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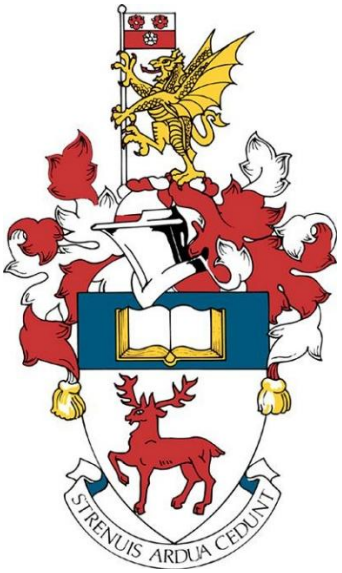
LEGAL RESEARCH AND DEVELOPMENT

SOUTHAMPTON STUDENT LAW REVIEW
2026 VOLUME 16, ISSUE 2

University of Southampton

SHOWCASING EXCELLENCE IN RESEARCH

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2026 VOLUME 16, ISSUE 2



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AKRAM ALASGAROV and MECNUN ÖZLEM
Editors-in-Chief, Southampton Student Law Review
September 2026

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Foreword

When Dr Alex Patrick, the editor-in-chief in 2021, asked Fatima if she wanted to take over the role, her first thought was: 'How could I? I'm only a first-year PhD student'. It was a conversation with another first-year PhD student, Madison, that changed her mind. We decided that, together, we could make it work. And so we did. We have had the pleasure of watching the SSLR grow and flourish over the years, allowing the students and alumni of Southampton Law School to make meaningful contributions to academic debate. Being an Editor-in-Chief is demanding; serving as Co-Editor-in-Chief is perhaps even more so, because it requires an exceptionally close working relationship. It certainly brought us closer, and over the years we have seen it foster similar friendships among successive editorial teams. Being asked to write this foreword, five years later, is an immense pleasure. So much has happened in between. Not least that the nervous first-year PhD students of this story are now lecturers. It is always an honour to watch successive generations of the Southampton Law PhD cohort carry the SSLR flag, passing it on from one to another.

This year the SSLR has two issues, reflecting the commitment of Southampton's law community to the discipline and its wider impact on society. This issue offers an excellent selection of articles which span an impressively wide range of legal fields. ***Melisa Das*** opens with a critical examination of the UK's restrictive surrogacy framework, arguing for reform to reflect modern family formation, while ***Saskia Simpson*** explores how far patient autonomy is upheld within the NHS when balanced against resource constraints and safeguarding concerns. ***Jake Ellis Aurora*** takes us into legal theory with a spirited defence of legal positivism's institutional account of law against its most famous critics. ***Aishwariyaa Angelina Stephen*** examines the Supreme Court's decision on post-contractual good faith in *Versloot*, continuing Southampton's longstanding strength in insurance law, and ***Shann Jalaly*** turns to the digital sphere, asking what Uber's unlawful cross-border data transfers reveal about data subject rights under the GDPR. ***Sofia Dani*** offers a thoughtful evaluation of the proposal to raise the minimum age of criminal responsibility to eighteen, proposing a gradual model of responsibility instead. ***Georgina MacInnes*** contributes twice: first with an assessment of whether UK immigration law truly balances human rights with migration control, and then with an LLB dissertation on judicial diversity, examining how the underrepresentation of women and ethnic minorities affects public confidence in the legal system. The breadth and

quality of these contributions speak for themselves, and we hope you read them with interest and pleasure.

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SHORT ARTICLE

The Legal Regulation of Surrogacy in the UK: Barriers, Inconsistencies and the Need for Reform

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ABSTRACT. Surrogacy in the UK is governed by a restrictive legal framework that prioritises surrogate autonomy and child welfare but creates significant challenges for intended parents (IPs). This paper critically examines whether the current statutory framework adequately accommodates contemporary surrogacy practices. It analyses the legislative scheme under the Human Fertilisation and Embryology Act 2008 (HFEA 2008) alongside judicial responses to both domestic and cross-border arrangements. Particular attention is given to the legal uncertainties arising from international surrogacy and conflicting regulatory approaches. The paper ultimately argues that the existing framework lacks coherence and requires reform to better reflect modern family formation and ensure legal certainty. It concludes that reform is needed to provide greater legal certainty by introducing a clearer framework for surrogacy arrangements before a child is born.

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Introduction

Surrogacy refers to an arrangement whereby a woman carries and gives birth to a child with the intention that the child will be raised by another individual or couple.[1] UK law does not recognise surrogacy agreements as enforceable[2] and does

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[1] Cafcass, 'Parental Orders (Surrogacy)' <https://www.cafcass.gov.uk/parent-carer-or-family-member/applying-order-gives-you-parental-responsibility/parental-orders-surrogacy#:~:text=Surrogacy%20is%20when%20a%20woman,by%20the%20intended%20parent%2Fs> accessed 2 January 2026.

[2] Surrogacy Arrangements Act 1985 s 1A.

not automatically confer legal parenthood on IPs at birth.[3] Instead, legal status must be transferred post-birth through a parental order (PO) under the HFEA 2008.[4] This framework reflects a deliberate policy choice to prioritise maternal autonomy and guard against the commercialisation of reproduction. However, it also gives rise to a fundamental tension: while the law seeks to protect against exploitation, it may simultaneously create practical and legal barriers for IPs, particularly where they are the child's primary carers from birth. This raises the question of whether the current legal regime strikes an appropriate balance between safeguarding public policy and facilitating modern family formation. One may argue that the current law provides necessary safeguards, protecting surrogate autonomy, preventing the exploitation of women, and ensuring that any transfer of legal parenthood occurs only after careful judicial scrutiny in accordance with the child's welfare. Others contend the law is 'confused, incoherent'[5] and outdated, creating obstacles for IPs and incentivising international surrogacy arrangements that expose families to uncertainty over parentage and child welfare.[6]

This paper argues that the UK's surrogacy law, while well-intentioned, is overly rigid and increasingly misaligned with contemporary practice. It will first evaluate the statutory framework governing parental orders, assessing whether it imposes unnecessary obstacles. It will then examine the rise of international surrogacy and the extent to which domestic law incentivises recourse abroad. Finally, it will argue that the law requires reform to ensure greater coherence, legal certainty, and alignment with the paramountcy of child welfare by introducing clearer pre-conception approval mechanisms.

1. UK Surrogacy Law

Although surrogacy is lawful in the UK, it is restricted, with the law prioritising maternal autonomy at birth and subjecting the transfer of legal parenthood to strict conditions.[7] At birth, the surrogate is the child's legal mother regardless of genetic links.[8] Consequently, IPs, even where they share a genetic link, are not recognised as legal parents at birth and must apply for a PO to acquire parenthood and extinguish a surrogate's legal status.[9]

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[3] Human Fertilisation and Embryology Act 2008 s 33.

[4] ibid.

[5] Kirsty Horsey and Katia Neofytou, 'The Fertility Treatment Time Forgot: What Should be Done About Surrogacy in the UK?' in Kirsty Horsey (ed), *Revisiting the Regulation of Human Fertilisation and Embryology* (Routledge 2015) 67.

[6] Louisa Ghevaert, 'Challenges in international surrogacy arrangements' [2022] April, Fam Law 527.

[7] Surrogacy Arrangements Act 1985 (n 2); Human Fertilisation and Embryology Act 2008 (n 3).

[8] Human Fertilisation and Embryology Act 2008 (n 3) s 33(1).

[9] ibid s 54.

The statutory criteria are deliberately extensive. Applicants must be over 18,[10] either married or civil partners, or living as partners in an enduring family relationship[11] (now extended to single applicants),[12] with at least one genetic link to the child.[13] At both the date of application and the making of the order, the child's home must be with the applicants, and one or both applicants must be domiciled in the UK.[14] The application must be made within six months of birth,[15] and the surrogate's free and unconditional consent is required,[16] valid only after six weeks post-birth.[17] The rigidity of these requirements reflects Parliament's intention to prevent the commercialisation of surrogacy and the exploitation of women, reinforced by the prohibition on payments beyond 'expenses reasonably incurred'.[18] It must be argued that this cautionary stance deliberately places IPs in a position of vulnerability, subjecting the acquisition of parenthood to judicial scrutiny rather than pre-conception intention.

As later cases demonstrate, the law has struggled to accommodate the reality that IPs are often the child's primary carers from birth. *In Re X*, the court acknowledged that POs can operate harshly, particularly where technical breaches, such as missing the six-month deadline,[19] threaten to deprive a child of secure legal parentage.[20] Sir James Munby P went as far as to critique the legislation as a 'slavish submission to such a narrow and pedantic reading', emphasising that a purely formalistic approach risked undermining the child's welfare and the very purpose of the PO.[21]

This tension is even more starkly exposed in *Re Z*,[22] where the child was left without a viable route to a PO because the intended father was a single applicant and therefore excluded by the two-applicant requirement under section 54 HFEA 2008. Despite the father being the child's sole and genetic parent, the court held that it was not possible to read down the law in accordance with section 3 of Human

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[10] ibid s 54(5).

