversely, as Matt Murdock the lawyer, he challenges the justice system from the inside. Here his opposition takes the form of resisting procedural abuses—such as delaying tactics or the exploitation of vulnerable parties—aligning himself with a deontological ideal of the "good lawyer" (Luban 1983). Indeed, as a lawyer, Matt Murdock draws on abilities that are, on closer inspection, extraordinary—such as detecting the heartbeat of witnesses on the stand to discern whether they are lying. Through these means, he seeks to remain honest and ethically consistent within a system in which proximity to power and the pervasive influence of money often foster corruption. Considered alongside the previous point, this element highlights a central question in legal ethics: the relationship between an individual's moral character and their professional competence. Put simply, can a good person also be a (good) lawyer (Thunder 2006)?

Finally, and in an even more radical way, Daredevil contests the rationality of the law from within the very setting—the courtroom—where rationality is traditionally regarded as a cornerstone of the legal order, serving to present the law as the only conceivable framework. Through his actions, the superhero shows that criticism of the existing legal system can be both appropriate and necessary. As a lawyer, Matt Murdock is bound to deploy rational argument, remaining faithful to the lessons of his father, a boxer murdered by organized crime for refusing to fix a match. From him, Murdock learned to rely on intellect rather than brute force—an ethos that resonates with the law's own purpose of prohibiting the unjustified use of violence.

Yet Murdock's practice is not untouched by emotion. At night, he releases the very force he appears to restrain during the day, in the public sphere. This restraint, however, is more apparent than real: the impulse to resort to force is never entirely absent, occasionally even jeopardizing his clients' interests when his secret identity intrudes upon his professional life.

This duality reveals yet another way in which Matt Murdock/Daredevil challenges the law—or, more precisely, its "legal architecture", which

rests on the separation of roles and powers. By day, he is a lawyer; by night, a judge. Such a conflation of functions, from a legal standpoint, marks a clear departure from the principles of the liberal rule of law. It raises the question: can this blurring of roles genuinely serve the cause of justice? And what becomes of judicial impartiality—long considered one of the rule of law's essential foundations—when the same individual acts as both advocate and adjudicator?

[E] WHEN NORMATIVE SYSTEMS COLLIDE. THE CASE OF BATMAN

As we shall see, Batman serves as a critical constitutional lens through which to examine the state's monopoly on violence. His stories explore the risks of systemic corruption and the "liminal legality" that arises when the rule of law slides into mere rule by law. In Gotham's infernal setting, the idea of law as a vehicle of justice appears almost untenable, corrupted as it is at every level—including within the police. This is starkly illustrated in *Batman: Year One* (Miller 1987), which portrays the early days of Lieutenant Gordon. Upon his arrival in the city, Gordon is partnered with Detective Arnold John Flass, whose conduct epitomizes the rot within the force. Encounters with figures like Flass lead Gordon to reassess, from the outset, the role that Batman might play in confronting Gotham's decay:

> He's a criminal. I'm a cop. It's that simple. But—but I'm a cop in a city where the mayor and the commissioner of police use cops as hired killers … he saved that old woman, he saved that cat, and he even paid for that suit (Miller 1987).

A few years later, in *Batman: Year Two* Gordon—now promoted to commissioner—frames the relationship between the Gotham police and Batman as one of cooperation. Yet, despite this understanding, the Dark Knight remains apart from the force, operating "strictly on his own" (Barr & Ors 1987):

> Gordon: "I can't speak for the department of twenty years ago, but the Batman works WITH the police force. Not against us."
>
> Interviewer: "And is this 'Batman' an authorized representative of force?"
>
> Gordon: "No, he operates strictly on his own. But he's offered me his services." (Ibid).

In *Batman: The Dark Knight Returns* (Miller & Ors 1986), Gordon—now at the twilight of his career—openly concedes that he has "bent

and sometimes broken" the rules precisely to work with the vigilante of Gotham.[9]

In order to collaborate with Gotham's vigilante, Batman—and this is precisely what makes him so intriguing to legal scholars—must be understood as a figure who operates outside the framework of the rule of law, thereby directly challenging the Weberian idea of the state's monopoly on the legitimate use of force. Yet his actions are undeniably guided by a pursuit of justice. A particularly revealing moment of this tension emerges in *Batman: The Long Halloween* (Loeb & Sale 1996-1997), where Gordon and Dent, still serving as Gotham's district attorney, await Batman on one of the city's emblematic rooftops—a scene that crystallizes the uneasy interplay between law and justice in this narrative world. As Thomas Giddens observes (2015b), what we encounter here is a genuine triumvirate: Gordon (representing the police) and Dent (the legal system) refuse to act until Batman—the embodiment of justice—arrives, underscoring that law is powerless without being animated by a pursuit of justice. Within this framework, Gordon and Dent persuade Batman to target mobster Carmine Falcone, but only within the boundaries of legality. Gordon is explicit: "I'll let you bend the rules but we cannot break them. Otherwise, how are we different from him?" This notion of bending without breaking epitomizes the liminal legality that Batman reluctantly embraces. Yet, to those who confine themselves to a purely legalist perspective, Batman appears little different from the criminals he hunts. Indeed, the theme of Batman's "closeness" to the Joker runs like a thread through the narrative from 1939 to the present. Apart from the oft-invoked prohibition against killing (not consistently present in the earliest depictions of the Dark Knight), the two figures share more than one might expect—a parallel the Joker himself makes explicit in *Batman: The Killing Joke*. In the animated adaptation (Liu 2016, which diverges in some respects from Alan Moore's graphic novel), a telling moment unfolds when Gordon—kidnapped and brutalized by the Joker and his men—is confronted with a series of questions:

> What should be done with someone who has no regard for the law?
>
> Someone who treats people like meat?
>
> A man who has no problem brutalizing his fellow man to get his way?
>
> What would you do to a man who breaks the laws you are sworn to uphold?
>
> A monster who ignores everything you stand for?

[9] "I don't think he can possibly know how much I bent and broke the rules for him, all these years." *Batman: The Dark Knight Returns* (Miller & Ors 1986).

To this barrage of provocations, Gordon—chained, stripped bare, and mockingly adorned with the oversized wig of a British judge—responds: "If it were up to me, I'd throw the book at him," meaning that he would impose the maximum penalty. In that very moment, the Commissioner hurls at the Joker a massive volume titled *The Law*, which had been placed at his side, turning the metaphor into a literal act. However, the Joker parades behind a Batman "cardboard cutout" and with a Mephistophelean smile clarifies that he was not talking about himself, but about Batman, his true *alter ego,* who has means not so different from his opponents:

> Truth is, Commissioner, the man on trial here you consider your friend.

Indeed, aside from the well-known prohibition on killing, Batman and the Joker share more similarities than one might initially assume. In that moment, the Joker's aim is precisely to demonstrate that anyone—after a single catastrophic day—can be pushed beyond their limits and lose control.

> All it takes is one bad day. That's how far the world is from where I am, just one bad day. You had a bad day once, am I right? Oh, I know I am. I can tell. You had a bad day and everything changed. Dressing up like a flying rat doesn't hide it, it screams it! You had a bad day and it drove you just as crazy as everyone else only you won't admit it! (Liu 2016).

This is not the only instance in which Batman finds himself placed on trial; one need only recall the iconic 1994 animated episode "Trial". On that occasion, a jury composed of Gotham's most infamous criminals—hardly an impartial panel—faces a question posed by none other than Judge Joker:

> Did the criminals of Gotham create Batman or did he create them?

This, of course, is a *tòpos*—a recurring motif that reappears, unsurprisingly, across the narratives of heroes and superheroes alike, from *Superman* to *Dragon Ball*: to what extent are these figures the source of crisis rather than the remedy to the decline of the systems they inhabit? With this question in mind, the following section will seek to explore what justice truly means in the world of Batman. In *Batman: The Killing Joke*, one of the Joker's central aims is to demonstrate that Batman himself deserves to stand condemned, even to the harshest penalty. Time and again, Batman reveals a tendency to place his own conception of justice—at times barely distinguishable from vengeance—above the law. Yet for Batman, justice extends beyond mere revenge, as illustrated in *Batman: Year Two* (Barr & Ors 1987), when Joe Chill—the man who murdered Bruce Wayne's

parents—reenters the story. To confront Gotham's previous vigilante, the Reaper, Batman reluctantly agrees to an uneasy alliance with Chill. At times, his desire for vengeance seems to overshadow his commitment to justice. During preparations for an ambush against the Reaper, the two engage in a tense exchange, and Batman, unmasking himself as Bruce Wayne, appears poised to kill Chill. However, Chill is ultimately killed by the Reaper, who arrives on the scene to confront the Dark Knight, sparing Batman from crossing that line. The Reaper (Judson Caspian, in *Batman: Year Two*: Barr & Ors 1987) is another pivotal figure for understanding the role of law in Batman's world. He returns to Gotham because he perceives Batman as weak, constrained by his own "code"—*Thou shalt not kill*. Yet Batman and the Reaper share certain traits, notably their instrumental use of fear—the Reaper's ominous battle cry, "Fear … the Reaper", is a case in point—and their past affection for Rachel Caspian, Judson's daughter and Bruce's former fiancée, who ultimately chooses a religious life after her father's death.

Two critical differences, however, set them apart: the Reaper has no faith in the law, and he does not hesitate to take the lives of criminals. It is precisely this willingness to decide life and death that marks him as a fully-fledged criminal in the eyes of both Batman and Gordon.

Still, Batman is not infallible and occasionally risks crossing his own ethical boundaries. A notable example occurs in *Batman: Hush* (Loeb & Sale 2002-2003), when Commissioner Gordon intervenes to prevent him from killing the Joker, underscoring the profound distinction between Batman and the supervillains he confronts. The crucial boundary that separates Batman from the criminals, in Gordon's view, is his strict adherence to the *Thou shalt not kill* rule. Gordon embodies the appeal to whatever vestiges of legality remain in the Batman universe, a theme recurring throughout many stories. For instance, in *Batman: The Killing Joke*, he urges the Dark Knight to apprehend the Joker "by following the rules"—*by the book*.

Batman: The Dark Knight Returns (Miller & Ors 1986) provides a striking example: in just a few pages, we move from a scene where—after defeating the leader of the mutants—the aging Batman is ironically hailed as their new leader. Though his physique betrays the passage of time, the Dark Knight's charisma remains undiminished. After breaking a gun—firearms being notably rare in Batman's arsenal—he appears to align, at least symbolically, with the cause of order itself, delivering a line of remarkable resonance:

> Tonight, we are the law. Tonight, I am the Law (ibid).

Statements such as these place Batman in direct tension with the Weberian conception of the state, as John Ip notes (2011: 226) "Batman, of course, works outside the law and outside the system. His vigilante actions are illegal since he infringes the state's monopoly on the legitimate use of force." How, then, should we interpret the declaration, "Tonight I am the Law"? Does it signify private justice, a breach of the rule of law, or simply the actions of a criminal fighting crime? The complexity deepens a few pages later, in a heated confrontation with Superman—a scene that would later inspire Zack Snyder's *Batman v Superman: Dawn of Justice* (2016)—where Batman explicitly labels both himself and Superman as criminals. In Jay Oliva's animated version, this passage unfolds through a straightforward exchange between our heroes.

> Clark Kent: "Why do you always have to be like this? You played right into their hands last time, when the parents groups and subcommittees came after us, you're the one they pointed to. You act like a criminal."
>
> Bruce Wayne: "We are criminals, Clark. We always have been. You're still one too. Only difference is you have a boss." (Oliva 2012-2013).

These two passages appear contradictory, yet they coexist within the same narrative. One might be tempted to interpret Batman's actions as akin to the exercise of constituent power. However, as David Graeber convincingly argues, this reading is problematic:

> Insofar as there is a potential for constituent power then, it can only come from purveyors of violence. The supervillains and evil masterminds, when they are not merely indulging in random acts of terror, are always scheming of imposing a New World Order of some *kind or another … Superheroes resist this logic. They do not wish to conquer the world—if only because they are not monomaniacal or insane. As a result, they remain parasitical off the villains in the same way that police remain parasitical off criminals: without them, they'd have no reason to exist. They remain defenders of a legal and political system which itself seems to have come out of nowhere, and which, however faulty or degraded, must be defended, because the only alternative is so much worse* (Graeber 2012: emphasis added).

In *Batman: The Long Halloween* (Loeb & Sale 1996-1997), the Dark Knight places his trust in Dent and, above all, Gordon, yet he remains deeply sceptical of the broader "system". This is evident in the way Batman himself describes Gordon in these scenes:

> Jim Gordon is a good man. He and the police do the best they can with limited resources. But, Gotham City needs Batman (Loeb & Sale 1996-1997).

The city requires a vigilante willing to operate within the liminal legality discussed earlier, precisely because corruption is so deeply entrenched. This is why Batman is prepared to bend those legal boundaries in the pursuit of justice—distinct from mere revenge—responding to the inherent inadequacy of the law itself:

> He implies that going outside the legal system is ethically justified when the system is broken, a message that explicitly challenges the rule of law. *Bruce seeks to punish people for breaking the law, but his vigilantism sends the message that the law is insufficient. Batman's very existence undermines people's faith in the societal norms he seeks to uphold* (Glew 2022: emphasis added).

This brings us back to what we saw in the case of Knuckleduster, but it takes on particular significance in a context of systemic corruption—a dynamic we do not encounter in the world of *My Hero Academia: Vigilantes*. After all, in one of the early Batman stories, our hooded crusader responded to those who complained about the difficulty of solving the case (Batman, after all, began as a detective) by candidly stating that "if you can't beat them 'inside' the law, you must beat them 'outside' it—and that's where I come in!" (*The Case of the City of Terror*, Kane & Finger 1940)

In both cases, the law is portrayed as a tool that can be abused—particularly in corrupt contexts, such as Gotham—and is shown to be insufficient on its own to guarantee justice, even when the fight against crime is entrusted to superheroes with extraordinary powers. After all, law is a human creation, and in this respect, the stories of Batman and Knuckleduster take on special significance, as they depict, more than others, humans waging their crusade with nothing but their own flesh and resolve, and blood.

[F] FINAL REMARKS

From an educational point of view, discussing constitutional law through the stories of comic book characters produced some unexpected insights. In particular, in secondary school classes there was a heightened awareness of the historical nature of law: the rules that govern our societies—as noted above—are human creations and therefore subject to tensions and even sudden changes.

At times, the discussion took unforeseen turns. For example, the relationship between the various ideas emerging in the adventures of the Dark Knight and the concepts of justice, revenge, deviance, and law—as well as the tension between justice and law—was transposed from the streets of Gotham to online life, prompting some participants to

reflect on the limits of what has been described in the literature as digital vigilantism (Trottier 2017).

Participants also frequently focused on aspects of human existence that legal scholarship has only recently begun to explore. In this respect, particular attention during lectures and seminars was given to the concepts of vulnerability and the "vulnerable subject" (Fineman 2010). As already noted, these stories invite us to question specific forms of subjectivity. These are just two of the many insights highlighted by those who joined our attempt to discuss the constitution and law through graphic narrative. The common thread running through our experience—reflected, ultimately, in this essay—is that engaging very young people with the principles of constitutionalism requires the ability to tap into their passions and cultural references without paternalism. This approach helps reveal that law—particularly constitutional law—is neither static nor inherently "right," but rather the product of a continuous effort to balance diverse social and political demands, an effort that must be examined critically, with attention to its rationale and history. And whether in Gotham, Hell's Kitchen, or the real world, the risk confronting the legal order is the same: losing sight of the rule of law and sliding into mere rule by law.

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The Racialization of the Rape Crisis? Revisiting BBC's *Three Girls* Following Baroness Casey's National Audit on Group-Based Child Sexual Exploitation and Sexual Abuse

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Abstract

This article examines the racialization of group-based child sexual exploitation and abuse (CSEA) in the United Kingdom through an interdisciplinary analysis of Baroness Casey's National Audit and the BBC drama *Three Girls*. Situating both within wider political and cultural discourses, it explores how ethnicity is mobilized in policy, data collection and dissemination, and media representation. The article demonstrates that limited ethnicity data, alongside selective narrative emphasis, risks reinforcing racialized rape myths that construct non-white men as inherent sexual threats of white women and girls. It argues that such framings marginalize non-white victims, distort public understanding of CSEA, and undermine equitable justice responses.