[11] ibid s 54(2)(a)–(c).

[12] ibid s 54A.

[13] ibid s 54(1).

[14] ibid s 54(4)(a)–(b).

[15] ibid s 54(11).

[16] ibid s 54(6)(a)–(b).

[17] ibid s 54(3).

[18] ibid s 54(8).

[19] ibid s 54(11).

[20] *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam).

[21] ibid [56] Munby P.

[22] *Re Z (A Child)* [2015] EWFC 73.

Rights Act 1998,[23] as Parliament had made a conscious policy choice to exclude single applicants because 'the fuller assessment carried out in adoption proceedings was more likely to ensure that a [single] person […] was able to cope with the demands of bringing up a child'.[24] While the court subsequently accepted that there was no independent Convention right to surrogacy or to a PO, it recognised that forcing single IPs down the adoption route solely because of their status amounted to discriminatory interference with their private and family life,[25] contrary to Article 8 of the European Convention on Human Rights. Although legislative reform eventually followed through the introduction of section 54A of HFEA 2008,[26] *Re Z* demonstrates how families are being left in prolonged legal uncertainty.[27]

These cases illustrate that the law imposes stringent hurdles that may be ill-suited to contemporary family forms, corroborated by the Law Commission's urge to 'bring the law into line with modern social realities'.[28] In this sense, the current law may make the acquisition of legal parenthood unnecessarily difficult, incentivising IPs to pursue international arrangements that promise greater certainty but expose them to significant legal risk.

2. International Surrogacy

In many foreign jurisdictions, surrogacy prioritises intended parenthood from birth, making them more attractive to IPs. For example, in Minnesota and California, POs recognise IPs as the child's legal parents from birth.[29] This contrasts with the UK by offering legal certainty that parental status will be awarded immediately and will be free from the six-month time limit and consent requirements under the HFEA 2008.[30] Consequently, IPs become incentivised to pursue overseas arrangements, as shown by a 350% growth in UK and international surrogacy over the last 12 years.[31]

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[23] ibid; Human Rights Act 1998 s 3(1).

[24] Department of Health, The Government's Response to an Incompatibility in the Human Fertilisation & Embryology Act 2008: A Remedial Order to Allow a Single Person to Obtain a Parental Order Following a Surrogacy Arrangement (Cm 9525, 2017) Department of Health para 2.6.

[25] *Re Z (No 2)* [2016] EWHC 1191 [13].

[26] Human Fertilisation and Embryology Act 2008 (n 3) s 54A.

[27] *Re Z (No 2)* (n 25).

[28] Law Commission and Scottish Law Commission, *Building families through surrogacy: a new law* (Law Com No 411, Scot Law Com No 262, 2023) para 1.22(2).

[29] American Society for Reproductive Medicine Legal Professional Group, 'Surrogacy Laws By State', <https://connect.asrm.org/lpg/resources/surrogacy-by-state?ssopc=1 > accessed 29 December 2025.

[30] Human Fertilisation and Embryology Act 2008 (n 3) s 54.

[31] Brilliant Beginnings, 'New Data from English Family Court Shows 350% Growth in UK and International Surrogacy Over the Last 12 Years' < https://brilliantbeginnings.co.uk/new-data-family-court-350-percent-growth-

However, such arrangements frequently give rise to clear breaches of UK surrogacy policy. This is most notably illustrated in *Re X*, where twins were born in Ukraine under a lawful commercial surrogacy arrangement that recognised substantial payments which far exceeded 'reasonable expenses'[32] made to the surrogate, directly contravening the UK's prohibition on commercial surrogacy.[33] Moreover, the surrogate's legal status was extinguished at birth without the freely given consent post-recovery required by UK law, undermining the domestic emphasis on maternal autonomy.[34] This concern is echoed by feminist scholars, Anton and Liezl, who warn that commercial surrogacy can commodify women's reproductive labour and undermine autonomy, particularly in international arrangements marked by economic inequality,[35] such as those seen in *Re X*.[36] The court acknowledged that this was fundamentally inconsistent with UK public policy, yet refusal of a PO would have rendered the children stateless, without secure legal parentage.

Ironically, the rigidity of domestic regulation, intended to protect women from exploitation, may operate counterproductively by pushing IPs abroad where regulations are weaker, thereby increasing the very risks of exploitation that UK law seeks to prevent. This is supported by Alghrani and Griffiths, who argue that the UK's law has become misdirected.[37] In *Re L*, Hedley J emphasised that welfare is not the court's 'first consideration' but its 'paramount consideration'.[38] However, he equally clarified the court's requirement to 'carefully scrutinise' applications authorising payments,[39] with a view to policing the public policy concerns identified in *Re S*, namely the risk of children being effectively 'bought' through such arrangements.[40] This exposes a contradiction: although the welfare principle routinely compels the court to approve POs arising from international commercial surrogacy, doing so risks normalising practices that Parliament expressly sought to deter. As a result, the courts are placed in an uneasy position of simultaneously condemning and legitimising the same conduct, reinforcing the argument that the

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surrogacy/#:~:text=In%202008%20there%20were%20just,the%20USA%20at%20around%2080.> accessed 29 December 2025.

[32] Human Fertilisation and Embryology Act 2008 (n 3) s 54(8).

[33] *Re X and another (Children) (Parental Order: Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [3], [17]–[18].

[34] ibid [13].

[35] Anton van Niekerk and Liezl van Zyl, 'The Ethics of Surrogacy: Women's Reproductive Labour' (1995) 21(6) *Journal of Medical Ethics* 346, 348.

[36] *Re X and another (Children) (n 33).*

[37] Amel Alghrani and Danielle Griffiths, 'The Regulation of Surrogacy in the UK: The Case for Reform' (2017) 29(2) *Child and Family Law Quarterly* 176.

[38] *Re L (A Child) (Parental Order: Foreign Surrogacy)* [2010] EWHC 3146 (Fam) [5] (Hedley J).

[39] ibid.

[40] *Re S (Parental Order)* [2009] EWHC 2977 (Fam), [7].

current law both fails to deter insecure international arrangements and leaves IPs reliant on discretionary judicial rescue rather than legal certainty.

This has become a recurring theme. In *Re C and D*,[41] Theis J warned that IPs engaging in surrogacy arrangements, particularly international ones, may be 'sleepwalking into an uncertain legal future for their much wanted child' where domestic requirements are not met.[42] Despite this, the court again prioritised the children's welfare, illustrating how the statutory framework compels judges to stretch their discretion.[43] *A and B v X and Z* also displayed further weaknesses when the court made a PO despite serious concerns about large payments, misleading conduct encouraged by a clinic in Northern Cyprus and potential conflicts of law arising from same-sex surrogacy prohibitions in Turkey.[44] Theis J was explicit that while welfare justified the outcome, the case revealed a deeply troubling lack of due diligence on behalf of the IPs.[45] This is particularly problematic because the IPs' reliance on foreign clinics can be traced to domestic legislation, which offers insufficient pre-conception guidance given the prevalence of anonymity and reporting restrictions in surrogacy proceedings,[46] which limits public scrutiny of unsafe practices and thereby incentivises parents to engage in high-risk arrangements.

This results in an inconsistent and inadequate application of the law. Domestic surrogacy is tightly legislated to prevent exploitation and uphold public policy concerns. Yet, international surrogacy achieved through practices prohibited at home is regularly legitimised through POs for the welfare of the child. This undermines legal certainty and supports the argument that the current law does make parenthood unnecessarily difficult for intended parents while failing to prevent the risks it was designed to avoid. Such inconsistency undermines Dicey's conception of the Rule of Law, which requires that legal rules be clear and predictable to have an effective judicial system.[47] Instead, IPs are left navigating a system in which compliance with domestic law offers less security than engaging in prohibited conduct abroad and relying on judicial discretion, as corroborated by Biggs and Jones.[48] This once again supports the argument that the current law both

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[41] *Re C and D (Children) (Parental Order)* [2015] EWHC 2080 (Fam).

[42] ibid [16].

[43] ibid.

[44] *A and B v X and Z* [2024] EWFC 304.

[45] ibid [44] (Theis J).

[46] Paola Frati and others, 'Bioethical Issues and Legal Frameworks of Surrogacy: A Global Perspective About the Right to Health and Dignity' (2021) 258 *European Journal of Obstetrics & Gynecology and Reproductive Biology* 1–8.

[47] Albert Venn Dicey, Introduction to the Study of the Law of the Constitution (10th edn, Macmillan 1959).