Keywords: sexual offending; group-based child sexual exploitation and abuse (CSEA); race; ethnicity; perpetration; victimization; interdisciplinary; socio-legal.

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[A] INTRODUCTION

In April 2023, former Home Secretary Suella Braverman wrote in the *Mail on Sunday* that grooming gangs in the United Kingdom (UK) were made up "almost entirely of British Pakistani" men (Owen 2023). She argued that British Pakistani men were responsible for sexual violence due to what she described as "cultural attitudes" that were fundamentally incompatible with British values. The press regulator, the Independent Press Standards Organisation (IPSO), later criticized these remarks (IPSO 2023). To state that a specific ethnic group has a cultural propensity to commit sexual offences is, according to IPSO, demonstrably false. Although the article was subsequently corrected and its comment section closed, it garnered a myriad of responses that collectively called for extreme punitive measures such as deportation, castration, and the return of capital punishment (Johnson 2025: 9).

The depiction of non-white men as inherent sexual threats is not a new phenomenon in British public debate. Another former Home Secretary, Priti Patel, defended the Nationality and Borders Act 2022 on social media site *X*. This piece of legislation, which permits the deportation of asylum seekers and undocumented migrants to offshore facilities in European and African countries, was viewed as way to protect women and girls by making it easier to deport those convicted of crimes including rape and sexual assault (Patel 2022). Under this logic, the Nationality and Borders Act 2022 supposedly contributed to national efforts to tackle sexual violence (Johnson 2025: 9). While rape continues to be weaponized by government officials to rationalize oppressive immigration and border control policies, rape victims are failed at every stage of the criminal justice system (Johnson 2025: 10). In the same year that Patel made these statements, only 1.2% of reported rapes resulted in a charge (House of Commons (Home Affairs Committee) 2022).

The purpose of this article is to situate Baroness Casey's National Audit on Group-Based Sexual Exploitation and Abuse within these wider political and cultural discourses. By analysing Baroness Casey's audit (2025) alongside BBC's *Three Girls* (Taylor 2017), the article examines how ethnicity is mobilized in media representation and policy discussions, shaping public perceptions of perpetrators and victims of child sexual exploitation and child sexual abuse (CSEA). It provides a contained interdisciplinary critical evaluation that combines policy critique, discourse analysis, and a close textual reading of a television drama to examine how ethnicity is constructed across policy and media narratives. It would be indefensible to claim that Baroness Casey's National Audit or

BBC's *Three Girls* actively promotes or endorses racism. Instead, what this article intends to more carefully accentuate is that the effects can oftentimes exceed authorial intention. They participate in and contribute to a wider representational field about race and sexual offending that has interpretive and ideological consequences.

[B] BARONESS CASEY'S NATIONAL AUDIT ON GROUP-BASED CHILD SEXUAL EXPLOITATION AND SEXUAL ABUSE

Context, purpose, and outcomes

In June 2025, Louise Casey (Baroness Casey of Blackstock) published the National Audit on Group-Based Child Sexual Exploitation and Abuse. Commissioned by the Prime Minister and Home Secretary in February 2025, the audit was rapidly carried out over a three-month period in March, April, and May 2025. The purpose of the audit was to provide a comprehensive evaluation into the scale, nature, and drivers of group-based CSEA at a local and national level. The audit reviewed existing data, empirical evidence, and testimonials to identify gaps in knowledge and understanding of these heinous crimes. It sought to present a thorough picture of the current landscape of group-based sexual offending against children, scrutinize the available datasets in this field, and develop a series of implementable recommendations. When actioned, the desired outcome of these recommendations is to ensure robust prevention of group-based CSEA by promoting cross-agency collaboration, strengthening mechanisms of redress for victims, and supporting the effective investigation and prosecution of perpetrators. This government-sanctioned audit can therefore serve as a meaningful evidence base for prevention, early intervention, and disruption of group-based CSEA. Additionally, it is likely to produce significant advances in policy development, risk and vulnerability identification, safeguarding procedures, and targeted responses to perpetration.

Recommendations

The report concludes by setting out 12 recommendations (Casey 2025: 150-154). In its response, the Government has accepted each recommendation (Home Office 2026).

1 The law in England and Wales should be changed so adults who intentionally penetrate the vagina, anus or mouth of a child under 16 receive mandatory charges of rape. This recommendation also

suggests the implementation of a "Romeo and Juliet clause" that prevents criminalizing teenagers in sexual relationships with each other.

2 A national police operation and national inquiry (co-ordinating a series of targeted investigations) should be launched into CSEA in England and Wales.

3 To review the criminal convictions of child sexual exploitation. To quash any convictions where the Government finds victims were criminalized instead of protected. This recommendation directly responds to the poor treatment of victims. Notably, there were situations where victims were investigated, arrested, and prosecuted for matters directly linked to their abuse.

4 The Government should make mandatory the collection of ethnicity and nationality data for all suspects in CSEA cases. The Government should also work with police to improve the collection of ethnicity data for victims.

5 Mandatory sharing of information should be enforced between all statutory safeguarding partners in cases of CSEA. Compliance should be monitored by the inspectorates and overseen by the proposed Child Protection Authority.

6 The Department for Education should introduce unique reference numbers for children to improve opportunities for agencies to share information about vulnerable children at risk of child sexual abuse.

7 Police information systems should be upgraded and enable the use of unique reference numbers for children introduced by the Department for Education.

8 CSEA investigations should be approached like serious and organized crime.

9 The Department for Education should interrogate child protection data to identify the causes of the decline in CSEA representation in "child in need" assessment data, examine the reasons for variations across local authorities, and review the effectiveness of Serious Incident Notifications in relation to CSEA.

10 The Government should commission research into the drivers for group-based CSEA, including online offending, cultural factors and the role of the "group".

11 The Department for Transport should stop "out of area" taxis and implement rigorous statutory standards for local authority licensing and the regulation of taxi drivers. This is because the report uncovered how taxis sometimes facilitate human trafficking

by transporting children across different geographical areas for the purposes of CSEA.

12 The Government should commit to fully resourcing the implementation of these recommendations over multiple years, track their implementation across departments and other organizations, and ensure reports are regularly submitted to Parliament.

Many of these recommendations speak to critical issues such as rectifying poor treatment of victims and advancing cross-agency collaboration. The recommendation advocating for a universal, blanket enforcement of the age of consent, which is aimed at resolving inconsistent application of rape charges where an adult has sexual intercourse with a child between the ages of 13 and 15, is particularly welcomed (Casey 2025: 143-145). However, certain recommendations remain a cause for concern. In particular, the mandatory recording of ethnicity for perpetrators is troubling when similar data collection for victims is not required (Casey 2025: 152). This is disappointing when such valuable data could be used to identify and address unique barriers faced by racialized victims navigating the criminal justice system including racism, cultural factors, language barriers, religious customs, and immigration status (Gangoli & Ors 2020).

Emphasis on the ethnicity of offenders without comparable attention to victims risks creating a disproportionate emphasis on perpetrators of group-based CSEA from particular backgrounds while continuing the marginalization and erasure of those harmed (Cockbain & Tufail 2020). It also risks a potential hyper-fixation on a specific racial combination of rape, namely a non-white perpetrator and a white victim, rather than addressing broader patterns of predatory behaviour and victimization that are constituent components of *all* CSEA cases.

Ethnicity

A central element of this national audit was to assess what is known about the demographics of so-called “grooming gangs” and their victims, including *ethnicity*. Baroness Casey concedes within the audit that, while the concept of “grooming gangs” is a feature of public discourse that exists within the popular imaginary and collective consciousness, it is not a defined legal category or capturable by any national data collection system (Casey 2025: 49). Nonetheless, this term is used in the report and coupled with “Asian” and “Pakistani”. The use of ethnicity as a focal analytical point was justified in the report as a concern about over-representation of Asian, Muslim, and Pakistani men as perpetrators of

this type of sexual offending (Casey 2025: 8). While the majority of CSEA offenders are white men, the report advanced the following argument:

> In a population of over 80% of people of White ethnicity, it should always be a significant issue when people from a White background are not in the majority of victims or perpetrators of crime … [I]t does no community any good to ignore disproportion[ality] in any form of offending (Casey 2025: 128, 126, original emphasis).

According to the title of section 6.2.4, "ethnicity matters" (Casey 2025: 128). Within this section, the audit argues that race and ethnicity, as a feature of group-based CSEA, cannot be shied away from and to do so, as institutions have historically done so as to avoid uncomfortable conversations, would be an affront to public conscience and justice. The report also cautions that it is "at best misleading" to claim that the majority of group-based CSEA is committed by white men—even if true (Casey 2025: 128). It is of course necessary to acknowledge that some non-white men have committed serious sexual offences against children, and it would be wrongful to deny this. However, it is equally important to consider the broader implications of how this fact is interpreted and represented. Prior to situating the retort that "ethnicity matters" within broader discourses of racialization, moral panics, and racialized rape myths that characterize non-white men as sexual threats, it is important to evaluate how ethnicity is handled within the audit itself.

Data limitations

The audit declared considerable limitations in the datasets regarding ethnicity (Casey 2025: 122). It is true to acknowledge there are serious constraints when trying to access, report, and interpret reliable empirical data from the Police National Database and the Ministry of Justice. This significantly impedes academic scholarship from conducting rigorous evidence-based research into race, sexual offending, and racial disparities in criminal justice responses thereto (Johnson 2025: 205).

The National Police Chiefs' Council (NPCC) has initiated steps to enhance the data collection of victim and perpetrator ethnicity in CSEA cases. Key initiatives include the annual publication by the NPCC's Vulnerability Knowledge and Practice Programme (VKPP) and the development of the Complex Organized Child Abuse Dataset (COCAD), part of the Child Sexual Exploitation Taskforce led by the Hydrant Programme.

However, a large percentage of the ethnicity data remains unknown because it has simply not been collected at point of entry. Ethnicity was only recorded on 35% of victims in the data published in 2024 by the VKPP (2025: 14). Moreover, COCAD identified that, in 2023, 53% of

victim ethnicity was unknown. In the context of perpetrator ethnicity, the data is as equally unreliable (Casey 2025: 72). The COCAD data reveals that 88% of group-based CSEA offenders are white only when unknown ethnicity data is excluded. When unknown ethnicity data is included, this falls to 28% (Casey 2025: 75). With confidence, it can be stated that at least 28% of group-based CSEA offenders are white. However, it cannot be definitively concluded that 88% are white overall. Despite limitations in the quality and quantity of ethnicity data, Baroness Casey's audit attempts to evaluate the available data pertaining to the ethnicity of perpetrators and victims.

Ethnicity of perpetrators

National data on the ethnicity of suspects in CSEA cases is currently inadequate. Data collected via self-identification or police officer-assessed ethnic appearance is inconsistent and incomplete, making it unreliable for drawing conclusions about the ethnicity of group-based offenders of CSEA.

The 2025 VKPP report recorded ethnicity for only 31% of perpetrators (VKPP 2025: 14). Of this 31% where perpetrator ethnicity was recorded:

- ◊ 88% are white;
- ◊ 5% are Asian;
- ◊ 3% are Black;
- ◊ 2% are Mixed;
- ◊ and 1% are Chinese or other ethnic group (VKPP 2025: 31).

Similarly, the November 2024 COCAD report published self-identified ethnicity for all group-based CSEA crimes in 2023. Among the 34% of perpetrators for whom ethnicity was recorded, the figures reveal that:

- ◊ 88% are white;
- ◊ 7% are Asian;
- ◊ 5% are Black;
- ◊ 3% are Mixed;
- ◊ and 2% are Other (Casey 2025: 75).

While the available data may appear to suggest relatively low levels of non-white offending of CSEA, the comprehensive timeline set out in Baroness Casey's report in section 2.2 indicates a growing focus on ethnicity over time (Casey 2025: 24-41). From 2009 to 2025, increasing attention is paid to the ethnicity of perpetrators of CSEA by politicians, agencies, policymakers, criminal justice agents, journalists such as Andrew Norfolk (2011), and television programmes.

Concurrent to this increased attention was a spate of high-profile investigations and prosecutions, including cases of CSEA in Derbyshire, Rotherham, Rochdale, Telford, Oxford, Peterborough, Bristol, and Huddersfield. Many offenders, as part of these highly publicized convictions, were British Pakistani or of an alternative Asian ethnic background. For example, in 2011, 11 men of predominantly British Pakistani heritage were convicted of multiple sexual crimes against 26 teenage girls as part of Operation Retriever. In 2012, as part of Operation Span, nine men of Asian ethnicity were convicted in Rochdale for a series of sexual offences including rape, human trafficking, and conspiracy to engage in sexual activity with a child. In 2013, seven British Pakistani men were convicted in Oxford for rape, human trafficking, and facilitating prostitution as part of Operation Bullfinch. In 2014, as part of Operation Brooke, seven Somali men were convicted of multiple sexual offences against children. Between 2014 and 2015, 10 men of Asian and Eastern European background were convicted of 59 sexual offences against multiple children as part of Operation Erle. Comparably, there was no reference to the white ethnicity of eight men convicted in 2025 of multiple sexual offences against a child between the ages of 13 and15, including rape. Together, these examples illustrate a pattern in which the ethnicity of some offenders is prominently noted, while in other cases ethnicity—particularly if white—is regarded as less important and remains unremarked upon. This shapes public understanding of CSEA in ways that do not reflect the full evidential landscape.

Ethnicity of victims

The final *Report of the Independent Inquiry into Child Sexual Abuse* (IICSA) published in October 2022, when discussing victim compensation schemes and adequate financial investment in support services and charitable resources, commented that ethnicity of victims was rarely recorded. The IICSA highlights this as an inadequacy. Citing the inquiry's "Child Sexual Exploitation by Organised Networks Investigation Report" (February 2022), the IICSA problematized the inquiry's widespread failures to collect victim ethnicity data across six case-study areas, including Rochdale and Rotherham. As a result of this paucity, police and other agencies are unable to identify patterns of CSEA in respect of ethnicity and cannot effectively tailor mechanisms of redress that allow for racial, religious, and cultural particularities.

Despite nearly two-thirds of victim ethnicity data being unknown, according to the available victim ethnicity data within the VKPP report:

- ◊ 87% of recorded victims self-identified as white or white British;
- ◊ 4% as Black or Black British;
- ◊ 4% as Asian or Asian British;
- ◊ 3% as Chinese or other ethnic group; and
- ◊ 3% as mixed.

The VKPP report compares these figures with Crime Survey and Census ethnicity data. It observes that white British victims remained the most common self-identified ethnicity group, while Asian or Asian British victims continue to be under-represented as victims of CSEA relative to their representation as victims in other types of crimes.

Additionally, Greater Manchester Police provided the audit with localized data across a three-year period from January 2022 to May 2025, which included 35 group-based CSEA operations. Within these 35 investigations, there are 317 recorded victims. The victim ethnicity data that is available demonstrates that 94% of victims are white, 3% are Asian, 2% are Black, and 1% are other (Casey 2025: 72).

Similarly to the VKPP report and Greater Manchester Police, the COCAD report into group-based CSEA demonstrates similar patterns of under-representation of non-white victims. According to COCAD, within the 47% of victims where ethnicity is discernible:

- ◊ 85% of recorded victims self-identified as white;
- ◊ 4% as Black;
- ◊ 4% as mixed;
- ◊ 4% as other ethnic group; and
- ◊ 3% as Asian.

Notably, Baroness Casey's audit reconfigured COCAD's dataset. When victims whose ethnicity is unknown is included in the percentage calculations, the figures changed significantly. With this unknown data incorporated, white victims represent only 39% of all victims (Casey 2025: 72). This suggests that non-white victims are likely to be far more impacted than existing data shows. Baroness Casey's fourth recommendation to only mandatorily record the ethnicity of perpetrators and not victims risks widening this gap, further limiting understanding of victim demographics and potentially undermining equitable support.

This imbalance is not merely a technical issue of missing or erroneous data. It has practical implications for how sexual violence is made visible, interpreted, and narrated within popular discourse. Therefore, the discussion must shift from the methodological issues arising from

unavailable ethnicity data to the interpretive and ideological work that such incomplete datasets can perform. Selective visibility of perpetrator ethnicity, combined with the systematic absence or uncertainty of victim ethnicity, creates conditions in which racialized narratives of sexual violence can be amplified.

[C] RACIALIZED RAPE MYTHS: CONSTRUCTIONS OF PERPETRATION AND VICTIMHOOD

"Asian grooming gangs": a UK variant of "the myth of the Black rapist"

In *Women, Race and Class*, Angela Davis writes extensively about "the myth of the Black rapist"—a figure historically constructed to legitimize racial terror, segregation, and the exertion of racial hierarchies. The myth depicts Black men as violent, predatory, and brutish rapists of white women. The monolithic centring of white womanhood as victimhood contributes, in turn, to the devaluation of Black women as "unrapeable" (Davis 1983: 191; hooks 1982). Although this myth belongs to a distinct racial genealogy and geography that goes beyond the scope of this article, Davis's analysis offers a useful analytical framework to understand constructions of perpetration and victimhood.

In the UK context, narratives around "Asian grooming gangs" similarly emphasize specific racialized combinations: non-white men as perpetrators of sex crimes against white women and girls. As Ella Cockbain and Waqas Tufail observe, the overwhelming focus on Asian men abusing white girls risks erasing victims outside of this narrow paradigm and overlooking other offenders (Cockbain & Tufail 2020: 15). Figures such as Tommy Robinson exemplify this. Robinson has positioned CSEA as his central political issue, securing appointments such as "special personal advisor on rape gangs" to the leader of the UK Independence Party (UKIP) and speaking on "grooming gangs" in the Czech Parliament (Cockbain & Tufail 2020: 9). Yet his authority is largely performative: he is neither a subject matter expert nor a champion for victims. Repeatedly, his outspoken focus on CSEA excludes offences committed by members within his own English Defence League network (*The Independent* 2018).

"Group" and "gang" are synonyms

Some unique particularities emerge in the distinctive racialization process for Pakistani, Muslim, and Asian men—especially in relation to *group-*

based offending. One significant difference between "the myth of the Black rapist" and "Asian grooming gangs" is the role of the group (Johnson 2025: 160). Gang discourse extends culpability beyond individual perpetrators and projects it onto an imagined homogeneous community. It implies not only coordinated offending, but a shared cultural motivation rooted in ethnicity and religion.

As Gargi Bhattacharyya and colleagues contend, the figure of the "Asian grooming gang" draws upon historic Orientalist constructions of non-white masculinity as hypersexual, patriarchal, culturally regressive, and inherently threatening (Bhattacharyya & Ors 2021: 114-116). The term "gang" performs significant ideological labour in this context. It does not simply denote co-offending or collaborative criminal activity; rather, it invokes a racialized "folk devil". Claire Alexander's influential analysis of the "Asian gang", which emerged in public discourse between the 1970s and 1990s, demonstrates how young South Asian men were cast as embodiments of deviancy and cultural incompatibility (Alexander 2000: xiii). In this formulation, the "Asian gang" was not merely a representation of incivility, but a criminal set marked by racial difference and an alleged opacity or unknowability that rendered it fundamentally outside the national community.

The contemporary "Asian grooming gang" revives this earlier figure in an explicitly sexualized register (Cockbain 2013). The shift from representations of street violence to those of sexual predation does not disrupt the underlying racial logic. Instead, it intensifies it. The label "gang" transforms what are, in legal and criminological terms, networks or groups into collective embodiments of racial pathology. In this sense, "group" and "gang" operate as rhetorical equivalents, but only in selective and racialized ways. When white men commit sexual offences together, media accounts frequently describe them as "friends" (or part of a "friendship circle") and "a group" (Humphries & Roughley 2025). By contrast, when the accused are Pakistani or Muslim, "gang" becomes the dominant descriptor. The distinction is not merely semantic; it is racialized. "Gang" connotes organized deviance embedded in cultural identity, fusing criminality with ethnicity and transforming individual wrongdoing into evidence of collective sexual transgression.

This discursive process produces two interrelated effects. Firstly, it casts British Pakistani men *en masse* as sexually deviant subjects, imagined as driven by a culturally specific desire for white girls. Secondly, it recentres whiteness as the paradigmatic site of victimhood. In a manner reminiscent of "the myth of the Black rapist", white femininity becomes

hypervisible or exceptional, while other victims are rendered peripheral or invisible.

The consequences of this framing are tangible. The focus on Asian men abusing white girls obscures the demographic complexity of child sexual exploitation in the UK, where both perpetrators and victims come from a range of ethnic and social backgrounds. It also marginalizes South Asian and Muslim girls who experience sexual abuse, often within familial or community settings, yet struggle to secure recognition within a public discourse that casts their communities solely as sites of perpetration.

The racialization of the term "gang", therefore, does more than describe crime; it constructs a moral panic. It reactivates longstanding narratives of racial threat, reframes them through the lens of sexual danger, and consolidates a hierarchy of victimhood in which white girls are imagined as uniquely vulnerable. In this way, the "Asian grooming gang" functions less as a neutral criminological category than as a cultural myth that maintains broader projects of racial boundary-making and exclusion.

If the "Asian grooming gang" operates as a cultural myth that exceeds its criminological referent, then it is through media and cultural representation that this myth acquires affective momentum. Moral panics do not circulate in the abstract; they are mediated, dramatized, and rendered emotionally legible through news reporting, political speech, and popular culture. Television drama occupies a powerful position in shaping public imagination, translating complex legal cases into intimate and accessible stories. To this end, television dramas operate as cultural artefacts that both capture and shape the values of their time. They do not simply mirror debates surrounding ethnicity, crime, and victimhood in cases of CSEA; they actively contribute to sustaining them. It is within this context that the BBC's *Three Girls* must be situated: not simply as a retelling of events in Rochdale, but as a cultural site in which questions of race are negotiated.

[D] REVISITING BBC'S *THREE GIRLS*: A CULTURAL SITE THAT SEES JUSTICE DONE, OR AN ENTRENCHMENT OF BARONESS CASEY'S STATEMENT THAT "ETHNICITY MATTERS"?

Setting the scene

The highly acclaimed and BAFTA award-winning BBC drama *Three Girls* originally aired over three consecutive nights from 16-18 May 2017 on BBC One. Written by Nicole Taylor and directed by Philippa Lowthorpe, the three-part series dramatized the rape, sexual exploitation, sexual abuse, sexual assault, and trafficking of children by groups of predatory men in the Rochdale area. The series highlighted the difficulty victims encountered when navigating the criminal justice system, including flawed policing strategies and Crown Prosecution Service (CPS) decision-making processes. The drama also critiqued the embedded institutional failings and sense of inertia that enabled cases of CSEA to take place over several years without effective intervention.

With a score of 100% on Rotten Tomatoes, a popularist website that collates reviews of film and television, the series was universally recognized as a critical success. The storytelling, acting performances by its cast, and sensitive directorial approach were praised as "powerful", "unflinching", "extraordinarily brave" in reviews by *The Guardian* (Ellis-Peterson 2017) and the *Irish Times* (Crawley 2017). Maxine Peake was particularly lauded for her performance as Sara Rowbotham MBE, a sexual health support worker who gathered substantial volumes of evidence that helped Greater Manchester Police convict nine male perpetrators of sexual offences against children in Rochdale.

The drama was based on a real case involving the following perpetrators convicted of group-based CSEA who were named in the series: Shabir Ahmed, Kabeer Hassan, Abdul Aziz, Abdul Rauf, Mohammed Sajid, Adil Khan, Mohammed Amin, Abdul Qayyum, and Hamid Safi (*R v Ahmed (Shabir)* 2014). The victims, by contrast, were appropriately anonymized through the creation of three fictional characters—Holly Winshaw, Amber Bowen, and Ruby Bowen. Crucially, their on-screen experiences were grounded in extensive research and personal testimonies. The series ultimately functions as a cultural and visual representation of justice in cases of CSEA, making the systemic failures, the victims' resilience, and the legal outcomes accessible and impactful to a broad audience.

Episode one

The first episode begins in a police interview room. Two male officers are present and are sat opposite a traumatized and visibly injured 15-year-old girl, Holly, alongside her father acting as the appropriate adult. Holly has been arrested on suspicion of causing criminal damage to the glass counter of a local takeaway shop and stealing two cans of a fizzy drink. From this bold opening gambit, it is derivable that victims are being mistaken as criminals. What commences is a harrowing 50-minute-long depiction of rape, sexual exploitation, sexual abuse, and trafficking of children told from the perspective of the three focal victims—Holly, Amber, and Ruby.

Holly has recently moved into the Rochdale area following either an eviction or repossession of their family home. During this period marked by financial instability, unsettled accommodation, and a loving but tense homelife, Holly befriends sisters Amber (aged 15) and Ruby (aged 13). Amber introduces Holly to a group of older men who work at Top Curry, a local kebab takeaway shop. The men initially appear as friendly, supplying unlimited free food, alcohol, and cigarettes. In some ways, it can be read as a sense of community-building. From the vantage point of Holly, Amber, and Ruby these men provide a space to socialize and, with the help of alcohol, escape troubling life circumstances.

The escalation of the men's aggressive, violent, and sexually coercive behaviour, though it may seem rapid in the first half of the episode, is part of a calculated, gradual, and insidious process. In a deeply upsetting scene, Holly is raped by Shabir Ahmed (colloquially known as "Daddy"). This violation is immediately followed by threats of violence that intimidate Holly into remaining silent about the abuse she is suffering. In the aftermath of the rape, Amber comforts Holly. She provides advice about not letting the men touch her or kiss her, implying Amber is also being subjected to horrendous acts of sexual violence. Defenceless and isolated, Holly's mental and physical health deteriorates as she is raped and sexually assaulted repeatedly by groups of men. Emblematic of a wider network of abuse that transcends the geographical area of Rochdale, Holly, Amber, and Ruby are transported, in taxis, to flats in different locations where they are raped and sexually abused by multiple perpetrators.

The vulnerability of these girls is explored in an honest and unyielding way. Ruby has severe learning differences and struggles to understand the intentions of the adults around her, making her particularly susceptible to manipulation and exploitation. This would explain her closeness

with a much older boyfriend, "Billy"/"Bilal", with whom she regularly has sexual intercourse. Amber, while slightly older, is similarly drawn into dangerous situations, seeking acceptance and a sense of belonging. Amber also feels she is somewhat in control of her situation owing to her relationship with "Tariq", a ringleader of this operation. We, as viewers, of course know that Amber is terrified, trapped, and powerless. Holly, new to the area and lacking a stable support network, is quickly ensnared in this already well-established cycle of sexual exploitation and abuse.

The three girls regularly attend a local sexual health service, run diligently by dedicated front-line support workers such as Sara Rowbotham. Sara repeatedly tries to share the breadth of information she has collected in her role (including names, addresses, and licence plates of perpetrators) with other agencies, including the police and social services. However, she receives constant push-back owing to children's "chaotic" lives. They are adultified as "streetwise" and perceived as complicit in their own abuse for accepting money in exchange for sex and returning to the perpetrators despite police intervention.

The episode ends bleakly. Holly, now pregnant as a byproduct of rape, manages to escape the situation with the help of her father. But there is no support from specialist agencies to navigate a long and gruelling road of trauma recovery. Amber and Ruby, with no parent outside to help, remain trapped in a house that facilitates their sexual abuse—a metaphor for their overall lack of agency.

Episode two

The second episode concentrates on institutional failings and the systemic obstacles experienced by victims of CSEA. Amber, arrested at age 15 for allegedly inciting other girls into prostitution, is isolated in a mother-and-baby unit while the perpetrators continue to move freely. Ruby is revealed to be pregnant, and her foetus is seized by authorities without her knowledge. This reveals how flawed policing investigative strategies further traumatize and violate victims. Meanwhile, Holly carries her child to term and later achieves academic success. She passes her GCSEs, opening opportunities to study A Levels and attend university.

Sara continues her tireless investigation, often working independently of the police, documenting multiple instances of sexual violence. Despite her efforts, the CPS initially cites insufficient evidence to proceed. Following the decision to not prosecute, the men continue to sexually abuse vulnerable children. Over a year later, Operation Span re-engages with the case and exposes extensive networks of CSEA. Victims are repeatedly subjected to re-traumatization as they navigate psychologically

taxing processes including interviews and photo identifications. Holly, destabilized by this process, loses custody of her child. This underscores the emotional cost of seeking justice.

The episode also depicts a fractious relationship between victims and the police. It captures the genuine anger and sense of betrayal felt by the girls. The police oftentimes refused files containing critical intelligence, treating referrals by Sara from sexual health services as merely information rather than adducible evidence. Strategic decisions about which victims to involve as witnesses further compound feelings of injustice, leaving some girls—particularly Amber—marginalized.

Despite these obstacles, legal action progresses under the guidance of Nazir Afzal as the Chief Prosecutor at the CPS for North West England. Charges are agreed for Holly and Ruby, but not Amber. This is because she is deemed too "unsympathetic" to put before a jury. Such a maddening decision reveals the complex questions surrounding victim status and credibility. Amber is in some ways a microcosm of broader conversations about "ideal" or "credible" victims and the lack of redress available for those who fall beyond this narrow construct. The treatment of Amber reveals how institutional processes, shaped by entrenched bias, stigma, and prejudice, can reproduce forms of secondary victimization and fail those they are meant to protect. The episode closes on a sobering note: while awaiting the trial, the girls' lives remain suspended in trauma. Their memories are mechanically extracted, at great personal cost, just to be treated as evidence.

Episode three

The third episode opens not with a victim, but with a building—Liverpool Crown Court. The trial begins. Protesters gather behind police barriers, clutching placards that read "Public enquiry now", "Rapists out", and "Justice for OUR children" as Union Jack flags ripple. National coverage, including live reporting by the BBC, reflects the intense public scrutiny surrounding the case and loud demands for accountability. In Rochdale, the fallout is palpable as community tensions simmer, trust in institutions erodes, and everyday interactions—from taxi rides to takeaway deliveries—become fraught with suspicion.

Inside the courtroom, the nine defendants sit beside each other. Each is represented by their own legal counsel, requiring the witnesses to undergo nine different cross-examinations. Holly, now 19, is the first witness for the Crown. Afforded special measures, Holly gives evidence via a live video link. Her testimony recounts the progression from friendship to acts of sexual violence. The courtroom hears how she froze, dissociated,

and complied out of fear. Cross-examination is relentless in their attempt to undermine her credibility. Each defence barrister scrutinizes her background, suggesting that she was promiscuous, drank alcohol excessively to the point of dependency, and behaved anti-socially. Rape myths are reproduced in courtroom speak as questions focus on why she did not physically resist or shout louder for help while being raped, reflecting familiar patterns of victim-blaming. Holly remains resolute, insisting she did nothing wrong and has nothing to be ashamed of.

Ruby, now 16, is the second witness for the Crown. Via video link she speaks about a relationship she believed was loving, describing affection alongside exploitation. This demonstrates how sexually coercive behaviour operates to create the illusion of consent. Cross-examination probes inconsistencies in her statements as counsel insist that she was deliberately deceptive about her age. Parallel to the courtroom, Amber is alone and ruminating with the decision to exclude her from proceedings as a victim. Instead, she does feature on the indictment as a more palatable way to admit her evidence. Her interviews, delving into unbearably painful lived experiences, are referenced in court only to show her as complicit and describe how she facilitated contact between victims and abusers.

After weeks of testimony, the jury delivers unanimous guilty verdicts on all charges including rape. Holly regains custody of her daughter and reconnects with her family. Ruby, decimated in cross-examination, is vindicated. But the episode ends on a reflective note, acknowledging that while convictions mark accountability, they do not erase the harm or resolve the exclusion felt by survivors like Amber.

Ethnicity as an ancillary character

Nicole Taylor, the writer of *Three Girls*, claimed that she approached the portrayal of ethnicity in cases of group-based CSEA cautiously. Aware that the drama had potential to incite racial hatred against Asian communities, Taylor did not want to platform far-right extremist attitudes about sexual offending. In an interview with *The Guardian*, Taylor made assurances that *Three Girls* does not platform racist viewpoints and does not provide the English Defence League with an opportunity to exploit sexual crimes committed against children (Ellis-Peterson 2017).

Yet, in *Three Girls*, ethnicity functions less as background context and more as an ancillary character: always present, ever-shaping interactions, structuring perception, and animating tension even when not explicitly named. It would be an indefensible claim to suggest that the series endorses racism or decisively entrenches racialized representation

of group-based CSEA. However, it does participate in the reproduction of racialized representation of sexual offending. Accordingly, race operates *dramaturgically* in a way that overloads the senses.