[48] Hazel Biggs and Caroline Jones, 'Tourism: A Matter of Life and Death in the UK' in I Glenn Cohen (ed), *The Globalization of Health Care: Legal and Ethical Issues* (OUP 2013) 164.

makes the acquisition of legal parenthood unnecessarily difficult for intended parents and fails to address risks abroad.

3. Reform

As Sir Nicholas Wall recognises, 'if public policy is truly to be upheld, it would need to be enforced at a much earlier stage' of a PO application.[49] A more coherent approach would be to shift to clearer pre-conception approval mechanisms. Such reform would better reconcile Parliament's opposition to commercial surrogacy with the paramountcy of child welfare. Without earlier intervention, judicial discretion will continue to function as a corrective method, undermining legal certainty and reinforcing the perception that prohibited conduct abroad will ultimately be regularised in the child's interests. In support of reform, the Surrogacy UK Working Group Report recommends that the law should 'consolidate and acknowledge social and political acceptance of domestic, altruistic surrogacy as a mainstream form of assisted reproduction', done through education on surrogacy in schools, nurturing transparency regarding surrogacy.[50] Clearer, pre-conception regulation of domestic surrogacy could reduce reliance on international surrogacy and prevent courts from being forced into retrospective welfare-based legitimisation of practices that undermine domestic public policy. One practical reform could perhaps be disclosing all proposed 'expenses' before approval of the PO. This would then move scrutiny to the beginning of the process, instead of judges being forced to approve after the child is already living with the IPs.

Conclusion

In conclusion, while the UK surrogacy framework is grounded in legitimate concerns surrounding exploitation, maternal autonomy, and child welfare, its rigid statutory structure creates significant practical and legal difficulties for intended parents. The requirement to transfer parenthood only after birth, coupled with strict eligibility criteria and procedural hurdles, often leaves families in prolonged periods of legal uncertainty. Case law demonstrates that courts are repeatedly compelled to prioritise the welfare of the child by adopting flexible and sometimes strained interpretations of the legislation.

As such, although surrogacy in the UK has the right intentions, in practice its rigidity makes the acquisition of legal parenthood unnecessarily difficult and judicial application inconsistent, thereby undermining the Rule of Law. The current law neither effectively deters exploitation nor provides sufficient clarity for families. Instead, it displaces risk onto international surrogacy arrangements and leaves parenthood dependent on retrospective judicial intervention. This ultimately highlights the need for reform that better reconciles public policy concerns with the

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[49] *Re X and Y (Foreign Surrogacy)* [2011] EWHC 3147 (Fam) [40] (Wall P).

[50] Kirsty Horsey, *Surrogacy in the UK: Myth Busting and Reform: Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (Surrogacy UK 2015) 36.

paramountcy of child welfare, ensuring greater coherence, predictability, and fairness within the legal framework.

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ARTICLE

Patient Autonomy, Resource Allocation, and Consent to Treatment: An Analysis of the NHS Constitution's Commitment to Patient-Centred Care within English Medical Law

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ABSTRACT. This article analyses how far the NHS considers patient autonomy within English medical law, examining autonomy, resource allocation and consent to treatment. This essay argues that, while the NHS and courts broadly uphold patient autonomy through the right to refuse treatment, the informed consent framework and the recognition of bodily integrity, it remains subject to significant safeguarding and resource constraints. It explores how the principle of self-determination is balanced against resource limitations, where finite budgets require allocation decisions that override individual preferences. It further considers how mental capacity requirements under the Mental Capacity Act 2005 and outdated frameworks governing abortion limit autonomous decision-making for vulnerable groups. The article further examines conflicting safeguarding considerations, including end-of-life decisions, where courts have prioritised safeguarding over patient preferences. It concludes that, while the NHS strives to tailor care to individual preferences, true autonomy remains conditional; constrained by legal, ethical and resource factors.

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Introduction

The NHS should help and promote individuals to manage and tailor their healthcare to their needs and preferences. Patients should have the right to

† LLB at University of Winchester (First Class Honours). I would like to thank my supervisor and editor, Ogechi Ikonne, for her guidance and support throughout the writing process. I am also grateful to Khadijeh Masty, my medical law lecturer, for her insight and support throughout my medical law module.

decide what happens to their body, and respect should be given to their wishes. English medical law operates as a composite system of statute, case law and policy that together determine how far patient autonomy can realistically extend.

However, this commitment to autonomy is rarely absolute in practice. This article will critically examine the extent to which patient autonomy is genuinely respected within the NHS, arguing that while the legal framework formally includes the right to self-determination, its practical application is frequently curtailed by resource constraints, conflicting statutory duties, and clinical discretion over patients' 'best interests'. It considers the legal and ethical foundations of autonomy, the structural barriers limiting its exercise, and the points of conflict between patient wishes and medical judgement.

1. Autonomy and Consent to Treatment

The NHS and medical professionals should support individuals to manage their own health and tailor their healthcare; individuals should feel encouraged to make decisions about their health, upholding the principle of autonomy and respect for self-determination.

Autonomy refers to the right to decide what happens to your body and the right to make your own decisions. This is seen to be evident in cases such as *St George's Healthcare*, where it was highlighted that 'the removal of the baby from within the applicant's body under physical compulsion constituted an infringement of her autonomy and amounted to a trespass',[1] showing that the courts will uphold and support the autonomy of a patient and the right to refuse treatment, where the NHS may not always consider it or may implement their decisions over the rights of the patient. This is supported by the ethical view of Principlism[2] that highlights autonomy is the right to make decisions about our lives and how we wish to lead them, even if it involves refusing treatment that is in our best interests. Academic Nahide Basri, emphasises this principle of autonomy when she suggests that 'both informed consent and mental capacity law reflect the dominance of patient autonomy by recognising that such decisions are no longer automatically determined by medical opinion, but are rather made by individual patients exercising a choice'.[3] For example, patients who have had fully informed consent can decide for themselves whether they want treatment, and respect must be given to the wishes of the patient, despite the possibility that they may refuse treatment. This autonomous decision to refuse treatment was further shown in the authority of *Re C (Adult refusal of treatment)*: 'Every adult has the right and capacity to decide

[1] *St George's Healthcare NHS trust v S* [1999] Fam 26, [1998] 7 WLUK 622 [27], where the claimant refused hospital admission despite risks from pre-eclampsia and was subsequently detained and subjected to a caesarean without her consent. This was held to be unlawful.

[2] Tom L Beauchamp and James F Childress, *Principles of Biomedical Ethics* (5th edn, OUP 2001) 57.

[3] Nahide Basri, 'The Coherence of the Principle of Patient Autonomy in the English Medical Law: A Re-Evaluation' (2020) 5 *LSE Law Review* 31, 33.

whether or not he will accept medical treatment, even if a refusal may risk permanent injury to his health'.[4] This demonstrates the principle of autonomy, where the NHS will not allow individuals to manage their own health, the courts will enforce that the NHS and medical professionals should support individuals to manage their own healthcare.

However, despite the right to refuse treatment that supports patients' autonomous decision-making, there is no right to demand specific treatment, as there is a limited amount of resources available that must be shared. The House of Lords highlighted that 'best interests decision-making is often not undertaken in the way set out in the Act: the wishes, thoughts and feelings of P are not routinely prioritised. Instead, clinical judgments or resource-led decision-making predominate',[5] suggesting that there is a limit to the patient's ability to make an autonomous decision, as there are lots of treatments the NHS may not fund, and medical professionals may prioritise this over the wishes of the patient.

Yet, the ECHR[6] safeguards the right to respect for private life, not to be interfered with by authorities, which has ultimately influenced the principle of autonomy in healthcare decisions. For example, in *Dickson v UK,*[7] it was demonstrated that healthcare services must balance the wider public policy considerations against the fundamental rights of the individual to respect and uphold autonomy. This was further shown in *Costa and Pavan*[8] when the court highlighted that patients must be supported to make informed choices about their own health and reproduction, upholding the ethical principle of self-determination that encourages doctors to help the patient in the decision-making process, to help them reach the best outcome for their needs and preferences. Academics Coggon and Miola[9] demonstrate the crucial duty of medical professionals to inform patients; 'crucial to autonomy, therefore, is the exercise of reason, and crucial to rational reasoning is a good ground of knowledge and understanding', showing that in order for patients to make an autonomous decision, they must be fully informed of their treatment and other options. However, Coggon and Miola have not recognised that some patients may not be capable of making these decisions, even with a good ground of knowledge and understanding. For example, autonomy is limited by mental capacity requirements, as patients must be able to exercise capacity under

[4] *Re C (Adult refusal of treatment)* [1994] 1 WLR 290, 294, when a schizophrenic patient obtained an injunction to prevent a leg amputation without his written consent.

[5] Select Committee on the Mental Capacity Act, *Mental Capacity Act 2005: post-legislative scrutiny* (HL 2013-14, 139) 8, para 2.