Sensorially, the series persistently codes difference. The visual juxtaposition of white victims against identifiably Asian men establishes a clear racialized binary from the outset. Linguistically, the ethnicity of the perpetrators is reiterated overtly with intentional naming conventions and the use of racial slurs to malign them. Descriptions of their "curry-like" smell are used to evoke disgust. Takeaway shops such as "Top Curry" and "Speedy Kebab" become recurring backdrops to abuse, embedding exploitation within culturally marked spaces. When perpetrators speak in another language, subtitles of untranslated dialogue simply read "speaks in a different language", amplifying alterity and contrast. Religion is also treated as a marker of ethnic identity where alcohol functions symbolically: they supply it, yet do not drink it. The abstention is framed not as piety, but as strategic control that reinforces a perception of calculated predation. The vilification of Asian men as a sexually predatory group extends to the Chief Prosecutor, Nazir Afzal, who is mistaken for a perpetrator outside the courtroom. While it is difficult to verify the accuracy of this scene, it identifies the overt racial tensions at play. Inside the courtroom, inappropriate and crude jokes about "small" Asian men (in height and penis size) infiltrate legalese. These choices do not merely depict ethnicity; they meticulously *stage* it.

Contrasting the overtly racialized perpetrators, Holly, Amber, and Ruby are white. Their ethnicity is not strictly foregrounded in dialogue because it does not need to be; it operates as the invisible norm against which racial difference is measured. Jenny Sharpe observes that, in the aftermath of the rape of a white woman by a non-white man, "the brutalized bodies of defenseless English women serve as a metonym for a government that sees itself as the violated object" (Sharpe 1993: 7). This is particularly evident in the protest scene outside the courtroom in episode three. Placards that read "Justice for OUR girls", "Rapists out", and "Our girls are not halal meat" as Union Jack flags fly proudly in the background. This depiction contributes to interpretive or ideological effects that frame the girls' suffering as a national injury. The microcosm of a raped white girl is macrocosmic of a nation's breached borders, and the trial (and subsequent removal of their citizenship in *Aziz v Secretary of State* 2018) operates as a symbolic restoration of state authority.

The drama itself did not necessarily intend these effects, nor did it likely mean to shape the viewers' thought processes in this way. It is entirely

plausible that the inclusion of these slogans on the placards was simply an attempt to reflect reality with factual accuracy. However, the wording on these placards does carry ideological weight. The phrase "our girls are not halal meat" intensifies nationalist and racialized logic. As David Gurnham notes, the use of the word "meat" presents white girls as something to be devoured, consumed, and destroyed while simultaneously constructing Asian men as animalistic, carnivorous, and cannibalistic (Gurnham 2014: 81-82). The metaphor of "halal meat" reduces sexual violence to racialized rhetoric, invoking imagery of consumption, violation, and annihilation. Within this framework, white female victimhood is mobilized as part of a broader cultural narrative of invasion and national defence. By staging this slogan so prominently, the series inadvertently reinforces racialized rape myths, intensifying a discourse in which sexual violence is interpreted and understood primarily through a flawed patriotic logic of a racialized threat.

A consequence of the drama's monolithic centring of white womanhood as victimhood is the erasure of non-white victims of CSEA. Shabir Ahmed was later convicted of 30 counts of rape against a young Asian girl (Carter 2012). However, this is absent from the drama. The omission is significant. By pairing a non-white perpetrator and white victim, the series consolidates a culturally familiar script in which harm flows in one racial direction. The existence of an Asian victim unsettles this binary. It reveals that sexual violence within these networks was not exclusively targeted at white girls and group-based CSEA cannot be reduced to a simple narrative of racialized desire. Without her story, representation is skewed. The absence reinforces a hierarchy of visibility in which white suffering is nationally legible, while non-white suffering is marginalized. As a result, the drama reproduces the racialized rape myths it seeks to handle cautiously, and risks presenting ethnicity as an explanatory axis of group-based CSEA. By omitting Asian victimhood, the series narrows the scope of public empathy and inadvertently sustains a racialized template of who counts as the "ideal" victim within the popular imaginary, despite scrutinizing this concept within the drama itself.

Three Girls operates as a cultural site of racialized rape mythmaking, constructing ethnicity as a highly visible axis of meaning in the context of group-based CSEA. By singularly platforming a specific racial combination of rape (a non-white perpetrator and a white victim), it adds to a cultural canon that perpetuates the marginalization of non-white victims and the obfuscation of white perpetrators of group-based CSEA. This is perhaps most starkly evidenced in a scene from episode one. Ruby discloses that her boyfriend, Billy/Bilal, filmed her dancing

naked and uploaded it to the internet. As a result, Ruby claims she is now "famous in Pakistan". This is where the interpretive and ideological work commences. Her abuse is imagined as travelling transnationally; her white body rendered consumable by an unseen, distant, non-white audience. Pakistan becomes less a real place than a symbolic "elsewhere", invoked to suggest a shared and collective cultural appetite for young white girls. This comment also territorializes sexual deviance across an entire geographic space. The remark, while supposed to be flippant, is richly loaded with meaning and projects sexual danger outward onto a diasporic landscape. While the drama seeks to narrate justice and raise awareness about the obstacles that victims of CSEA encounter, it also reinforces Baroness Casey's assertion that "ethnicity matters". In *Three Girls*, ethnicity is never just context; it is both dramatized and instrumentalized, shaping audience understanding of perpetration and victimhood within the popular imaginary.

[E] CONCLUSION

This article has revisited BBC's *Three Girls* in the context of Baroness Casey's National Audit on Group-Based Child Sexual Exploitation and Abuse, examining how race and ethnicity are mobilized within policy discourse and media representation. The series highlights systemic failings in the treatment of victims while simultaneously reproducing culturally entrenched narratives that exceptionalize white female victimhood and racialize non-white men as predatory sexual threats. By depicting the racial combination of non-white perpetrator and white victim as it does, *Three Girls* reflects and reinforces a broader cultural template in which ethnicity becomes both an explanatory device and a normative lens through which sexual violence is understood.

The audit highlights the limitations and complexities of existing data. Ethnicity is inconsistently and inadequately recorded for both victims and perpetrators, producing a partial and potentially misleading picture of group-based CSEA. Casey's fourth recommendation, which mandates the recording of perpetrator ethnicity without a corresponding requirement for victim ethnicity, intensifies this problem. Comprehensive data on victim ethnicity could reveal the specific barriers faced by racialized survivors and inform the development of effective mechanisms to better support them.

Cultural representations of group-based CSEA can simultaneously educate and mislead. *Three Girls* raises awareness of systemic injustices while reproducing racialized rape myths. As argued, *Three Girls* does not

endorse racism in any simple sense. By dramaturgically staging race as it chooses to do so, it conjures within it a wider representational field that produces ideological and interpretive consequences. In this sense, its effects exceed authorial intention.

Recognizing these complex dynamics is crucial for policymakers, practitioners, and scholars aiming to address the full spectrum of CSEA. This ensures equitable treatment of all victims, regardless of race, gender, or social positioning. Ultimately, the convergence of media, law, and race in the UK context underscores the urgent need for a nuanced, evidence-based, and interdisciplinary approach to understanding, preventing, and responding to group-based CSEA.

About the author

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Juridical Cohesion and Tactics of Shadow and Fog: Law's Withdrawing Shadow and its "Dark Matter"

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Abstract

The issue central to this article involves tactics used by Dutch agro-industries in close cooperation with successive Dutch Governments and the Ministry of Agriculture to hide the real extent of, and responsibility for, pollution caused by pesticides, herbicides (like glyphosate) and, in particular, an excess of nitrogen emissions. One tactic is to avoid confrontations in court and to operate in what has been called the "shadow of the law". The other one is to hide the reality of things through a discursive or representational "fog". One aim of such tactics is to make the prosecution opt for settlement instead of fully enforcing the law, what is defined here as the "withdrawing shadow of the law". A second but connected aim is to weaken a society's juridical cohesion, imagined metaphorically here as law's "dark matter". Physically, this is the elusive mass that is needed to explain what holds together galaxies; juridically, it is what holds societies together under a rule of law that serves justice.

Keywords: shadow of the law; rule of law; corporate legal tactics; juridical cohesion; dragging.

[A] HOW TO OBSTRUCT TRANSPARENCY

In 2021, legal scholar and philosopher Raymond Wacks published a study entitled *The Rule of Law Under Fire?*[1] The question mark was rhetorical. Wacks traced at least 16 different threats to the rule of law around the world (2021: 86). The title of Wacks' study employed a clear-cut dichotomy between the rule of law and those who would subject it to an ongoing attack. In contrast, this article focuses on something that threatens the rule of law not through forms of "attack" but a continual weakening of juridical cohesion within society, a process to which forms of visibility and invisibility are pivotal. If the strategic goal of the actors

[1] I thank the peer reviewers and, especially, editor and colleague Anthony T Albright, for their contributions to this paper. Conversations with Greta Olson and Stewart Motha helped to clarify my thoughts on the issue.

propelling this process is to evade accountability and responsibility, the tactics used to realize this end combine excessive visibility in the domain of popular culture, on the one hand, and attempts to make matters legally foggy or shadowy, on the other.

The major actors behind the process are multiple, but vast corporations are central. Here, I draw upon two empirical studies by historians Naomi Oreskes and Eric Conway, *Merchants of Doubt* (2012) and *The Big Myth* (2023). Although these studies brilliantly illustrate the strategies and tactics that vast American corporations employ to avoid responsibility and accountability, they do not consider the effects of such tactics on how general audiences affectively relate to the rule of law. I contend that what I call tactics of shadow and fog weaken a society's juridical cohesion. Obviously, this assertion forces me to define "juridical cohesion". Consequently, the article is developed in three steps. First, I will introduce the case that provoked my initial thoughts, one that helps to illustrate the general problem. Then I will address said tactics of shadow and fog in more detail. Finally, I will consider the problem of preserving juridical cohesion, drawing upon studies by the nineteenth-century legal scholar Rudolph von Jhering, the twentieth-century political theorist Antonio Gramsci, and contemporary scholars Scott Veitch, a legal theorist, and Greta Olson, a law and humanities scholar. The argument will lead me to introduce a metaphor that allows us to imagine juridical cohesion as law's "dark matter".

The paradigmatic situation that provoked these reflections is the nitrogen crisis in the Netherlands. Excessive nitrogen emissions, primarily from Dutch agriculture—or better, Dutch agro-industries—have led to an enormous (85%) reduction in biodiversity in the Netherlands (Van den Brink & Ors 2022). Because these emissions place the country in violation of European Union (EU) environmental protection laws, they also inhibit construction permissions nationwide. As with any crisis, people are interested in the data describing it, such as which agro-industry businesses emit what and how much. Official data on this topic does exist, collected by the Dutch Government. Public access to the data was delayed and, in some cases, simply denied, however, by a recent Minister of Agriculture from the *BoerBurgerBeweging* (Farmer–Citizen Movement: BBB), a Dutch political party devised by a marketing agency on behalf of agro-industries in the Netherlands (Wagendorp 2023).[2] At the same time, a junior Cabinet member from the same party sought to sow doubt

[2] The agency behind the construction of the BBB is called ReMarkAble and works in the service of agro-industries (Wagendorp 2023). The former director of the agency became the BBB party leader as of February 2026.

as to the accuracy of the data measurements. Both Cabinet members made no secret of their connection to the industry in whose interest they apparently work. In a sense, then, everything is crystal clear—except for the data.

Two Ministers of Agriculture, from different parties and belonging to consecutive governments, tried to hide the data. It took a three-year joint effort, from 2022 to 2025, by an investigative news website (*Follow the Money*), a national newspaper of record (*NRC*), and a regional broadcaster (*Omroep Gelderland*), to obtain an answer to an information request whose subject matter, politically and legally speaking, should have been public all along.[3] To gain access to the data, the three parties initiated a so-called WOO procedure. WOO stands for *Wet Open Overheid* (Transparent Government Act). The law gives every Dutch citizen the right to request all relevant documents concerning matters falling under state responsibility. Knowing what the procedure would result in, the previous Minister of Agriculture from the *Christen Unie* (Christian Union) party had decided on 4 May 2023 that the emissions data should be disclosed. Then the Cabinet fell in July 2023.[4] Upon taking office, the subsequent Minister of Agriculture, the BBB's Femke Wiersma, reversed the decision to make the data public. She eventually responded to the request by releasing the data, as required by law, although by this time the figures were out of date. So, the three news organizations took their case to the Council of State: an independent council with two departments: one is advisory, the other is aimed at regulatory scrutiny with regard to issues of whether the state has acted according to law.

In relation to the disclosure of the data, the agro-industry companies and their advocates had also sought recourse before the same body. Their principal argument was that disclosing the data would endanger individual nitrogen emitters by revealing their names and addresses. In effect, they considered data crucial to public debates about large-scale environmental harms as a private matter. In seeking a ruling by the Council of State, a range of actors appeared to converge on the same objective: the sitting Minister of Agriculture from the BBB was joined by the Organization for Agriculture and Horticulture (LTO)—a politically influential trade group for Dutch farmers—the Dutch Dairy Farmers' Union, and the Farmers Defence

[3] *Follow the Money*, is, in its own words "a platform for radically independent investigative journalism. We have a transparent target: truth finding in service of society. Whether it concerns health care, the building market, or politics: we are your watchdog." *NRC* is a national newspaper of record. *Omroep Gelderland* is the regional broadcaster of a province with the biggest Dutch farming industries, especially chickens.

[4] The minister concerned, was Piet Adema from the *Christen Unie*, a Christian Democratic party with considerable constituencies in Dutch rural regions.

Force (FDF), an activist organization behind many of the outspoken and sometimes violent farmer protests in recent years.[5] Also, farmers, politicians, or journalists opposing FDF positions had encountered members of the group who took the military connotations of "Defence Force" literally and had paid intimidating visits to their home addresses. The privacy of the one is clearly not the privacy of the other.

On 24 September 2025, the Council of State decided that current emissions data should be made public by the Minister within two weeks after its verdict.[6] In response, the Minister of Agriculture initiated a formal procedure that first asks all parties involved to comment on the matter. This is a costly procedure that will take at least another year and will not change the Council's decision, which tests whether the state acts according to law. Meanwhile, Wiersma's undersecretary for agriculture challenged the scientific models that had been used to measure and assess emission data. He commissioned an expert in probability theory, also known for his idea that governments lean too heavily on science in policymaking, who asked ChatGPT to find weaknesses in the existing models.[7] To nobody's surprise, these were found, since any scientific measurement in such a case works with margins, statistical probabilities, and scientific choices.

I find this case paradigmatic of tactics used globally by corporations, governments, and states alike. Its significance, of course, depends on the severity of one's concern about the poisoned state of Dutch soil and waters. For those unfamiliar with the Dutch landscape, it may be helpful to know that the term Low Countries connotes that half of the Netherlands sits below sea level. The country is interlaced with bodies of water, including the delta of the Scheldt and Meuse rivers, which enter the country from Belgium, and the Rhine, which enters from Germany. The country *is* water (although climate change has also brought the Netherlands repetitive periods of long drought). In January 2026, it became apparent that virtually no Dutch open waters meet the standards for healthy waters defined both by EU and Dutch law. The Dutch water quality is "below acceptable levels, worst in the EU with 1% of all open waters declared to be 'good'" (Van den Brink & Ors 2022).[8] For 83% of Dutch waters, urgent

[5] The arguments of the different parties are reported on by LTO (2025).

[6] ECLI:NL:RVS:2025:4557. Note: case names are not available because criminal cases in the Netherlands are anonymized.

[7] It concerns Professor Ronald Meester, who used the fact that, scientifically speaking, the measurements of emissions and pollution are always subject to margins. This led Meester to hint that the measurements are subject to doubt. This tactic was extensively studied in Oreskes and Conway (2012; 2023).

[8] An updated version of this article appeared online on 1 July 2025.

action is required. Cause? The intense use of pesticides and herbicides, and the excessive discharge of dung on Dutch soil. One may ask what "intense" means, here, or "excessive". These terms are based on external scientific standards or conventions, no doubt, but need data nevertheless.

In relation to all this, I want to address the way in which powerful actors can create both a legal and societal atmosphere of shadow and fog to hide the reality of things. If these sound like old-school tactics, the current state of affairs is still different. My ultimate hypothesis is that such tactics target and weaken collective juridical cohesion.

[B] THE PRODUCTION OF FOG: ECOLOGICAL INVISIBILITY AND DISCURSIVE VEILS

One can see dung, and one can smell it. The consequences of excess dung for the ecological balance of the soil, of waters adjacent to agricultural land sprayed with dung slurry, and of surrounding environments, are much less visible and much harder to smell. Now, for decades Dutch farmers were allowed to spray more slurry on their lands than their European counterparts, the result of a successful lobbying effort in Brussels by a combination of predominantly Christian democratic politicians, state officials, and agro-industry trade groups. The Dutch exemption from EU policy was known legally as a *derogation*, or an allowance by which certain actors, under certain conditions, may disregard certain laws. In this case, the EU environmental rules allowed a maximum of 170 kilograms of nitrogen to be applied per hectare of certain agricultural land per year. This is yet another highly technical and, in a sense, idiosyncratic way of putting things, for how much dung contains 170 kilograms of nitrogen? Well, this depends on the type of dung. In the case of cattle, for instance, 1 kilogram of nitrogen is contained in 200 litres of dung slurry. In other types of dung, it varies, but on average, the limit of 170 kilograms of nitrogen per hectare of soil translates to a limit of 34,000 litres of slurry discharged annually on that soil. Needless to say, this is a limit, which means that according to scholarly and political consensus the annual discharge of 34,000 litres is only just acceptable.

Since 2006, however, derogation had allowed farmers in the Netherlands to exceed the EU limit. Depending on the type of soil, Dutch farmers were allowed to discharge between 230 and 250 kilograms of nitrogen per hectare of land per year, or approximately 40% more than the EU rules had established as the limit. In 2023, the EU decided that the derogation should stop; hence, a so-called "phase-out period" was agreed on. In 2025, Dutch farmers could discharge 190 or 200 kilograms

per hectare, still roughly 16% more than the limit. A fruitless attempt by the Dutch Government to extend the derogation measures reached its conclusion on 23 December 2025, when the European Commission officially informed the Dutch Parliament that the derogation measures would stop permanently in 2026.[9]

The resulting problem is what to do with the excess of dung produced by the Dutch agro-industry, which raises far more cows, pigs, chickens, goats, and sheep than can be supported by the amount of land on which their dung can be legally discharged. This problem motivated, amongst other things, the 2018 establishment of the *Nederlands Centrum voor Mestverwaarding* (NCM), a self-declared "independent foundation" that brings together state authorities and agro-industry interests in relation to the problem of dung. It does so under the umbrella of a term that is unknown to most Dutch citizens and absent from daily usage: *verwaarding*.[10] Its English translation is much more understandable: "valorization". The "Dutch Centre for Dung Valorization" has a clear mission:

> The point of departure is that dung is an important source of rare minerals and biomass, and that it plays an indispensable role in the transition towards a circular economy. In parts of the Netherlands there is, however, an imbalance between supply and demand of dung (NCM 2025).[11]

Reframing a problem by hiding it under a cloak of euphemisms is a useful rhetorical tactic. Reframed, the excess dung is considered as an opportunity here because of its valuable minerals and biomass, especially in the transition towards a circular economy. As for the latter, the idea that Dutch governments and industries are actively working towards such an economy runs counter to all available data. Then, defining the problem as an issue of "imbalance" is a euphemism. The total livestock dung production in the Netherlands is currently around 75 billion kilograms per year (CLO 2024). Half of the Netherlands—2.1 million hectares—is

[9] This is information from the Rijksdienst voor Ondernemend Nederland (RVO: Netherlands Enterprise Agency) (RVO 2026).

[10] The independent status of this foundation is an issue of debate. Its current director is Jan Roefs, who is a farmer himself along with being the "founder and participant in a fertilizer producing company, which we started in 2000 and produces a highly innovative liquid fertilizer. Before that I was an export manager for climate control systems for pig houses." See Jan Roefs LinkenIn profile. The supervisory board consists of (former) owners of (global) agro-industry companies, advocates for certain agricultural branches, strategic private advisors, and one senior policy advisor of the Ministry of Agriculture.

[11] In the original: "*Uitgangspunt is dat mest een belangrijke bron is van schaarse mineralen en biomassa, en een onmisbare rol heeft in de overgang naar een circulaire economie. In delen van Nederland is er echter sprake van een onbalans tussen aanbod en behoefte van mest*."

used for agriculture (CBS 2020). This comes down then to an average of roughly 35,500 kilograms per hectare. Slightly above the discharge limit of 34,000, one could say. However, not all agricultural lands require this treatment. So, there are enormous surpluses in some parts of the country, whereas other parts do not need any dung. To define excess and uselessness as an issue of "supply and demand" is also a euphemism.

In practice, this means that the Netherlands is one of the world's largest dung transporters, both domestically and across borders. Such dung transport is subject to strict legal requirements under the acronym rVDM (*realtime Vervoersbewijs dierlijke mest*: "Real-time Transport Certificate for Animal Dung"). Still, one need not be a legal expert to expect that the enormous quantity of dung in the Netherlands, combined with the laws regulating how it can be transported and discharged, almost inevitably creates conditions for corruption, hidden discharges, and other illegal means of getting rid of the shit.

One exemplary case of such criminal conduct concluded on 4 December 2025, in the District Court of East Brabant, in the Dutch province of North Brabant. The case, which involved dung discharges, led the court to find that the defendants had engaged in "structural and extensive fraud with profit as the only purpose".[12] Two aspects of the case are especially telling for my argument. Firstly, the verdict emphasized a breach of trust between the criminals and the responsible regulatory body, the *Nederlandse Voedsel- en Warenautoriteit* (Netherlands Food and Consumer Product Safety Authority, NVWA). The other aspect speaks for itself in the words of the judgment:

> The offences have been committed in a vulnerable chain in which great trust is put in regulatory bodies like the NVWA. This trust has been badly damaged. The damage to the environment is considerable and hard to quantify. The sentencing reflects the seriousness of the offences.[13]

Now, a corpse is a corpse and, since the invention of the camera, it has been possible to make a corpse visually present in ways that general audiences can read with relative ease, even if they lack the legal or medical skills for close analysis. One factor that complicates recognition of ecological destruction is its invisibility to broader public audiences, an invisibility that counts as much for the actors causing the destruction,

[12] ECLI:NL:RBOBR:2025:7907.

[13] ECLI:NL:RBOBR:2025:7907; ECLI:NL:RBOBR:2025:7904; ECLI:NL:RBOBR:2025:7906; ECLI:NL:RBOBR:2025:7903. In the original: "*De feiten zijn gepleegd binnen een kwetsbare keten waar een groot vertrouwen bestaat in toezichthoudende instanties zoals de NVWA. Dit vertrouwen is ernstig geschaad. De milieuschade is aanzienlijk en lastig te kwantificeren. De strafmaat weerspiegelt de ernst van de feiten.*"

whether legal or illegal: agro-industries, or criminal actors engaged in fraud. Let me leave aside here the problem that such audiences may suffer from what has been defined as ecological illiteracy. The major point that interests me for now is the invisibility of ecological destruction *per se*, something that is, legally speaking, "hard to quantify", as the judge states. The other point is an apparent loss of trust. Whose trust, one may ask? The NVWA's trust that farmers behave decently? Or the trust of the general public that the NVWA, as a regulatory authority, will ensure decent food production?

If the difficulty of making ecological destruction visible is one aspect of fogginess, another aspect is that the regulatory authority (in this case, the NVWA) may, in daily practice, be incompletely effective in cases involving agro-industry practices. According to sources, the main obstacle to the Authority's effectiveness as a regulator is its in-house lawyers, who assess whether decisions are likely to withstand court scrutiny, especially when parties subject to its enforcement actions are expected to counter-sue (a point to which I will return in the next section).[14] This caution has at times led critics to accuse the Authority of complicity, for instance, in condoning criminal practices. Besides, if its work "in a vulnerable chain" is based on trust, as the judge claims, it is worth asking what authority the NVWA actually has. I, for one, would want to know more about the links in this "chain" and why it is so "vulnerable".

A third aspect of fogginess relates to the difficulty of imagining the masses of dung and slurry involved. In 2026, the surplus will amount to somewhere between 79 and 95 million kilograms of nitrogen (NCM 2024). This represents between 15.8 billion and 19 billion litres of slurry. In order to make such figures imaginable, some political figures have thought to visualize the quantities in terms of bathtubs.[15] The idea was to imagine the annual dung production of the Netherlands as an individual bathtub for every inhabitant of the country (now approximately 18 million) filled to the brim with dung *every week*. In my assessment, this comparison runs up against the limit of imaginability, entering the realm of absurdity or the grotesque.

[14] One source is investigative journalism by the television programme *Argos*, which consulted an independent foundation called Wakker Dier that has been bringing cases to court since 2000 and whistleblowers from within the NVWA (Raay 2025). Another one is a study that considers the intermingling, for decades, of Dutch agro-industries, the state, and the Ministry of Agriculture (Siebelink 2025). The title of this study translates into English as: "The entoxicating apparatus: the state against man, nature and animals."

[15] This rhetorical move was made by the Party for Animals in a question to the Minister in Dutch (Wassenberg 2020).

Yet another aspect of fogginess becomes apparent when we consider how prominent popular media thematize Dutch agriculture while ignoring or hiding the destructive effects of agro-industries. The clearest paradigm of this phenomenon is *Boer zoekt vrouw*, the Dutch version of an internationally successful reality television formula known as *Farmer Wants a Wife*. Almost no programme on Dutch television has aired continuously for more than two decades, and none has matched this one's sustained popularity and success since it began airing in 2004. For now, the question is not how the programme fits in the phantasmagoria of patriarchy, with one man choosing a wife from a pool of purportedly willing women. The question is what, in two decades, audiences have seen of the Dutch agro-industry's dirty everyday practices. The answer will not surprise: *almost nothing*—not one barrel of pesticides, not a truckload of glyphosate, not a tank of dung slurry, and not one scene showing animals forced into wagons that will transport them to their death. Instead, the programme only shows women being lured into what they hope will be a successful marriage, against the background of unproblematic agricultural practices.

Since the programme began, it has been presented by Yvon Jaspers, who from 2015 to 2019 was also employed as the public face of an agro-industry company called ForFarmers, one of the largest producers of cattle feed in the Netherlands. When this became known (Jaspers herself had forgotten to mention it), it became apparent as a conflict of interest. So, the parties "for the time being" stopped their partnership. Five years later, in 2024, Jaspers was knighted by the Dutch king in recognition of her relentless efforts as an "ambassador for the agrarian sector".[16] This is a clear example of what Oreskes and Conway analysed in *Merchants of Doubt* (2012) and *The Big Myth* (2023) as the importance of popular culture in the affective manipulation of public audiences by organized corporate actors.

One specific case that Oreskes and Conway study is future president Ronald Reagan's role as the public face of General Electric in the 1950s, when he hosted a popular radio programme and, later, an equally popular television show through which he promoted the interests of the company (Oreskes & Conway 2023: 232). In particular, he delivered the implicit message that a private entity was much better equipped than the state to supply the American public with electricity. As Oreskes and Conway show, this was the culmination of a concerted, decades-long campaign by several corporations to persuade the American people that

[16] The qualification is from the farmers who nominated her (Hüsken 2024).

said corporations could provide services more effectively than the state. Yet in the 1920s and 1930s, the state had generally been a reliable supplier of affordable electricity. Over the following decades, this fact was progressively obscured in a manufactured fog by private actors through a mix of intensive lobbying, buying scientists, distributing free or inexpensive teaching materials to schools of all levels, advertising across the mass media, and, crucially, funding popular radio and television shows, often interspersed with advertisements (Oreskes & Conway 2023: 9).

In a fog, only what is directly in front of you is visible; everything behind it disappears in the mist. In the case of the Dutch series *Boer zoekt vrouw*, what remains up front is popular culture: amusement, perhaps temporarily disturbed by a hiccup concerning conflicts of interest, that ultimately ends with farmers and their wives romantically joined, and the programme's host blessed with a royal ribbon. What disappears in the mist is the cruel reality of systematically poisoned Dutch soils and waters.

[C] THE WITHDRAWING SHADOW OF LAW: FEAR OF DRAGGING

Elsewhere I have proposed that "the shadow of the law" might sometimes be better known as "the ominous shadow of the law". In the former case, parties seek to settle disputes outside of court based on mutual agreement, in the latter they do so out of straightforward fear (Korsten 2026). The phrase was initially proposed by legal scholars Robert H Mnookin and Lewis Kornhauser (1979), who studied reasons why divorcees do or do not take their case to court. Fearing what might happen in court, divorcees sometimes sought to avoid litigation and resolve their differences through mediation or bargaining.[17] Mnookin and Kornhauser identified five reasons why divorcees might want to avoid court:

> (1) the preferences of the divorcing parents; (2) the bargaining endowments created by legal rules that indicate the particular allocation a court will impose if the parties fail to reach agreement; (3) the degree of uncertainty concerning the legal outcome if the parties go to court, which is linked to the parties' attitudes towards risk; (4) transaction costs and the parties' respective abilities to bear them; and (5) strategic behavior (Mnookin &Kornhauser 1979: 966).

With regard to all these factors, it is relevant that both parties in a divorce case must *agree* to resolve their dispute out of court. When the shadow of

[17] The article was reconsidered by one of the authors (Mnookin 2021).

the law becomes an ominous one, this implies that one party in a dispute might also wish to avoid court for fear of facing a much more powerful legal opponent. In the latter case, bargaining is not even necessary; one party simply accepts its loss beforehand, in order to avoid worse.

The shadow of the law proper and its ominous counterpart may be accompanied by a third form of shadow. The Dutch *Openbaar Ministerie* (OM, Public Prosecution Service) keeps track of the number of cases that are resolved through *transactie* (plea bargain) (OM 2025). In such cases, the prosecutor proposes that the defendant should deal with the case outside of court, by accepting the offer of the prosecution. The agreement needs to be checked, however, by a judge. There is also a second form, called *strafbeschikking* (penalty order) in which case the prosecution more or less takes the position of the judge and imposes punishment (which can be done up to a limit of six years' imprisonment). Defendants have to agree here, in the sense that if they do not accept this, they will have to bring their case to court. While presenting data about these two possibilities, the report does not give any information about *schikking* or settlement: an extra-juridical agreement in the sense that parties come to an agreement before taking their case to court, whereas this agreement is legally binding. Such settlements do not require an official test by a judge and are examples of the original phrase of "the shadow of the law".

The OM focuses its enforcement resources on the priority areas that it defines as "cybercrime, digitalized criminality, serious sexual offences, domestic violence, jihadism and terrorism, child pornography, human trafficking and smuggling, whitewashing" (OM 2025: 39). Environmental crime is clearly not a priority. In fact, it is hardly mentioned. The prosecution of environmental crimes has grown from 77 cases in 2020 to 101 in 2024, so the report states, but in relation to the whole, their number remains "small scale" (OM 2025: 26). Could it be that environmental criminality might also be a judicial or, more broadly, a societal blind spot, something that is made to be hidden in mist? Or is it that the adjudication of environmental crimes may suffer here from a third form of law's shadow, this one with its source on the side of the prosecution.

The imagery of the shadow of the law finds its motivation in the fact that a shadow is a "figure" for imagining and making sense of courtroom proceedings. In this context, the shadow of the law is not a metaphor, since there is no comparison at stake, just as Lady Justice is not a metaphor but a symbol. The shadow of the law is not a symbol, however, rather a personification. It is as if the law is a person projecting, or having, a shadow. The phrase suggests a hidden figure projecting the shadow, a

source that looms out of sight. In this context, the phrase "shadow of the law" finds a prominent source of inspiration in cinema. The two terms discussed in this article—shadow and fog—reference the 1991 Woody Allen film *Shadows and Fog*. Cinematographically, this movie in turn references German modernist films such as Fritz Lang's *M: Ein Stadt sucht ein Mörder* (1931) and the American tradition of *film noir* from the 1940s and 1950s.[18] Shadows, in such movies, can be with or without a real source. The major point is that shadows in themselves produce fear or horror because the source of the shadow is not visible or real while the shadow, as a powerful indexical figure, implies the menacing force of a real figure. The affective impact of the shadow in such films is often to generate a sense of stretched time. Shadows are rarely fast. They loom or they approach slowly, which contributes to their menacing force. They may also withdraw, which does not mean the entity behind their projection is gone.