[6] European Convention on Human Rights art 8.

[7] *Dickson v United Kingdom* (2008) 46 EHRR 41.

[8] *Costa and Pavan v Italy* (2012) 55 EHRR 17.

[9] John Coggon, Jose Miola, 'Autonomy, Liberty, and Medical Decision-Making' (2011) 70 *Cambridge Law Journal* 523, 529.

the Mental Capacity Act[10] in order to make decisions about their health and act autonomously. If a patient lacks capacity under the act, then it is up to the doctors, families and carers of the patient to make the decision for them, in their best interests, as demonstrated in *Airedale NHS Trust*[11].

Furthermore, it is also evident that there are legal limits to autonomy that stop patients from being able to exercise capacity and bodily autonomy. For example, the Abortion Act[12] and the Offences against the Person Act[13] require doctors to sign off on an abortion to allow a woman to have it, and if they refuse, women can be prosecuted if they decide to abort illegally, suggesting limits to a woman's preference for healthcare, as she may be refused an abortion. Robinson agrees there is an issue with this legislation, as he highlights 'it seems entirely unjust to prosecute women merely for exercising their bodily autonomy',[14] supporting the view that the NHS can only encourage autonomy to a certain extent, as legislation does not permit women to make these decisions about their bodies, despite the fact that they are capable. Yet, it is also evident from *Re A (Capacity: Refusal of Contraception)*[15] that even where women are permitted to make autonomous decisions, doctors are found to be interfering and overstepping, taking away the preference of the patient and giving their own views.

Therefore, the NHS tries to promote and support patient autonomy, with the right to refuse treatment and the concept of informed consent, but in areas such as abortion and contraception, legal restrictions can limit a patient's autonomy.

2. Resource Allocation and Wider Considerations

While the NHS should support individuals to manage their own health, this must be balanced carefully against resource allocation, ethical considerations and wider society. For example, patients cannot demand treatment; there is a limited budget of the NHS that must be shared among everyone. This is shown to be evident in *R v Cambridge,* where it was noted that 'difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients'.[16] Bingham illustrates how the limited funds

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[10] Mental Capacity Act 2005 s 2(1).

[11] *Airedale NHS Trust v Bland* [1993] AC 789, 833 (Hoffman LJ), where Lord Hoffmann highlights it is 'the duty of a doctor towards a patient who lacks mental capacity to express his own wishes is to give or withhold treatment according to what appears to be the best interests of the patient.'

[12] Abortion Act 1967 s 1.

[13] Offences against the Person Act 1861 ss 58 and 59.

[14] Hannah Robinson, 'UK Abortion Laws and Women's Rights' (*The Indiependent,* 25 July 2022) <https://www.indiependent.co.uk/uk-abortion-laws-and-womens-rights/> accessed 1 May 2025.

[15] *Re A (Capacity: Refusal of Contraception)* [2010] EWHC 1549 (Fam), where there was medical intervention in a woman's contraception from the doctors questioning the woman's ability to bring up a child, this was held to be an unnecessary consideration.

[16] *R v Cambridge Health Authority, ex p B* [1995] 1 WLR 898 (CA) 906 (Lord Bingham).

of the NHS mean that patients cannot always get the course of treatment they desire, and the limited funds must be allocated to benefit the greatest number of people.[17] A utilitarian theory would support Bingham's view of resource allocation, that we should allow the greatest amount of good for the greatest number of people, thus meaning the most amount of patients can get treatment.

However, despite the limited resources, Martha's rule allows parents to alert staff and have rapid access to meeting with a medical professional if they believe the patient's condition is deteriorating, even with limited resources,[18] suggesting the NHS is still trying to put patients first. This rule reinforces the principle of patient autonomy, where families and carers can have a more active role in the patient's care and ensure they are working closely with medical professionals to achieve the best outcome for the patient. However, there is still no right to demand treatment, so whilst this rule may help patient autonomy, even with limited resources, it is not ultimate.

Academics[19] further illustrate the conflict between patient-centred care and resource allocation when they highlight 'learning about a patient's needs, goals and values requires extended discussion between health-care professionals and patients, and yet a health professional's time is often a scarce resource', supporting that although the NHS tries to tailor care around the patient, their families and carers, this is not always possible as there is a limited budget and a limited amount of doctors' time available. Equally, you do not have the right to demand treatment, and in the case of reproduction, there is no right to conceive a child or demand IVF, suggesting that the NHS may not always be able to offer you treatment.

To ensure the fairness of treatments, NICE[20] assesses the cost-effectiveness of treatment offered and ensures that the resources used are fair and equitable, meaning the largest number of patients can get treatment. However, if all patients were to decide on their course of treatment, it may mean that autonomy could disadvantage the wider community, and those with niche and rare health conditions may not get treatment. In continuation, if medical professionals do not provide patients with a sufficient amount of autonomy, they may decide to go privately and, in turn, take money away from the NHS.

In addition, whilst patients may have the capacity to decide what treatment they desire or whether to refuse treatment, it may not be in the best interests of the

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[17] ibid.

[18] NHS England, 'Martha's Rule' <https://www.england.nhs.uk/patient-safety/marthas-rule/> accessed 3 June 2026.

[19] Carolyn Ellis, Matthew R Hunt and Jane Chambers-Evans, 'Relational Autonomy as an Essential Component of Patient- Centred Care' (2011) 4 *International Journal of Feminist Approaches to Bioethics* 79, 83.

[20] National Institute for Health and Care Excellence, 'Standards and Indicators' (*NICE*) <https://www.nice.org.uk/what-nice-does/standards-and-indicators> accessed 13 July 2026.

family and carers. The NHS will make a decision based on the wider potential caring implications to reach the best outcome for the patient, for example, as illustrated by the case of *Charlie Gard*.[21] Despite the parents not wanting to turn off life support, the potential caring implications for the future meant the NHS and courts may overrule the family's preference to decide in the best interests of the child and balance the patient's health against the future resource implications. The balancing act of the child's interests and parents' interests is also seen in the case of conjoined twins[22] when the parents wanted to keep the twins together, and the doctors wanted to separate them. Therefore, it is evident from a multitude of cases that the NHS will encourage and support families and patients to manage their own health; however, they may intervene if the families are not making decisions in the best interests of the patient.

3. Safeguarding

While the NHS should try to accommodate the preferences of patients, their families and carers, this goal must be balanced with critical factors such as safeguarding considerations and ensuring the best outcome for the patient.

For example, the medical expertise of the doctors should be taken into account, as they are aware of the best course of treatment for the patient's condition, and the autonomy of the patient may mean that they may have to return for treatment if they do not sufficiently take on board the medical professional's opinion, which may cost the NHS. This may also result in doctors leaving the NHS because they do not feel sufficiently listened to, which would further cost the NHS, putting more funding into employment and not healthcare.

Fatima argues that 'if a doctor believes that a certain medical treatment is necessary for the patient's health, then he or she may be forgiven for thinking that the patient's autonomy should be sacrificed in order to facilitate treatment'.[23] Fatima demonstrates the difficulties of doctors weighing up autonomy and the conflict of the best health outcome for the patient's needs, suggesting an issue that may arise in the NHS becoming more patient-centred. Therefore, autonomy should not be ultimate freedom but must be weighed with fully informed consent, as outlined in *Montgomery v Lanarkshire Health Board*[24]: ethical and collaborative views, to reach the best outcome for the patient and the NHS. This is supported by Maclean who argues that 'the context of consent provides a reason to prefer

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[21] *Yates and another v Great Ormond Street Hospital for Children NHS Foundation Trust and another* [2017] EWCA Civ 410, [2017] 4 WLR 131, where Charlie suffered from a rare disease and the parents did not want to turn off life support but the doctors and courts ruled it was in Charlie's best interest to allow him to die with dignity and turn it off.

[22] *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] 2 WLR 480 (CA).

[23] Hera Fatima, 'Informed consent and Medical law' (2023) 6 *International Journal of Law Management & Humanities* 147, 150.

[24] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 [87], where it was ruled that doctors have a duty to disclose all information necessary.

autonomy as moral, rational, self-determination, rather than the more individualistic liberal view of autonomy as rational self-determination'.[25] This demonstrates that decision-making is about discussing with the doctor the treatment options and reaching a conclusion together, rather than leaving the autonomous patient to make the decision on their own – 'a view of autonomy that isolates patients in their decision-making would work against a patient-centred approach'.[26]

Although the NHS aims to support patient preferences, this must be balanced with safeguarding and legal constraints that can limit autonomy, particularly in areas such as abortion. Despite promoting women being able to manage their own health, the laws are over 150 years old, and the judgment and difficult process of having an abortion mean it is not an autonomous choice, and women may avoid having to manage their health and may seek alternative routes.[27] For example, Robinson suggests 'women experiencing miscarriages and incomplete abortions may be deterred from seeking medical help for fears of being accused of unlawful behaviour',[28] supporting the negative legislation and judgement of abortion, despite being intended to protect women, encourages women not to seek medical help and undermines the principle of patient-centred care.