The menacing force in a third form of the shadow of the law is indeed very much related to time. It may have been at work in the East Brabant case considered above. The verdict in this case was not the outcome of a trial. The judge simply affirmed the adequacy of an agreement between the defendants' lawyers and the prosecutor. The case is an example, that is, of so-called *procesafspraken*, or plea bargains considered as formal agreements between prosecutors and defence lawyers. The case itself, consequently, presented little to be *seen*, unlike the more conventional trial process whereby defendants are brought to court, their alleged crimes are examined in detail, and they can even be interrogated by judges or questioned with regard to their motivations (if they do not make use of their right to remain silent). One can even play with the idea that there could have been victims involved, like people who got cancer due to environmental factors, or who died because they drank poisoned water, as a consequence of which relatives would have had the right to speak. None of this was possible here.

Procesafspraken do not render the reality and true impact of the case fully invisible for general audiences but they do prevent the legal process from reaching full disclosure. In the dung discharge case, for instance, one individual agreed to get two years of imprisonment and had to pay a fine of €250,000.[19] One other agreed to be sentenced to a conditional time in prison for one year, and community service of 140 hours.[20] Then there

[18] *Film noir* got its French title not because of French cinematographic prefigurations of the Hollywood genre but due to a contemporary authoritative French critic, Nino Frank.

[19] ECLI:NL:RBOBR:2025:7904.

[20] ECLI:NL:RBOBR:2025:7903.

was a *verdachte rechtspersoon*—a suspect legal person—that agreed to pay a fine of €100,000, of which €35,000 was conditional.[21] Now how is a general audience to assess this? First of all, the criminal is, or the criminals are, pseudonymized—as legally required. The fines are clear, but again, what was the damage done to the environment? The judge concluded it was "considerable and hard to quantify". The tension at stake, then, is one between forms of quantification and forms of visibility in environmental law and legal discourses. Quantifying something does not necessarily make it more visible, while on the other hand declaring something to be not quantifiable does not necessarily unquantify it.[22]

The increasing prevalence of plea bargaining from the side of the prosecution was explicitly addressed in a verdict by the Dutch Supreme Court in 2022. This verdict may help us to grasp the third sense of the shadow of the law. It is not fear of a much mightier opponent with vast financial resources, but a fear of *dragging on*. The court motivated its judgment in one particular case by stating:

> the court can and will not close its eyes to the developments in the juridical chain of criminal justice. Cases and dossiers become more and more complex and comprehensive with longer and longer procedures as a consequence. This, in turn, causes friction with, amongst other issues, the right of the defendant to have their case heard within a reasonable time, as has been codified in article 6 of the European Convention on Human Rights (ECHR). Moreover, in a diversity of cases further research (for example, the hearing of witnesses many years after the alleged facts would have occurred) is becoming more complicated and often of lesser value when too many years have gone by. For injured parties, a process is a burden that drags on for years while they have no means to influence the course of this process (my translation).[23]

All this may, pragmatically speaking, be understandable. No doubt, court cases that drag on for years burden injured parties and may also injure the defendant. But a court case that out of fear of dragging is not heard fully in court might also burden—or, more fundamentally, degrade—both individual and collective senses of justice. Last but not least, parties may

[21] ECLI:NL:RBOBR:2025:7907.

[22] I thank Anthony T Allbright for his contribution to the argument here.

[23] ECLI:NL:HR:2022:1252. In the original: "*De rechtbank kan en wil desalniettemin niet haar ogen sluiten voor de ontwikkelingen in de strafrechtketen. Zaken en dossiers worden steeds omvangrijker en complexer met als gevolg steeds langer durende strafprocessen. Die ontwikkeling kan dan weer op gespannen voet komen te staan met onder andere het recht van de verdachte op een behandeling binnen een redelijke termijn, ook neergelegd in artikel 6 EVRM. Bovendien wordt het doen van nader onderzoek (bijvoorbeeld het horen van getuigen vele jaren nadat de verweten feiten zich zouden hebben voorgedaan) na het verstrijken van jaren in diverse gevallen steeds moeilijker en (soms) van minder waarde. Voor benadeelde partijen betekent een zich jarenlang voortslepend proces, waarbij zij op het verloop van dat proces niet of nauwelijks invloed kunnen uitoefenen, ook een belasting.*"

threaten to engage in procedures that they will try to keep dragging on for years, while knowing that from fear of such dragging the state, or other entities involved, will opt for forms of mediation or bargaining.

With this third shadow of the law, mutual agreement is not the pivotal issue, nor is the fear of engaging in a real court case with mightier opponents that are much better equipped to deal with juridical intricacies than others (the ominous shadow).[24] The third shadow exists in the fear of the judiciary itself for cases that keep dragging on. Let me call this the *withdrawing* shadow of the law. The element of withdrawing is evidenced on the website of a national network of agricultural mediators called Agrimediation. It tells its members and clients:

> The state is legally obliged to follow (appeal) procedures. More and more often, the state will seek a solution with parties along the lines of deliberation and negotiation. In such cases, results can be achieved without hurting procedures or creating legal precedents (my translation).[25]

The argumentative transition from the first to the second sentence is a brilliant example of a *bon entendre*. Without saying it, the website tells us that the judiciary, as a collection of state officials, will have to work slowly and that this can be used. If the state prosecution fears slowness, it will be easy for other parties to make the state favour "deliberation and negotiation".

The widespread prevalence of such mediation and bargaining is common knowledge, if we only consider the fact that the vast majority of cases in the United States are resolved in this way. In the Netherlands, likewise, the Dutch Council of State has published a special brochure inviting potential litigants to first try to reach a mutual agreement through mediation. That this institutional preference for mediation can be abused becomes clear when the website of Agrimediation mentions that the Council of State, as a regulatory body checking the appropriate handling of law by the state itself, "will not consider a case if mediation has not been tried first".[26] This is not true. Mentioning it can be an effective tool, though, to educate people how to manipulate the judiciary. Or it discloses what these agrimediators are actually aiming for.

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[24] To describe such cases as a contest between "David and Goliath" (Van Domselaar & de Bock 2023) is in many cases wishful thinking.

[25] Agromediation (2026). In the original: "*De overheid is wettelijk verplicht om een (bezwaar)procedure te volgen. Steeds vaker zoekt ook de overheid met partijen naar een oplossing langs de weg van overleg en onderhandelen. En dan kan ook zonder de procedures te schenden of precedenten te scheppen resultaat worden bereikt*."

[26] Ibid.

Now, of course arbitration or mediation can be subject to extensive judicial regulation. The social consequences of its prevalence are broader.

[D] JURIDICAL COHESION: "DARK MATTER" AND HOW IT CAN BE WEAKENED

In a recent study, Greta Olson (2022) not only describes the development of one interdisciplinary scholarly field into another but also introduces a new definition of legality. Olson's study is much inspired by the work of the nineteenth-century legal scholar Rudolph von Jhering, who coined the concept of *Rechtsgefühle*: people's feelings for law. Jhering's work was neglected by those twentieth-century thinkers who would criticize law's role in preserving the existing social order—that is, in defending the *status quo*. In various Marxist analyses, in poststructuralist approaches, and in the field of critical legal studies, the major aim was to show how law makes things go wrong: how jurisdiction can be biased, or how it works as an instrument of oppression. In general, these approaches do not consider the question of how people feel bound by law insofar as they feel positively *attached* to law.

The latter issue was Jhering's nineteenth-century concern, just as it was the twentieth-century concern of Antonio Gramsci, and most recently Scott Veitch in a study entitled *Obligations* (2022). Jhering developed his theory in a society industrializing so rapidly from feudalism that many matters were not regulated by law. This lack motivated a struggle (a *Kampf*) by upright citizens to establish a law proper that served not just their private interests but society (Jhering 1997). The second thinker, Gramsci, was thrown into prison by Mussolini and knew well the consequences when a proper rule of law is destroyed and replaced by a perverse one. This may have been an important reason why Gramsci wondered whether we ought to consider how law can be a pedagogical and civilizing—rather than simply oppressive—force. The third, Veitch, asks whether the recent dominance of "rights" in legal theory and practice—also in an ecological context—deflects from the more fundamental juridical issue of obligations. Veitch's major point is that obligations have force only when they are underpinned by a culture that defines accepted, promoted, less accepted, and unacceptable modes of behaviour and turns these into a mode of living (2022).

Influenced particularly by Jhering, Olson (2022) studies how people's affective bonds with law take shape within the twenty-first-century media landscape. Olson argues that people's feelings for law are produced not only by law itself but also by a diverse constellation of cultural forms.

These genres and media, belonging to both high and low culture, underpin, shape, and reshape people's feelings for law and jurisdiction. A very straightforward example is the enormous influence of cinema and television on popular knowledge of what happens in court (Goodrich & Delage 2012; Becci & Ors 2025). As Olson shows, this might also be an imagined knowledge; legality can but need not directly express the reality of jurisdiction.

Olson's (2022) argument implies that many of the feelings people have about law's execution are imaginary, though this does not make them less real. Still, mindful that Olson is not explicit on the issue, I read her work as grappling with something that remains elusive. If her primary question is how people develop feelings about law and jurisdiction, she is right to show how such feelings are shaped not primarily by the legal system or the disciplinary forces residing in institutions such as education. Rather, she highlights that such feelings are cultivated outside of the fields of law and education, as in the arena of cultural production, with the consequence of diversity, and perhaps even disparity, in people's feelings for law. What nevertheless remains elusive, then, is what keeps a society together under a law to which people apparently feel attached, even if *differently*. Indeed, what affective matter within a given society gives rise to its juridical *cohesion*?

In the *Prison Notebooks*, Gramsci's positive answer to this question is to conceive of the state as an educator and civilizing force, one that in turn needs to educated and civilized by the subjects living under its rule, all of whom are potential legislators. The relation between state and subjects is, on the one hand, enforced from above, but, on the other, never fully accepted from below (Gramsci 2007: 74). In relation to the former aspect of the dynamic, Gramsci is still Marxian, but in relation to the second he is more on the side of Jhering. Precisely because the people within a given society are diverse—socially, culturally, ethnically, professionally—there must be a continuing struggle not about but *for* law. Obviously, a struggle can be analysed in terms of winners and losers. But the German term *Kampf* addresses more than a competitive dynamic with an unequal outcome. Jhering rather contends that through a laborious, continuous effort (another meaning of the term *Kampf*) people show they care for law, and that they feel attached to it.

This returns us to juridical cohesion's elusiveness as a force. For why would people *care* for the proper administration of law? Why should they not choose, for whatever reason, to avoid such a laborious process and instead be satisfied with a state or an authority that takes care of things

for them, even if this means simple subjection? In his analysis of civil resistance, Howard Caygill (2013) introduces a Gramscian typology of civil protests that are all bound ethically by an "organic continuity". We find again a metaphor, here, this time of "the organic". I find the notion of the organic infelicitous, considering that the struggle for law can never reach a final conclusion and that this struggle involves a people's diverse yet more or less collective care for law. I therefore propose an alternative: to take the universe's dark matter as a metaphor for the elusive, not immediately visible *affective mass* embodied in a people's collective attachment to law—the law's dark matter.[27] This mass is everywhere, without us being able to have a look at it, or to "get it".

The metaphor is useful to help indicate something that is not visible and therefore needs imagination, a bit like Benedict Anderson's (1991) famous "imagined communities" of nation-state cohesion. In contrast with the latter, however, where the existence of a nation depends on its production through media, the rule of law and its execution depends on something else that already exists, as Veitch argued. It consists in a more or less collectively shared culture that defines people's attitude towards law and justice. With respect to this, the metaphor of dark matter allows us to imagine the affective mass that prevents the elements of a society from spiralling out of control.

Now, affects can be felt but are invisible. So, the affective mass that upholds the rule of law, allowing people to participate in it and feel attached to the law, is felt but unseen. The metaphor acknowledges that people's feelings for law are first of all an issue of attraction. Surely such feelings are connected to visible, traceable, perhaps quantifiable factors, even as these cannot fully explain juridical cohesion insofar as it is based on a diverse but nevertheless shared culture that facilitates a care for the rule of law? Such cohesion can only be explained, the metaphor suggests, by an imaginable *affective* mass that produces it and that through this metaphor becomes visible. In a sense, law's affective mass is the condensation of a society's collective hypotheses as to its nature. This hypothetic dynamic also makes it vulnerable. The fact that we cannot

[27] The idea of law's dark matter came to me through "The Great Debate", a satirical song by American composer and singer Randy Newman (2017). In the song, a mediator convenes a debate between scientists and "true believers". The first scientist to enter into the debate is asked to explain dark matter and the mediator wonders whether he could have a look at it. When a voice laughs in response "Of course not", the mediator concludes: "Let me get this straight: you don't know what it is, you don't know where it is, and we can't get any? Put that to the one side. Let's put the Lord, faith, eternity, and whatever on the other side. Show of hands?" At this point, the choir of true believers begins to sing that they'll choose Jesus every time. The resulting score in this mock battle is 1-0 for true believers. After a scientific expert on evolution is subsequently questioned, the score rises to 2-0 for true believers.

really define or locate juridical cohesion represents an opportunity for those who do not care for such positive cohesion: actors who would sow doubt about its very existence, or seek to replace voluntary collective care with an enforced collective belief in a divine or secular supreme being.

One way to analyse what is happening in the United States under its 47th President is to consider how the collective care for law is being weakened by the tearing apart of juridical cohesion, in an attempt to replace its affective materiality with belief in an imaginary supreme being whose private interests are partly visible yet still remain foggy. As my Dutch case illustrates, Donald Trump is surely not the only one interested in subverting a collectively underpinned, bottom-up care for law. Big corporations have similar interests. The attitude of both toward the rule of law is ambiguous if not schizophrenic. On the one hand, they invoke the rule of law, at times excessively, when it serves their interests. On the other hand, they attack jurisdiction's role in disclosing truth, seeking to prevent it from bringing to light their behaviours. To do so, they use tactics of shadow and fog.

As a result, in the Dutch case, the cause of the country's massive and surely palpable pollution is *known* and yet remains murky or foggy. As for the prosecution of the crime of pollution, it is a bad sign when state prosecutors fear cases dragging on. The expected and all too real result is that environmental crime is only a marginal issue in the courts. More broadly, if things remain hidden in the mist, if the shadow of the law prevents the full disclosure they deserve, how are public audiences expected to *care*? As I have been suggesting, the slightly elusive, incalculable affective dark matter of legality that makes juridical cohesion within a society possible also allows certain actors to sow doubt about its very existence. If its existence, as a result, is no longer collectively felt, the collective resistance to injustice may lose its force and society becomes the playing field of the mighty.

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central in Imagining Urban Complexity: A Humanities Approach in Tropes, Media, and Genres *(Routledge, 2024; together with Anthony T Albright). The way in which powerful actors play with jurisdiction is the focal point in* Law, Spectacle, and the Play of Jurisdiction *(Routledge, 2026).*

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The Trial and Exposure

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Abstract

This article offers an interpretation of Roger Waters' "The Trial" (*The Wall*, 1979) by comparing it with Franz Kafka's *The Trial* and "The Judgment" and with Friedrich Dürrenmatt's *Die Panne* (commonly known as *A Dangerous Game*), in order to highlight the profound affinities among the four works in their representation of the trial as a process of exposure that leaves the defendant's life stripped bare and laid open both to the gaze of others and to their own. Thus, whatever the verdict, the trial naturally culminates in shame; shame is therefore the necessary punishment of both the convicted and the acquitted.

Keywords: Pink Floyd's *The Wall*; Roger Waters; Friedrich Dürrenmatt; Franz Kafka; shame; trial; society.

[A] INTRODUCTION

Some years ago, I decided to try to write a book on "Law and the Humanities", a field of research that I had explored only intermittently while working on *Bēowulf*, Dante's *Comedy*, philosophical science fiction, and, more generally, while reflecting on certain classics of Western literature from a political and legal perspective. My intention was to show that law and literature are concerned with the same object, namely society, and that they often approach it in similar ways.

First, both law and literature are expressions of society itself: we study and interpret them as manifestations of the ideologies that shape the particular historical society in which they arise. Secondly, both law and literature seek to intervene in society in order to change it in particular directions: a law against racism, for instance, pursues much the same aim as a novel such as *To Kill a Mockingbird*, or a film such as *Guess Who's Coming to Dinner*. Thirdly, both law and literature have a didactic function. I do not mean to claim that law and literature must be didactic, but it is nevertheless a fact that they produce an important didactic "fallout effect" upon the population. The repeal of laws against homosexuality in the United Kingdom, for example, was intended to protect individual rights from morally unacceptable legal interference, but its medium-term

effect on society undoubtedly involved a broader acceptance of the moral neutrality of sexual preferences and habits. Something similar occurred in Italy with the introduction of divorce in 1970–1974: the immediate legal aim was to enhance individual freedom in matters that caused no harm or danger to the rights of others, but the moral effect on society was a very rapid transformation in public judgement of divorced people, from something morally suspect into something normal, part of the accepted moral landscape.

Finally, both law and literature function as instruments of critique. Law criticizes society through direct normative interventions: laws against police harassment, for instance, indicate that the legislator considers police harassment to be a real problem and draws the attention of politicians, the public, and police officers to it. Literature does the same, but, of course, in a non-normative way. By describing an episode or narrating a story, whether real or fictional, a writer can show readers the problems generated by a specific action or by a political or legal decision, thereby inviting them to judge it. By way of a single example, I would think of a book I recently read, *Entre deux mondes* (2017), by the French writer Olivier Norek, a novel that recounts two specific instances of African migration towards England. The author himself states that the events are fictional, but he also makes clear that these fictions are not mere fantasies because through fictional characters they depict the real conditions faced by migrants and the situations with which they are forced to contend because of illegal traffickers and European immigration laws.

To return to the book I was planning, I intended to organize it into five chapters, each devoted to a specific theme addressed by both law and literature. Naturally, one of these had to be a chapter on the trial, since the trial is a necessary component of any legal system and also a pivotal theme in literature. It is impossible to count the literary, and more generally artistic, works that depict trials; and in my view this widespread artistic interest arises from the fact that the trial is the principal event through which law becomes visible to the public.

Law itself is invisible; it consists of words that describe abstract concepts. One cannot see a duty, for instance, but only individuals performing actions, and no one can know or say whether those actions are motivated by a sense of duty or by legal obligation. Once one sees a trial, however, the situation changes: there is a prosecutor who claims that the defendant has violated a law, and a defence lawyer who argues the contrary. We hear witnesses and statements; we see evidence in the

form of recordings or documents that describe the facts; and we interpret the narrative of those facts within the invisible framework of invisible legal concepts.

Furthermore, the trial is the only tangible expression of law, and this is evident also in its very choreography: robes resembling those of priests; obscure and esoteric language; a structured plot in which each character performs exactly what the script prescribes, even in the event of an unexpected twist. It is true that a police uniform is also a visible manifestation of law, but I think we may safely agree that the trial is a far more powerful one, perhaps the most powerful manifestation of all.

It is impossible, I think, to write an overview of the trial in literature without addressing Franz Kafka's posthumously published novel *The Trial* (2009: *Der Prozess* [1925], written in 1914-1915). That book brings together all the defining elements of Kafka's poetics: the triumph of bureaucracy—a necessary machinery of the modern state that has turned into an engine operating for its own sake; the incomprehensibility of the world; the failure of communication between individuals; the blending of reality with a dreamlike atmosphere, at times nightmarish and at times erotic; and, finally, shame—the shame of being guilty without having committed a crime.

The story is well known. A bank clerk, Josef K., receives an early-morning visit from two men who inform him that he is under arrest. He is allowed to continue his normal activities—he can go to the office, to the restaurant, and so forth—but he is under arrest and will shortly be judged by a court. The men do not tell him why he has been arrested, nor what crime he is accused of. They probably do not know themselves. Josef does not know either; yet as one reads the novel, it becomes clear that the crime—the accusation itself—is not what truly matters. The only relevant element is the trial and Josef's increasingly desperate attempts to escape it.

It is a bizarre trial. Josef encounters the court only once, near the beginning of the story, when he goes to the courtroom on a Sunday morning. The setting is chaotic: a crowded, noisy hall in the back room of an ordinary apartment building in a suburban district. It is not clear what exactly happens there. After asking for information about his situation and receiving no answer, Josef declares, "This is a trial only if I recognise it as a trial," and leaves.

The following chapters narrate a series of attempts to seek advice from various figures—a painter, an uncle, a former high court judge, even a

priest—in the hope of obtaining an acquittal (though he is told that full acquittals are extremely rare), or at least of finding some way to delay or halt the proceedings.

In the final chapter, Josef receives a second visit at home: two melancholy men, dressed like actors (Josef imagines them as opera tenors). He walks with them until they reach an abandoned quarry. There he sits on a stone, and one of the men executes him by plunging a knife into his heart. His final thought is that his shame will outlive him.

[B] KAFKA, DÜRRENMATT, AND WATERS

Reflecting further on Kafka's *The Trial*, I came across two short texts that deal with similar themes. The first is a short story by Kafka himself, "Das Urteil" ("The Judgment") (2012), in which a father judges his son Georg—a devoted son and upright young man—suddenly bursting out with a torrent of confused accusations and charging him with an indistinct heap of offences. The father ultimately sentences him to death by drowning.

At first, the son is astonished; he believes that his beloved father has gone mad. However, as the irrational accusations continue, he begins to respond, even though there is in fact nothing meaningful to which he can reply. Gradually, he accepts the situation: he accepts being placed under judgment. When the father pronounces the judgment, the son goes down into the street, runs towards a bridge over the river, and throws himself over the railing.

The second work is a short novel by Friedrich Dürrenmatt, *Die Panne* (*A Dangerous Game*) (1956), which tells the story of a group of elderly men—a retired judge, several retired lawyers, and even a retired executioner—who host Alfredo Traps, a travelling salesman, in their home for the night and decide to entertain themselves by staging a mock trial. Their guest is to play the defendant. As the lengthy dinner unfolds, they question him about his professional and personal life, uncovering minor acts of bribery, instances of unfair conduct towards a colleague, and even the fact that he once cheated on his wife with his secretary.

The evening proceeds in an atmosphere of apparent amusement, amid jokes, abundant food, fine wines, desserts, and liqueurs. In the small hours of the morning, just as dawn approaches, the judge declares something to the effect of: "Well, I believe the only solution is to sentence you to death—do you agree?" The entire company—the defendant included—bursts into loud laughter, exchanging tears of amusement and hearty pats on the back.

Later that same morning, however, when the judge opens the guest's bedroom door to call him down for breakfast, he discovers his corpse: the guest has carried out the mock judgment and hanged himself.

This last story has often been described as a rewriting of *The Trial*, but in my opinion it should be more plausibly read as a rewriting of "The Judgment". In *The Trial*, no mention is made of the charge brought against the defendant—and, crucially, the defendant himself does not know it. In "The Judgment", by contrast, the mock trial begins without any specific accusation, but as the farce develops, a series of charges gradually emerges: bribery, unfair conduct, infidelity, and so forth.

Furthermore, in *The Trial*, the defendant is executed without ever being formally informed that he has been sentenced to death (he infers it when he opens the door to the two "sad tenors"). In "The Judgment", by contrast, the father-judge explicitly pronounces the sentence, and the son commits suicide in order to carry it out.

Finally, a third consideration, perhaps a more subtle one: none of those sentenced appears to be physically forced into execution. The first simply follows the executioners, though the reader has the impression that he could refuse; the second accepts his father's judgment and carries it out himself; the third agrees to take part in the mock trial as a joke and knows that the death sentence is merely the punchline of an amusing evening. Later, however, alone in his bedroom, he reflects on the whole affair, turns the joke into something serious, reconsiders his life, and realizes that he cannot continue living as before. Three different plots, united by a common element: shame.

Josef K., the protagonist of *The Trial*, is ashamed of being placed on trial; Georg, in "The Judgment", is ashamed of the absurd accusations that his father hurls at him, but, like a child, he cannot reply, so that his shame is the shame of being accused; and Alfredo Traps, Dürrenmatt's travelling salesman, is ashamed when the playful exposure of his minor moral failings reveals to him a truth he had perhaps never fully acknowledged.

These are three stories in which shame goes hand in hand with accusation and with the impossibility of contradicting it. Josef does not even know the charge brought against him; he is therefore deprived from the outset of any meaningful possibility of defence. Georg, reduced in some sense to the condition of a child, is not allowed to reply to his father: the paternal voice overwhelms him and excludes any genuine dialogue. Alfredo, for his part, accepts the game and offers no defence; on the

contrary, he willingly exposes his life to public scrutiny. Yet later, when he finds himself alone and might perhaps wish to respond—to apologize, to offer mitigating explanations, or to reinterpret his actions—he can no longer do so. Everyone is asleep. The space for defence has vanished. Shame, now internalized, overwhelms him.

The theme of the trial, as I have noted, is one of those legal elements that have traditionally attracted literature and the arts. The so-called "legal drama" has become a constant presence in television schedules, and the legal thriller is a highly successful literary genre. Music, by contrast, seems to show comparatively little interest in the subject: trials are seldom the central focus of a song or musical composition. In Italy, for example, the songwriter Fabrizio De André referred to a trial on at least two occasions: in the song "Jordi" that, however, is fundamentally about the rule of law, which compels even the king to pronounce a cruel judgment. More ironically, De André returns to the theme in "Un giudice" (a judge), a song about the revenge of a dwarf who becomes a judge and uses his new authority to retaliate against the humanity that had cruelly mocked him in his youth. In British music, one example that comes to mind is Jethro Tull's song "Two Fingers", which opens with the promise: "I'll see you at the Weighing-In / When your life's sum-total's made." Here the text evokes the idea of judgment; however, it seems clear that this "weighing" is closer to a judgment of the soul than to a human and legal trial.

One notable exception—indeed, the only one that comes to mind—is Roger Waters' song "The Trial", which brings to a close the narrative of Pink Floyd's concept album *The Wall* (1979). Strictly speaking, "The Trial" is not the final track of the double LP, whose closing piece is a kind of reprise of the theme of its most popular song ("Another Brick in the Wall"); nevertheless, *The Trial* constitutes the true narrative conclusion of the work.

An extensive body of critical literature has been devoted to Pink Floyd's music, which is hardly surprising given the band's undeniable influence on twentieth-century popular music. This is not the appropriate venue for a detailed engagement with that body of scholarship, and in any case such an undertaking would exceed my area of competence. It may be nonetheless observed that most critics tend to divide the history of Pink Floyd into two distinct phases: the Barrett era and the post-Barrett era,

with Waters, after Barrett's departure, emerging as the principal composer and, above all, as the band's primary lyricist.[1]

Year after year, the lyrics became increasingly cryptic, moving towards a form of hermeticism whose central concern is the loneliness of the individual within society and anxiety as the natural condition of existence. Mental illness, in this perspective, is portrayed almost as a form of normality, because in a world where genuine communication is impossible—where the failure of communication constitutes the core of the human condition—we are all, in some sense, fools or lunatics. One may think, for example, of the very ending of the masterpiece *The Dark Side of the Moon* (1973): "There is no dark side of the Moon, really. Matter of fact, it's all dark. The only thing that makes it look light is the sun" ("Eclipse").

The poetics of the album *The Wall* as a whole are quite clear: the individual in society becomes isolated as a result of the alienation that society itself produces. "The wall" represents the barrier that stands between each person and the rest of society. This wall is built brick by brick, and we all contribute to its construction. Some bricks are laid by ourselves, while others are imposed by institutions, the education system, the rules of work, and the expectations of social conformity and politeness. The idea is that we are all components of a larger machine, compelled to perform the roles assigned to us by its very architecture. (To this poetic theme, the artwork adds elements of the motif of the "absent father". Waters never knew his father, who was killed at the Battle of Anzio before he was born. However, this element functions largely as an anticipation of a theme that Waters would develop more fully in his later works). We accept this condition because it is from the machine itself that we receive our roles and, ultimately, our identities. From this perspective, Karl Marx's and Friedrich Engels' famous sentence, "The proletarians have nothing to lose but their chains", may need to be reconsidered: if all that one owns is one's chains, then they are the most important thing one possesses. It is from the chain that one receives a role, an identity, a place in the world. Kafka's clerk, Josef K., derives his identity and his place in society from his position as a senior bank official. Even though he has friends, a girlfriend, and relatives, his life is essentially defined by his work. Significantly, the first information we are given about him concerns his professional role rather than his private life, which appears

[1] For further reading, see Alves da Silva (1982); Mason (2004); Sacido Romero & Varela Cabo (2006); Blake (2008); Mabbett (2010); Bunea (2013); Kock (2013); Urick (2016); Testino (2020); Sacido Romero & Varela Cabo (2021); Hart & Morrison (2023); The Lunatics (2023); Saci (2024); Ottelin (nd).

secondary and marginal. Josef's chains are so central that they constitute the very foundation of his identity. The same may be said of Georg in "The Judgment": he has a friend and a fiancée, yet the story centres on his work and on his relationship with his ageing father, the former owner of the company that Georg now manages. Of Alfredo Traps we know only that he is a travelling salesman and nothing more. All the further details of his life emerge only when he agrees to play the trial game. Up to that very moment, Alfredo Traps is merely a travelling salesman like any other, defined entirely by his professional life.

We also know almost nothing about "Pink"—from this point onwards I shall write the name without quotation marks —Waters' *alter ego* in *The Wall*. We are told that he is a musician—this is made clear in the album's opening song, "In the Flesh?"—but we are given no real sense of what kind of musician he is. Instead, the album emphasizes his solitude: even when he stands before a crowd, he remains profoundly isolated. There are clear signs of mental illness, which at times erupt in violent and disturbing ways, more explicitly in the 1982 film *The Wall* than on the original LP (the connection between the LP and the film has been noted by many critics: Waters worked on the screenplay together with Alan Parker, the director, and the two seem to have aimed at something akin to what Arthur C Clarke and Stanley Kubrick achieved with *2001: A Space Odyssey*—a kind of collective artwork, fully understandable only when its two "parts" are considered together).

[C] THE TRIALS

As we have seen, the first three trials display many similarities. Perhaps the most significant of these is the absence of a clear accusation before the trial begins. In Kafka's *The Trial*, the defendant—and the reader—is never informed of the charge throughout the entire narrative. Even the death sentence is not formally pronounced; it is inferred rather than explicitly declared. In both "The Judgment" and *Die Panne*, by contrast, the accusations emerge as the trials proceed: Traps agrees with the judge's accusations, whereas Georg rejects those of his judge-father; yet in both cases the defendant is at least told what he is accused of.

In *The Wall*'s "The Trial", matters proceed somewhat differently. First, the song does not itself tell us who the defendant is. We know that it is Pink only from the 1982 film. It is my view that, although Pink is in many respects Waters' *alter ego*, just as Josef K. is in some respects Kafka's *alter ego* (in the latter case, the identification is almost explicit), in both instances the author's aim is to suggest that the defendant could

be anyone. The same lack of identification that I have just noted with regard to the defendant also applies to the judges. In Kafka's *The Trial*, Josef K. encounters the tribunal, but the real authority of the court remains fundamentally hidden. The magistrate he meets during the first hearing is only a minor official, part of a vast and obscure bureaucratic apparatus. Throughout the novel, Josef K. never reaches the real judges or the true centre of power. The system judges him, but the source of that judgment remains unknown—and unknowable. This opacity is essential to Kafka's vision: the individual is trapped within a system the authority of which undeniably exists, yet cannot be clearly identified or confronted.

In Waters' "The Trial" (both the song and the 1982 film), the situation is quite different. There is a judge, and he performs the functions one expects in a trial: he calls the witnesses (the schoolmaster, the wife, the mother); he listens to their accusations; and finally he pronounces the sentence. Even more importantly, whereas in Kafka the defendant does not know what he is charged with, in Waters' work the song begins with the prosecutor addressing the court ("Good morning, Worm your Honour") and stating that the defendant is accused of having shown his "human nature".

Indeed, the only defendant to whom the tribunal explicitly states the charges is Georg ("The Judgment"). Both Josef and Pink appear ignorant of the accusations. Neither Josef nor Pink is allowed to speak in his own defence; but whereas Josef cannot see his judgment, Pink is present while the trial unfolds and can hear the witnesses' statements.

One might object that Pink does in fact know the charge: namely, that he has shown his human nature. But what sort of charge is that? Everybody shows their human nature. Traps does so too: during the night in which the mock trial unfolds, he shows the court his own particular human nature by recounting specific episodes from his life. In the end, the judge "condemns" him for bribery, cheating, unfairness, and the like, all in relation to specific actions that he actually committed: this is not a trial of "human nature", but a trial that judges concrete acts performed by a human being. The same holds true of Georg: he is accused by his father of specific offences, however false and inconsistent, and the verdict is based upon them. The accusation of "human nature" concerns only Kafka's and Waters' trials, even though it is made explicit only in the latter case.