In addition, the conflict between women's autonomy and legal constraints becomes even more complex when discussing the capacity of young people. *Gillick v West Norfolk and Wisbech Area Health Authority*[29] allows young people under 16 to consent, even to contraception and abortion, but they must be considered competent to make the decision. However, this creates an ethical tension with the NHS constitution's commitment to patient-centred care, as children deemed incapable of making decisions under Gillick may later be expected to make decisions for the future child, highlighting inconsistency in how competence is assessed across different contexts. This brings about an ethical dilemma when contrasted with the NHS Constitution's commitment that 'the patient will be at the heart of everything the NHS does',[30] as autonomy is necessarily limited by capacity assessments and safeguarding duties. It also raises a broader inconsistency that young people may be treated as lacking competence in relation to reproductive decision-making yet still be expected to assume full parental responsibilities if a child is born.

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[25] Alasdair Maclean, *Autonomy, Informed Consent and Medical Law, A Relational Challenge* (1st edn, Cambridge University Press 2009) 79.

[26] Ellis, Hunt and Chambers-Evans (n 19) 85.

[27] *R v Bourne* [1939] All ER Rep 615 (CCC).

[28] Robinson (n 14).

[29] *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 (HL) 169, 170.

[30] Department of Health and Social Care, 'The NHS Constitution for England' (17 August 2023) <https://www.gov.uk/government/publications/the-nhs-constitution-for-england/the-nhs-constitution-for-england> accessed 21 May 2026.

This shows the inconsistency of the law when discussing the capacity of young people and their autonomy. Despite the legislation trying to safeguard children, it is not ensuring the best outcome for young mothers and their future children. Lord Fraser further supports this point that 'it seems to me verging on the absurd to suggest that a girl or boy aged 15 could not effectively consent',[31] enforcing that, despite the safeguarding concerns, most children aged 15 are capable of making their own decisions and should have the capacity to make decisions about their bodies without interference from the state.

Yet it is evident that, even where patients lack the capacity to make decisions, Section 4 of the Mental Capacity Act[32] enforces that medical professionals must consider the patient's past and present wishes and feelings, beliefs and values and any other considerations they believe necessary when making a decision on behalf of the patient. This shows that the NHS will try to accommodate the needs and preferences of the patient and their families and carers when having to make a decision for the patient. Despite this, Jackson suggests that 'patients with capacity have an almost absolute right to refuse medical treatment [...] In contrast, for a patient treatment andcity, decisions are taken for her, in her best interests, and, according to statute, her wish to refuse treatment is simply one relevant factor'.[33] Jackson demonstrates the contrast between those patients who can make an autonomous decision with capacity and those who are deemed to lack capacity and have no preference for treatment, and are stripped of managing their own health. Therefore, this is evidence of a core limitation in how the NHS can support individuals to promote and manage their own health; whilst the legislation encourages autonomy, the ultimate decision, for those lacking capacity, lies with medical professionals and carers.

Furthermore, academic Varelius highlights the general effort of the NHS to try and allow autonomous decisions for those who have capacity, despite an outcome that may not be the best for the patient – 'autonomy is so important that there are cases where patients would be allowed to make their own choices about their treatment even if it is clear for all parties involved that others would be in a better position to make choices that would serve the patients wellbeing'.[34] Varelius suggests that even where the patient may not make the best decision for their wellbeing, the NHS will try to allow them to make the decision anyway, for the preference of the patient, showing the efforts of the NHS to balance autonomy and safeguarding.

Yet, a significant conflict between patient autonomy and safeguarding

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[31] *Gillick v West Norfolk and Wisbech Area Health Authority* (n 29).

[32] Mental Capacity Act 2005 (n 10) s 4(6).

[33] Emily Jackson, 'From 'Doctor Knows Best' to Dignity: Placing Adults Who Lack Capacity at the Centre of Decisions About Their Medical Treatment' (2018) 81 *MLR* 247, 249.

[34] Jukka Varelius, 'The Value of Autonomy in Medical Ethics' (2006) 9 *Medicine, Health care and Philosophy* 377, 377.

considerations is the law's refusal to permit the right to die. The law recognises a right to life[35] but does not have a similar section for a right to die, despite the promotion of being able to manage your own health and the NHS tailoring care around patient preferences. Even where a patient is competent, it is evident that the law prioritises safeguarding and protection of vulnerable individuals over the preference of patients, for example, in the case of *Pretty*[36]. Pretty illustrates that where the courts and Parliament are concerned about wider ethical and coercive issues of making euthanasia legal, they will not allow individuals to manage their own health in this area and will prioritise safeguarding, showing how the NHS can try to accommodate patient preferences but cannot in certain circumstances.

Therefore, while the NHS tries to accommodate patient preferences and autonomy, this must be balanced with medical expertise, safeguarding considerations and legal constraints. In areas such as abortion, capacity and euthanasia, preferences may be limited, highlighting that autonomy is not absolute and final decisions often rest with medical professionals or the courts.

Conclusion

Overall, it is evident that while the NHS tailors care to the patients' needs and preferences, giving them autonomy, it is not certain. The NHS and medical professionals support patients in managing their own health, as evidenced by informed consent and the right to refuse treatment; however, this must be balanced with limited resources, safeguarding, and legal limitations. Furthermore, autonomy is restricted in abortion, capacity and euthanasia related discussions where decisions can be made for patients by medical professionals and the courts. Whilst the NHS encourages individuals to manage their own health, this ability is restricted by legal, ethical and resource factors.

[35] ECHR (n 6) art 2.

[36] *Pretty v United Kingdom* (2002) 35 EHRR 1, where Pretty suffered from terminal degenerative disease and complained that the ban on assisted suicide violated her rights. It was held Article 2 did not include a right to die and although Article 8 was involved, the ban on assisted suicide was justified and a proportionate interference.

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ARTICLE

Separating Law and Morality: A Defence of Legal Positivism's Institutional Account of Law

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ABSTRACT. Legal positivism has long been hailed as providing a cogent account of the institutional aspect of law. This article expands upon and defends this view while rebutting the common claim that positivism fails to make sense of law's moral aspect. Section one establishes the conceptual boundaries between the institutional and moral aspects of law. Section two demonstrates how Hartian positivism provides a universally applicable and cogent account of the institutional aspect. Section three addresses and debunks the criticisms of Finnis, Fuller and Dworkin. It argues that their assumption that a descriptive theory of law must also be justificatory confuses the *is* and *ought* function of positivism. The article concludes that positivism does not fail to account for morality but rather, by decoupling legal validity from merit, positivism preserves the distinction necessary to identify law in the first place.

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† LLB at University of Southampton. I would like to thank Jonathan Turner for his particularly helpful comments on previous drafts and for engaging my interest in jurisprudence. I would also like to thank Emily Willis and the editors of the Southampton Student Law Review for considering this piece and for their comments. Any errors remain my own.

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Introduction

Legal positivism is best understood as a thesis about legal validity. Put succinctly, 'it is the thesis that the existence and content of law depend on social facts and not on its merits'.[1] The generally advanced premise of legal positivism has been that it is a cogent theory of law. On that basis, it has traditionally been claimed that legal positivism *ought* to provide a cogent account of both the moral and institutional aspects of law. Yet, while it succeeds in the former, it fails in the latter. This article explores the merit of this claim. Before analysing this, it is important to identify the two central claims made. First, that legal positivism gives a cogent account of the *institutional* aspect of law. Second, that it fails to make sense of the *moral* aspect of law. These two claims are defined, along with legal positivism, in the first section of this article. However, the premise of the overarching claim must first be scrutinised.

The premise of the traditional claim makes two assumptions: both that legal positivism attempts to explain the moral aspect but is inadequate, and that legal positivism ought to provide an explanation of it in the first place. I reject both assumptions. I disagree that legal positivism does the former and neither should it do the latter, not least because it offers a general descriptive theory of legal validity as opposed to a justificatory theory of law's authority. I will proceed on that basis throughout this article, making the claim that legal positivism gives a cogent account of the institutional aspect of law, but does not make sense of the moral aspect of law because it is chiefly a theory of legal validity, not a general account of all legal philosophy.

Section one defines legal positivism, the institutional aspect and the moral aspect of law. Section two explains why positivism provides a cogent institutional account of the law. Section three explains why legal positivism's choice not to address the moral aspect of law is not a theoretical failure, but rather a recognition of its limitations as a descriptive methodology. Therefore, while I disagree with the premise of the claim, I agree with the specific assertion that legal positivism offers a cogent of the institutional aspect of law.

[1] Leslie Green and Thomas Adams, 'Legal Positivism' in Edward N Zalta and Uri Nodelman (eds), *The Stanford Encyclopedia of Philosophy* (Winter 2025, Metaphysics Research Lab, Stanford University 2025) <https://plato.stanford.edu/archives/win2025/entries/legal-positivism/> accessed 31 December 2025.

1. What is the definition of legal positivism?

1.1. Legal positivism as a theory of legal validity

There is no single definition or summary of legal positivism that every positivist agrees on. But even so, John Gardner posits a definition originating from Joseph Raz's sources thesis to which, subject to 'some differences of interpretation', the dominant figures of the legal positivist tradition agree: [2] 'In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits (where its merits, in the relevant sense, include the merits of its sources)'.[3]

This definition highlights how contemporary positivism, most well represented by the likes of Hart and Raz, differs from traditional positivism, represented by Jeremy Bentham and John Austin. Traditional positivism, best seen in Austin's 'command theory', provides a reductionist account of law,[4] with every command being backed by a sanction.[5] Hans Kelsen attempted to address command theory's problems with the *grundnorm* (basic norm).[6] In doing so, Kelsen expanded upon traditional positivism by attempting to explain what underpins the basic norm of a legal system. In other words, assuming command theory were true and that laws were binding norms, laws can only be a binding norm if a higher norm says as much (e.g., a constitution). At risk of oversimplifying Kelsen, his general view posited that a constitution is supreme, not by virtue of its written or codified status, but because the very existence of the constitution presupposes its functioning as *the* fundamental norm in society. While historically significant, Austin's command theory and Kelsen's pure theory of law are conceptually obsolete today,[7] at least in the eyes of contemporary positivists who support Hart's critiques of Austin and Kelsen, accusing both of distorting the realities of law at 'the price of uniformity'.[8]

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[2] John Gardner, Law as a Leap of Faith: Essays on Law in General (OUP 2012) 20.

[3] ibid 21.

[4] John Austin, *The Province of Jurisprudence Determined* (Wilfrid E Rumble ed, Cambridge University Press 1995) 29.

[5] ibid 88.

[6] Hans Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence' (1941) 55 *Harvard Law Review* 44.

[7] This is a broad generalisation that has been contested in recent works and therefore deserves some qualification. Contemporary positivists, notably Hart, are accused of doing something I risk doing here: overgeneralising broad terms, including the linguistic distinction that Hart suggests exists between being *obliged* and being *obligated*. Although amenable to these linguistic arguments, I adopt the Hartian view in this article to avoid drifting away from my central argument. See generally, Frederick Schauer, 'Was Austin Right After All? On the Role of Sanctions in Theory of Law' (2010) 23 Ratio Juris 1, 12–16; Christoph Kletzer, *The Idea of a Pure Theory of Law: An Interpretation and Defence* (2nd edn, Hart Publishing 2020).

[8] HLA Hart, *The Concept of Law* (2nd edn, Oxford University Press 1994) 38–42.

Therefore, Gardner's recitation of the sources thesis neatly sums up a core principle that the most figures of the legal positivist movement agree upon today.

1.2. Defining the *institutional* aspect of law

For the purposes of this article the *institutional aspect of law* refers to the features of law concerned with how a legal system is structured, organised and governed by social rules and the practice of legal officials. I have adopted this definition because it isolates and identifies the features of law that legal positivism is well-equipped and, in part, designed to describe. The understanding of the institutional aspect allows for an assessment of positivism's strongest ground: the view of law as a social fact that is constituted by official acceptance of its sources, as opposed to its merits.

The fact that the institutional account's definition aligns with the socio-structural account of the legal system that Hart also tries to illuminate does not predetermine whether it is cogent or not. It instead allows for a richer discussion as to how successful Hart's conception of law is, considering that he aims to provide an institutional account in the first place. It does not provide a circular account of law nor, as I have now demonstrated, does it make a predetermination as to the cogency of the institutional aspect. In turn, an emphasis on the institutional aspect of law helps demonstrate why legal positivism provides a compelling foundation for understanding legal validity, while simultaneously capturing the reality of modern legal systems.

1.3. Defining the *moral* aspect of law

For the purposes of this article, the *moral aspect of law* refers to the idea that the validity, authority, or interpretation of law depends, in whole or in part, on moral considerations. This definition reflects the normative claims law makes upon its subjects, namely, that its demands are justified, that law morally obligates compliance and that its coercion is legitimate. It also encompasses thicker conceptual ideals like the rule of law and justice. This aspect of law is reflected in the realities of legal practice, such as in the reasoning employed by judges when interpreting constitutional rights or justifying a model of penal law by reference to the normative concept of coercion. Therefore, whereas the institutional aspect describes the social structure of the legal system, the moral aspect's strength lies in its explanatory and normatively justificatory account of law.

On the other hand, positivism does not aim to provide a normative account of the moral authority of law, nor should it be expected to, despite the protests of critics like Finnis.[9] The reason for this is that legal positivism provides a general

[9] John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 17.

descriptive account of legal validity, rather than a justificatory account of law's authority or a complete theory of legal philosophy.

2. How does legal positivism provide a cogent account of the institutional aspect of law?

2.1. Why the positivist account of the institutional aspect is conceptually cogent

There are two main reasons why I agree that the positivist account of the institutional aspect of law is particularly cogent.[10] The first reason for positivism's cogency is positivism's insistence on a general descriptive account of law that eschews moral evaluation. The second is its philosophical self-restraint. Legal positivism prevents and avoids presenting itself as a general theory addressing *all* legal philosophy's most pressing questions, instead remaining focused on the theory of legal validity.

Although these reasons may be prima facie similar, they advance distinct points. The first concerns the methodology of positivism, specifically its commitment to a descriptive account of legal validity. The second reason looks at the scope of positivism, defining the boundaries of positivism's analysis by focusing strictly on the conditions for validity, rather than attempting to answer broad, normative questions of legal philosophy. Critics might retort that the shrewdness of positivists in not committing themselves to answering questions beyond that of legal validity fails to show that the account of validity they offer is cogent. However, this philosophical restraint facilitates its functional brevity, by explaining the institutional account in relatively few and simple concepts. Although, admittedly, this does not necessarily enhance its philosophical cogency, it still demonstrates that the account of validity legal positivism offers is functionally cogent.

Positivism's methodological separation makes its descriptive task easier by focusing on what the law *is* as opposed to what the law *ought* to be: mainly through Hart's rule of recognition. This matters because the institutional aspect focuses on the structure and operability of a legal system, which is constituted by social facts rather than morality. A theory that focuses on describing as opposed to justifying these social facts is, in turn, well suited to explain the institutional aspect of law. By excluding moral evaluation from its account of the concept of law, positivism provides the analytical space required to describe the structure of the legal system, while reserving questions of moral justification for a separate inquiry. As this

[10] While descriptors like *compelling* or *persuasive* denote a subjective appeal, *cogency* is deliberately used here and throughout this article to signify how positivism is logically sound, consistent and built on well-supported premises. Other words, like those mentioned above, may be useful synonyms in common parlance, however, their use here would not reflect the breadth of legal positivism's strength as well as *cogent* does.

separability provides methodological clarity, it therefore enhances the cogency of the institutional aspect of law.

One could easily retort to this: 'what if positivism is clear and astute in its methodology but simply gets the theory wrong?', and Austin himself could arguably be guilty of this. After all, while he observes the same constraints I do, most positivists believe he does a poor job of explaining the institutional aspect of law. However, this sidesteps a foundational point: while a clear and shrewd methodology in and of itself does not guarantee a perfect or indefeasible theory, it is nonetheless a necessary precondition for one. Therefore, by separating the institutional aspect from moral evaluation, positivism creates the conditions under which a description of law can be built upon. By creating these conditions, positivism elicits cogency, not an indefeasible theory of law. For example, Hart uses the same cogent methodology to find a more accurate social fact (i.e., the rule of recognition). In my view, the very fact that a theory can improve using its own rules demonstrates that positivism provides a cogent institutional account of law.

The second reason positivism provides a cogent account of the institutional aspect is because of the deliberate restraint it employs. Positivism does not attempt to answer all questions of legal philosophy, nor does it aim to provide a normative account of law.[11] Instead, positivism limits its explanatory role to demonstrating the existence of law as dependent on social facts. By limiting its inquiry to social facts, positivism can provide a neutral framework that can identify institutional boundaries across legal systems. Unlike justificatory theories, which collapse the separability of morality and the institutional aspect, positivism can retain its objective analytical strengths, even when a system's content is morally objectionable. This restraint, coupled with the conceptual separability of a normative and descriptive account of law, is what allows positivism to give such a cogent account of the institutional aspect of law.