In both trials it is evident that the defendant cannot escape the proceedings. In Waters' trial, we are faced with a "real" tribunal, and we may suppose that the defendant is compelled to remain there. In Kafka's

trial, Josef's inability to escape is due to the social rules he has accepted: although he declares that "This is a trial only if I accept it as a trial" and leaves the courtroom, he does, in fact, accept the trial because the whole novel consists of attempts to obtain a legal escape or a highly improbable full acquittal.

As we have seen, these latter two trials unfold in different ways. They also end with two sentences that, at first sight, appear quite different: Kafka's with its implicitly declared death penalty; and Waters' with the sentence that the judge defines as the full penalty of the law, namely that the defendant is to be exposed before his peers—"Since, my friend, you have revealed your deepest fear, I sentence you to be exposed before your peers. Tear down the wall."—who, because we share with the defendant the same "human nature", are also our peers. Since we know nothing of Kafka's proceedings, let us consider how Waters' trial unfolds.

After the prosecutor's opening declaration, the judge calls the witnesses. The first is the schoolmaster, who simply says that he "always said he'd come to no good in the end", that "if they'd let me have my way, I could have flayed him into shape", and concludes by asking the judge: "let me hammer him today". Then comes the wife, who continues by insulting the defendant, calling him "little shit", hoping that now "they throw away the key", accusing him of having broken their home with his habits (though no divorce is mentioned), and finally asking the judge: "Just five minutes, Worm your Honour, him and me alone." Finally comes the mother, who appears to be the only witness for the defence. She merely asks for mercy, which shows that she too accepts the accusations. She weeps before the court, praying: "Worm, your Honour, let me take him home."

In fact, we have three prosecution witnesses, yet none of them says anything that supports any definite accusation. Insults, threats, demands for harshness, or pleas for mercy say nothing except that the defendant is blamed, hated, or motherly loved. Turning to Kafka, although there are no witnesses in *The Trial*, something similar happens to Josef: no one appears to know what he has been charged with, but everyone assumes that he is guilty of something, because "the only innocent person is one who has never been put on trial". All the people Josef meets in his attempts to resolve his situation have nothing to do with his trial as such: they are lawyers, retired judges, a priest, even a court painter, yet none of them can give any specific advice concerning his unknown case, only general advice on how he might persuade the court to cease taking an interest in it, at least temporarily. The strong impression is that the novel is dominated by blame and shame: the people who blame Josef,

and Josef's shame in response to that blame. As we have seen, blame is equally dominant in Waters' trial, though shame is not, at first sight, so evident.

The close similarity between the two trials becomes apparent when we realize that both courts condemn the defendant to the highest penalty. These penalties are, respectively, the death penalty in Josef's case and exposure before his peers in Pink's; yet it seems to me that, despite this apparently considerable difference, the penalties are in fact the same. Pink's judge sentences him to be exposed before his peers by tearing down the wall, and Josef's invisible judge sentences him to death by dagger; but in both cases these appear to be merely the means by which the real punishment is achieved, namely shame. Josef is stabbed in the heart, and as he dies his final thought is not despair at the end of his young life (he is 30 years old), but the sad and bitter recognition that shame will outlive him. His last words, perhaps expressing surprise at the peculiar manner of the execution, are "Like a dog!", as though he regretted the hangman or the firing squad that would have executed him as a man deserves. In Pink's case, shame consists in being seen by others in his human nakedness: the wall that the judge orders to be torn down is the wall that every person builds around themself, that is, the boundary separating more or less public behaviour and appearances from what is private, intimate, and even secret. Pink cannot see others in this way, but they can see him. This is the cruelty of the punishment: the sentence abolishes the reciprocity of blindness that exists beyond the boundary we draw in society between ourselves and others.

We all conceal something from others. The slogan "Nothing to hide, nothing to fear" is naïve and foolish. One does not want others to see them while they sit in the loo; nobody wants private masturbation to become public; we do not want spy cameras in our homes: no one could accept that. In short, we would not accept the walls of our homes—literal and metaphorical alike—being made of glass, especially if the walls of other people's homes were still protected by the opacity of concrete.

[D] CONCLUSIONS

It is now time to move from imaginary trials to real ones. At first sight, things appear very different: the defendant is informed of the charge, hires a lawyer, appears before the judge, and can respond to the prosecutor's accusations and contest them by offering alternative explanations, proof, and evidence. In the real world, one might say, trials do not unfold as Kafka and Waters describe them: both literary trials are metaphors for

the existential anxiety faced by human beings in society, for the difficulty of meeting social expectations and fulfilling one's social role as an honest worker, parent, son, daughter, or citizen. The theme, in short, would be what Freud calls the discontent of civilization; or perhaps the discontent of society.

Some have argued that *The Wall* in general, and "The Trial" in particular, constitute a poetic critique of Thatcherism, a political position that Waters often criticized harshly and explicitly, as in his later work *The Final Cut* (1983), for example. Others have suggested that the whole album is centred on mental illness, a theme that Pink Floyd and Waters had already addressed in their masterpiece *The Dark Side of the Moon* (1973). Others, as I have already noted, have identified the core of *The Wall* in the theme of the absent father: the only living parent mentioned is, in fact, the mother (there is also a song, "Mother", which describes the difficult relationship between a growing son and an overprotective mother); and, if one looks at "The Trial" in particular, no father is mentioned at all, while the only witness in favour of the defendant is, in effect, his mother.

The Wall is indeed a highly complex work, one that brings together many more or less interconnected poetic themes, so such interpretations are by no means unfounded. In my view, however, none of them can be regarded as a complete interpretation of the work. Probably, the "absent father" explains why all the male characters are embodiments of a strong and often physically elusive authority; and certainly the idea of "the bricks" (no brick is different from any other) that build a wall is a critique of Thatcherism and, even earlier, of the utilitarianism that emerged during the Industrial Revolution and that Charles Dickens strongly criticized in novels such as *Hard Times*, especially in the pages where he describes the education system—the school—as seeking to shape each student not as an individual and autonomous person, but as a fungible element of the "System". Finally, those who have identified mental illness and alienation as central themes are surely right: this theme runs as an undercurrent throughout the whole work and emerges clearly in certain songs (one may think, for instance, of the powerful "One of My Turns"). Waters' approach is to depict society and man-in-society by surgically separating their constituent elements and analysing them one at a time. And what do they all have in common? Judgment: you are placed in a certain social role, certain performances are expected of you, certain clothes, even certain private behaviours, and we all judge you from this normative standpoint.

Thus, "The Trial" is the perfect ending to *The Wall* because it is the point at which all these themes converge and find their resolution. If

the charge is "human nature", it implies collective guilt, since we all share it. But—and this is the crucial point—while our "human natures" remain hidden beneath the normative coverings supplied by the social system (we know nothing of what our colleagues are privately afraid of; for instance, we do not know whether one of them sleeps with the light on because they are afraid of the dark), the trial exposes many aspects of the defendant's life, including those belonging to areas that we normally regard as irrelevant to public scrutiny and which we strive to protect from public knowledge with the utmost determination. The first punishment, then, arises from the mere fact of the trial, since it entails the forced exposure of the defendant's private self, while the private selves of others remain carefully protected and concealed. Judges, prosecutors, lawyers, witnesses, court clerks, spectators, newspaper readers: they are the audience, seated in the dim light of the theatre and staring at the man who stands upon the stage in full light. He is the one we all look at and can see in his entirety, whereas we can glimpse the others in the audience only as shadowy forms, quietly seated in their chairs, with the reassuring certainty that I—each individual "I" seated in the audience—am myself a similar shadow in the eyes of every other person attending the performance.

Thus, we blame Traps (the mock defendant in *Die Panne*'s nocturnal trial) not so much for his cheating as because his cheating has become public knowledge, whereas ours remains a secret shared only between ourselves and our lover—who may very well also be married. And what do we blame Pink for? For his private fears, for instance, even though some of them are our own private fears as well—or rather because the trial has unveiled them, and now he feels ashamed beneath our gaze upon his nakedness.

Can we really be sure that, in real trials, things proceed differently? The trial begins with an accusation, sometimes with an arrest, when the police lead the arrested person away in handcuffs, which that person often tries to conceal beneath a coat. When I was a child, seeing on television yet another arrest and noticing that familiar coat, I asked my grandmother why it was there: "Is it cold in prison?" She smiled at me and answered: "No, dear, it is for shame—the shame of the handcuffs." From the moment of arrest, especially if the person arrested is well known, or if the case appears interesting in some way (a financial crime, political corruption, a particularly gruesome murder, or any case involving someone we know, even if only by sight), everything unfolds like a serial novel or, better still, an episodic television drama. Every day brings new details about that person, and people follow with curiosity—often with morbid curiosity—

the gradual unveiling of the defendant's private life. Witnesses speak of the defendant's friends, associations, and more or less secret passions. Wiretapping may reveal unsuspected sexual affairs, impolite manners, habitual swearing: "Ah, just look at that goody-goody, would you? What a disgrace!" Perhaps the defendant is charged with robbery or murder, and the charge probably has nothing to do with sexual preferences; yet the person standing on the omnibus (that mythical figure so beloved of many moral philosophers), reading the newspaper, will exclaim: "Well, look at that! That upright family man, all home and church, was obsessed with girls!" The politician charged with corruption, so outwardly loyal to the Prime Minister, refers to her on the telephone to his friends as "That silly cow": what a hypocrite! The polite bank clerk in a tie, charged with embezzlement, tells his wife once a week that he is going to spend the evening with friends playing darts, but instead goes out to the suburbs to visit prostitutes. There is no need to worry, though: it is precisely the evening that his Salvation Army wife looks forward to because she is free to meet her lover. What a shame, and what a laugh! This man lied to his friends; that woman was an idler at work. Everyone calls him "Doctor", yet he is not qualified; that perfect nose is no gift of nature but the work of a surgeon's knife. What a heap of human nature, and what a mess beneath those curtains of respectability and uprightness. How shabby the undergarments they wear beneath their neatly ironed and socially appropriate clothes.

Are we any different, though? Are our lives free from stains? Are we certain that at every moment we would readily strip off our metaphorical clothes and reveal our underpants? Of course, the answer is no.

In Italy, grandparents once used to recommend changing one's underwear every day because, "if something happens", one might be taken to hospital, and doctors and nurses would judge you if your underpants were not clean. But what about the doctors' and nurses' underwear? That does not matter because you cannot see it: you are the one on the casualty-room trolley, not they. And they blame you because they can; despite the fact that their own undergarments may be shabbier than yours, they blame you for your slovenliness and for the scant attention you pay to personal hygiene. When some criticizable aspect of a person's private life comes to light, people are always ready to point the finger and heap blame upon them, blame that seems to call for a corresponding shame on their part: even though we share the same criticizable traits, we can conceal them while that person cannot. Perhaps we are equal, and in looking at someone like that we are in fact looking at ourselves in a way in which we very much do not wish to be seen, not even by ourselves.

Our blame and their shame are our social shield. Their shame protects us from our own shame: it is the bloodless sacrifice that allows society to remain standing and our lives to continue sustaining it. Perhaps Italian grandparents were, in their way, a little Kantian: dress yourself every day as though you might suddenly be taken to hospital. Perhaps we should be a little more Kantian than they were: act always as though you might suddenly be brought before a tribunal, because in every case—whether you are convicted or acquitted—the tribunal will surely tear down your wall.

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News

Compiled by Eliza Boudier

University of London

IALS News

IALS Appoints Nothando Lunga as Creative Practitioner in Residence

Nothando Lunga has been appointed as the Institute of Advanced Legal Studies (IALS) 2026 Creative Practitioner in Residence. The role is made possible through funding provided by the School of Advanced Study to all of its Institutes for an annual residency. The year 2026 is the 50th anniversary of the opening of Charles Clore House, where IALS is based. It is a grade II listed brutalist building designed by the renowned British architect, Denys Lasdun. The call for proposals this year focused on creative responses to the building and the history of its site at 17 Russell Square in London.

Nothando Lunga holds a Master's degree in Architecture from the Graduate School of Architecture at the University of Johannesburg, where her thesis examined how archival and spatial practices can help reinterpret the #FeesMustFall student movement by exposing infringements of students' constitutional rights during the protests. Nothando is currently pursuing a PhD in Architecture at the Royal College of Art, where she investigates decolonial approaches to land reform in former sugarcane plantations along South Africa's East Coast.

She has taught at the University of Cape Town and the University of Johannesburg and has worked in architectural practice. Nothando's work has been supported by the Goethe-Institut, and she serves on the editorial team of *Ellipses Journal*. She has contributed to the Index of Edges, an audio installation presented at the 2023 Venice Biennale Architettura. She was also a participant at the African Futures Institutes' Nomadic African Studio, Fes, Morocco.

Commenting on her appointment as Creative Practitioner in Residence, Nothando said:

> I'm delighted to be appointed the 2026 Creative Practitioner in Residence. This role offers a chance to develop ambitious ideas that engage with the past, respond to the present, and imagine the future

of Charles Clore House as an exhibition space, while rethinking how we listen to the many voices embedded in our built environment and how we can more effectively amplify them.

Former IALS student sworn-in as Judge of the Court of Appeal in Kenya

Congratulations to our former student Johnson Okoth Okello who has been sworn in as Judge of the Court of Appeal in Kenya. Mr Justice Okello completed the LLM in Legislative Drafting at IALS 20 years ago. He has been in regular contact with the Sir William Dale Centre for Legislative Studies and our Legislative Drafting Course.

Mr Justice Okello's career began at the Kenya Law Reform Commission, where he specialized in legal research and legislative drafting. He has consulted for organizations such as the United Nations, the United Nations Development Programme and the World Bank, contributing to legislative drafting and training. He served as Director of Legal Services in the Senate of Kenya and was the first African elected President of the Commonwealth Association of Legislative Counsel.

University of London Press: Latest Books

The Institute is delighted to announce two new open access publications from University of London Press, in the series, *Reimagining Law and Justice*, edited by Carl Stychin, Director of IALS. Both books are available in hard copy or are free to download. Further details can be found on the series webpage.

Law and Justice in the 1950s: Case Studies From a Neglected Decade edited by Fiona Cownie and Rosemary Auchmuty

The 1950s was a decade of considerable legal development in England and Wales, despite often being regarded as very conservative in contrast to the more radical 1960s and 1970s. This collection illustrates the breadth of those developments, providing a socio-legal perspective on a range of topics across criminal, property, family, commercial, environmental and public law, and legal education. It examines the social, political and economic context of the decade to reveal how legal developments in the 1950s have much greater significance than has generally been acknowledged to date. Drawing on case studies from the Great London Smog in 1952, the treatment of women in the Wolfenden Report and divorce law reform, to the takeover battle for the Savoy Hotel in 1953, law on the radio and more, the chapters

throw new light on current debates about the relationship between law and issues of justice, inclusion and equality in different spheres of activity.

***Migrating Borders and Citizenship in Law* by Devyani Prabhat, former member of the IALS Advisory Council**

The book argues that law has multiple roles and mechanisms for breathing life into borders, operating at different locales and scales (from worldwide to the nation; from the family to the workplace), and through different practices, for example, preventing entry or withholding access to resources. It examines case law, legislation and press accounts relating to several key events in recent times that have changed the legal landscape on migration control, such as the Immigration and Nationality Acts in the United Kingdom (UK), the end of empire, the arrival of *Empire Windrush*, Brexit, Covid and the case of Shamima Begum. Focusing on race and ethnicity, gender and class, as well as crime and control, the book contextualizes the legal debates around these historical and political developments, the question of who belongs, the consequences of behaviour for immigration status and citizenship, and the links with conduct and national security.

IALS Library Legal Fiction Collection

In support of the National Year of Reading 2026, the Library is launching a Legal Fiction collection which will be housed in carousels on the second floor of the Library. The National Year of Reading 2026 is a UK-wide campaign designed to inspire more people to make reading a regular part of their lives. At the IALS Library, we are taking this opportunity to learn more about our students' and researchers' reading interests and to support their wellbeing by inviting them to take time out for recreational reading. We are seeking suggestions from across our reader community.

To suggest up to three works of fiction with a legal theme, see the IALS National Year of Reading 2026: Suggest a Book for IALS webpage.

Podcasts and Videos

Selected law lectures, seminars, workshops and conferences hosted by IALS in the School of Advanced Study are recorded and accessible for viewing and downloading.

See website for details.

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