2.2. Hart's positivist account of the institutional aspect

Hart's positivist account provides the clearest description of law, and particularly its function in a legal system, with the greatest example of this institutional clarity reflected in his distinction between primary and secondary rules. Hart and Raz agree that primary rules impose duties and confer powers, but independent of secondary rules, they remain unable to create a legal system.[12] Secondary rules (i.e., rules of change, adjudication and, most importantly, recognition) transform a pre-legal society into a legal system, because they allow for the creation, amendment, and authoritative application of primary rules, thereby

[11] Green and Adams (n 1).

[12] Joseph Raz, *Practical Reason and Norms* (Oxford University Press 1999) 136–137.

transforming a set of norms into a unitary legal system.[13] In turn, Hart's concept of law is not cogent just because it reflects institutional reality; that would be too simple. Most importantly, it offers a cogent account of the institutional aspect because it explains why law has stability, why it changes and why we have adjudication. In turn, it does so with surprisingly few concepts, further demonstrating its brevity, also contributing towards its institutional cogency.

Central to explaining the institutional aspect of law is Hart's rule of recognition. This is the secondary rule that legal officials accept (from the internal point of view) as being capable of identifying the criteria of legal validity.[14] It is effectively the practice of legal officials that fixes the rule of recognition, something that Gardner aptly describes as a social rule functioning as a customary norm.[15] As a social fact, its conceptual strength and cogency lie in its ability to explain the hierarchy and functioning of a legal system without relying on moral evaluation. For example, judges regularly identify valid law by assessing the sources of law (e.g., statutes, precedents and constitutional provisions) rather than assessing the moral merit of said norms. It may, however, be argued that sometimes judges do assess the moral merit of such norms. For example, when being asked to decide the apportionment of liability in cases of contributory negligence as is 'just and equitable', the source itself asks the judge to look at morality.[16] But the identification of the content of law here is not an exploration of morality as an independent and free-flowing authority, but rather as a criterion of legal validity that the institution has chosen to adopt. Therefore, even the reliance on source-based criteria mirrors Hart's account and demonstrates why positivism is at its strongest when explaining the institutional aspect of law—because it is what an exercise in legal validity, not morality, relies upon.

As a result, legal positivism provides a cogent account of the institutional aspect of law because it explains, through a general descriptive account, the normative elements of legal practice without collapsing into a purely justificatory theory of law. However, this section presumes that this is a desideratum for an account of law's institutional aspect. Critics, like Ronald Dworkin, would disagree by asserting that a theory of law that does not justify the law is incomplete and misses what law really is. To Dworkin, providing a cogent institutional account of the law necessarily requires moral evaluation, which itself sufficiently grounds, is part of, and justifies the law.[17] However, Dworkin collapses the separation between

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[13] Hart (n 8) 103.

[14] ibid 89–90.

[15] Gardner (n 2) 69–70.

[16] Law Reform (Contributory Negligence) Act 1945, s 1(1).

[17] See generally, Ronald Dworkin, *Law's Empire* (Harvard University Press 1986).

what the law is and what the law ought to be. For example, the institutional structure of South Africa's apartheid regime or Nazi Germany's legal system is capable of being described, without it being justified. Positivism's institutional account is cogent precisely because it does not seek to collapse what law is and what it ought to be. Like a dictionary, positivism can identify an abhorrent thing without endorsing that same thing.

In this context, the normativity identified by positivism is *institutional* rather than *moral*, for example, as reflected in the practices of officials. In turn, this explains why Finnis, despite rejecting positivism's previously identified methodological restraint, accepts that the existence and content of law can be identified without reliance on moral argument.[18] Finnis's broader objections as a result do not undermine the cogency of positivism's account of the institutional aspect of law, as that aspect involves legal validity as a matter of social fact.[19] Therefore, once the institutional and moral aspects of law are properly separated, positivism's descriptive account of the institutional aspect of law remains cogent.

3. Does legal positivism fail to make sense of the moral aspect of law?

As Leslie Green points out, the most substantive and influential criticisms of positivism all seem to flow from the assertion that positivism fails to give (or is unable to give) proper consideration to the role of morality in law.

The claim that legal positivism fails to make sense of law's moral aspect relies on a mistaken assumption. It assumes that legal positivism either aims to or ought to make sense of the moral aspect of law. However, a theory can only fail at the realisation of a mission that it itself sets. Legal positivism has never presented itself as a theory of the morality of law. Instead, its explanatory focus is on legal validity, not morality. There are, however, legitimate criticisms, notably levelled by Finnis, but also Fuller, about whether positivism should have to explain the normative aspect of law in order to provide a theoretically illuminating general account of law.[20] But that is a separate question altogether, and without moving the goalposts, it will be addressed later in this section.

Critics therefore regularly misunderstand the remit of legal positivism, with Gardner aptly pointing out that critics are often baffled when a descriptive theory of law, intended to explain the nature of law, cannot be directly applied in everyday legal decision-making.[21] However, as Gardner points out, this presupposes that positivism's main role is in facilitating the direction of law in practice as opposed

[18] Green and Adams (n 1).

[19] See section 3.3.

[20] John Finnis, *Philosophy of Law: Collected Essays Volume IV* (Oxford University Press 2011) 186.

[21] Gardner (n 2) 25.

to the identification of law in practice.[22] Consequently, the attribution to positivism of views it does not hold, in order to facilitate criticism, does not demonstrate that positivism fails to make sense of the moral aspect of law.

3.1. Is morality constitutive of law?

A central preliminary question is whether legal positivism holds morality to be constitutive of law. As the answer is in the negative, positivism cannot be faulted for failing to explain it.[23] Accordingly, the argument that positivism should make sense of the moral aspect of law is a separate and equally misplaced proposition.

One reason critics seek to have positivism make sense of the moral aspect of law is because early positivists, including Thomas Hobbes, Jeremy Bentham and William Blackstone, characterised law, by virtue of it being posited, as meritorious. For example, early positivists often claimed that because law creates the conditions (norms) necessary for a civilised and stable society, it therefore provides societal stability, which in turn proved posited laws are meritorious. However, Hart's clarification of this is key in rebutting the idea that the simple act of positing a norm is meritorious in and of itself. He argues that legal rules which possess formal qualities, including generality, are matters of efficient functioning of the law, rather than evidence of its moral merit. This is a distinction aptly reinforced by Gardner, through his exclusion of the merits of law's sources from the definition of (LP*).[24]

As stated above, no positivist therefore believes morality is constitutive of legal validity; even so-called soft positivists, such as Hart, accept this unless a social rule renders morality itself relevant. For example, a constitution may prevent 'cruel and unusual punishment',[25] require substantive due process,[26] or direct courts to do what is 'just and equitable',[27] thereby incorporating moral criteria into law. However, this does not alter the fact that legal validity still depends on the source itself permitting such an interpretation.[28] Consequently, positivism is clear in demonstrating that it is a theory that relies on the validity of its sources, not its merits, and therefore does not attempt to make sense of the moral aspect of law.

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[22] ibid 23.

[23] Hart (n 8) 185.

[24] Section 1.1. See also, Gardner (n 2) 21.

[25] See e.g., US Const, amend VIII.

[26] See e.g., US Const, amend V, XXIV.

[27] See e.g., Law Reform (Contributory Negligence) Act 1945, s 1(1).

[28] Hart (n 8) 204.

3.2. The separability of law and morality

The claim that legal positivism fails to make sense of the moral aspect of law rests on a misunderstanding of the separation thesis and the positivist account of the relationship between law and morality. No legal positivist claims that moral considerations are irrelevant, nor, more radically, that there is no connection at all between law and morality in the first place (hereinafter 'NNC^{A}'), despite this being a common allegation of critics.[29] The approach of legal positivism to the role of moral consideration is more precise: there is no necessary *conceptual* connection between legal validity and morality (hereinafter 'NNC^{B}').[30] Therefore, (NNC^{A}) provides a strawman account of legal positivism's position on the separability of law and morality. As a result, the attacks made on legal positivism's inability to make sense of the moral aspect on this account should be rejected because they do not even undermine a legitimate positivist position.

One might retort that this indicates a lack of conceptual cogency, as critics are unable to understand the position of positivism. On this view, if positivism were truly cogent, then it would not be so frequently misunderstood, by both its critics and proponents alike. However, this critique may be summarily dismissed through an analogy. The fact that someone is unable to solve a mathematical problem and applies the wrong formulae does not indicate that the mathematical problem is wrong or lacks cogency. Instead, the problem solver misunderstands the way to solve the problem, rather than the problem itself being wrong or unclear. The real positivist claim, as stated in section one of this article, is that validity depends on its sources and not its merits. This does not exclude morality from the debate over legal validity (NNC^{A}), rather, it reflects the separa*bility* of the two (NNC^{B}). Critics regularly attack a version of positivism (NNC^{A}) that no positivists believe. Once this is clarified (NNC^{B}), then the alleged failure of legal positivism to account for the moral aspect disappears. Positivism consciously excludes moral evaluation from the criteria of legal validity to maintain the theory's analytical clarity. Therefore, the critique here only carries weight if it is assumed that a theory of law must be justificatory in the first place—a position that is explicitly rejected by positivist methodology.

3.3. Why the failure to make sense of morality is not a defect of legal positivism

Finnis presents a relevant and interesting counterargument, which warrants consideration, but in any event will be rebutted. He argues that refusing to explain the moral aspect of law on the grounds that positivism only provides a general

[29] Lon L Fuller, 'Positivism and Fidelity to Law--A Reply to Professor Hart' (1957) 71 *Harvard Law Review* 630, 656.

[30] Hart (n 8) 185–212.

descriptive account of law is not sufficient because any general descriptive account of law is unavoidably normative. Legal positivism, he argues, prevents itself from saying anything theoretically illuminating because it excludes moral evaluation.[31] However, because Finnis starts from his own evaluative account of law, he does not argue against positivism on positivism's terms. He critiques positivism for not sufficiently explaining the connection between a normative account of law and a general descriptive account of law. He demands of positivism something that it neither aims nor purports to provide, by suggesting that it is inherent in any theory of law.

Saying positivism should do something, and critiquing it on that basis, is quite different from arguing that positivism does something—but not very effectively. Finnis, in my view, conflates the two. Given his broad agreement with the positivist account of legal validity, as explained earlier by Green, it is difficult to see how his position does anything more than facilitate an exploration of the truth of legal positivism, rather than refute it.[32] If Finnis agrees with the positivist proposition of legal validity (i.e., what legal positivism's central thesis is), then anything else is an obiter critique of what positivism should do. In turn, I believe Finnis's natural law theory is not in direct contradiction with the legal positivist thesis on legal validity but, rather, supplements it.

Finnis takes positivism to offer an account of the concept of law, not just the concept of legal validity, and this etymological confusion lies in Hart's prima facie ambition to define the concept of law. Finnis argues that since the concept of law is an evaluative one, positivism fails to make sense of it. In contrast, the positivist position I advance is that to have a concept of law, you need only explain how it can be identified and describe how it functions. In turn, the concept of law is descriptive and factual. It is not simply that the concept of law is only a concept of validity, rather, legal validity is the only part of the concept of law that can be described in an objective manner. Therefore, when evaluating what is cogent, an analysis of what can be more widely and universally applied (i.e., positivism) must take precedence over Finnis's thicker concept of law. Indeed, the definition advanced by Finnis can surely only work for just societies, whereas positivism's cogency does not fluctuate depending on the regime or society in which it is applied in.

Fuller also falls into a similar, albeit separate, trap as Finnis by attempting to explain how legal positivism fails to account for the morality of law, only for his theory to mistake the conditions for good lawmaking (i.e., the 'inner morality of

[31] Finnis (n 9) 17.

[32] Gardner (n 2) 51–53.

law') with the conditions of legal validity.[33] Fuller puts forward the case that rule of law principles constitute the 'inner morality' of law, such that the failure to comport with them results in a failure to make law *at all*. But this inner morality is still compatible with them being source-based, especially because Fuller is unable to rebut Hart's claim that legality is compatible with 'very great iniquity'.[34] Raz's claim that the rule of law is a virtue of law, not morality, helps us understand how Fuller's claim is compatible with the source-based thesis of legal validity that legal positivism posits. Hart and legal positivism succeed in demonstrating that Fuller's 'inner morality of law' is a theory of legal efficacy rather than validity, notwithstanding Fuller's protestations.

This is not a defect, instead, it leaves the normativity of law to be explained by other, complementary theories, and does not purport to offer a comprehensive account of the whole of law. Positivism therefore does not fail to make sense of the moral aspect of law. Rather, it succeeds at its own task by providing an explanatory account of legal validity through social facts, while leaving moral authority and justification to normative political theory. This so-called failure is therefore only a failure if one accepts what is, as argued above, a mistaken assumption that cannot be attributed to positivism.

Conclusion

In conclusion, legal positivism provides a cogent account of the institutional aspect of law, as it explains legal validity in terms of social facts rather than morality. The descriptive and conceptually restrained account of law advanced by positivism allows it to illuminate the structure and operation of the legal system without collapsing into either a moral account of law or a justificatory account of legal authority. Additionally, the claim that positivism therefore fails to make sense of the moral aspect rests on a mistaken assumption about what positivism *seeks* to achieve or what it *ought* to achieve. Because morality is not constitutive of legal validity, the criticism that positivism fails to account for the moral aspects of law is misplaced, not least because the critique aims to evaluate legal positivism against a justificatory aim that it has never sought to meet. Therefore, once the institutional and moral aspects of law are distinguished, positivism clearly succeeds on its own terms by offering a general descriptive account of legal validity, while reserving normative questions for moral and political theory.

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[33] Lon L Fuller, *The Morality of Law* (rev edn, Yale University Press 1969) 39.

[34] See respectively, Fuller (n 29) 636; Hart (n 8) 207.

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ARTICLE

From Fraudulent Devices to Collateral Lies: The Supreme Court's Recalibration of Post-Contractual Good Faith in *Versloot*

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ABSTRACT. This article examines the implications of the Supreme Court's decision in *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG (The DC Merwestone*), which abolished the fraudulent devices rule in English insurance law. The Supreme Court decision represents a principled recalibration of the law governing dishonest claims conduct rather than an overextension of protection for insureds. The analysis of materiality, causation and proportionality in the fraudulent devices' context demonstrates that forfeiture is confined to dishonesty that is causally relevant to the insurer's liability, as affirmed in *Versloot*. Collateral lies, which merely accompany otherwise valid claims, lack this causal connection and therefore fall outside the proper scope of forfeiture. The decision therefore aligns fraud doctrine with the compensatory function of insurance contracts.

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Introduction

It has long been established that the contract of insurance is the principal example of contracts described as *uberrimae fidei*, requiring the utmost good faith. In the 1766 case of *Carter v Boehm*[1], insurance was defined as 'a contract founded upon the utmost good faith; if the party seeking indemnity knows of circumstances which would influence the judgement of the insurer, and conceals them, he violates the principle on which the insurer contracts.'[2] This underlying principle has since imposed on the insured a duty to disclose all material facts to balance the significant information asymmetry between insurers and the insured. While post-contractual forfeiture was justified by information asymmetry, its basis is weakened by modern insurance practice characterized by sophisticated underwriting and contractual risk allocation. Against this backdrop, the Supreme Court's decision in *Versloot Dredging BV and anor v HDI Gerling Industrie Versicherung AG and ors (The DC Merwestone)* [3] questioned the legitimacy of the fraudulent device rule.

By abolishing the fraudulent devices rule, the Court has confined forfeiture to cases of genuine fraud rather than collateral dishonesty. This development is aligned with Section 12 and Section 14 of the Insurance Act 2015[4] (the Act), which remove avoidance for breaches of good faith and abolish the duty of utmost good faith as an independent source of remedy. Post-contractual good faith thus no longer operates as a free-standing source of sanction.[5]

This article explores the position that, rather than permitting concealment, the abolition of the fraudulent devices rule corrects a punitive overreach by rejecting the automatic forfeiture of valid claims based on non-causal dishonesty, preserving a clear and principled balance between insurer protection and genuine entitlement. By examining the concepts of materiality, causation, and proportionality as the normative principles governing when and how post-contractual dishonesty should attract forfeiture, it argues that valid claims should not be forfeited for dishonest statements bearing no causal relationship to the insurer's liability.

1. Post-contractual duty of utmost good faith

Notwithstanding its origins in pre-contractual disclosure, the doctrine of utmost good faith has been extended into post-contractual phases, where it has been

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[1] *Carter v Boehm* (1766) 3 Burr 1905.

[2] ibid 109 and 110.

[3] *Versloot Dredging BV and another v HDI Gerling Industrie Versicherung AG and others (The DC Merwestone)* [2016] 2 Lloyd's Rep. 198.

[4] Insurance Act 2015 (c 4) ss 12, 14.

[5] John Birds and Katie Richards, *Birds' Modern Insurance Law* (Sweet & Maxwell 2019) 7-06.

used to justify sanctions for dishonest claim behaviors.[6] Early authority such as *The Litsion Pride*[7] treated post-contractual good faith as extending to claims conduct, such that fraud was not required to trigger remedies under Section 17 of the Marine Insurance Act 1906.[8] This approach was problematic because it treated the claims stage as analogous to contract formation, despite the absence of informational asymmetry and the adversarial nature of claims handling.

Lord Clyde rejected this in *The Star Sea*[9] and favored a flexible construction of utmost good faith, which is doctrinally significant. It confines forfeiture to cases where dishonesty affects the validity of the claim itself, rather than operating as a remedy for collateral dishonesty.[10] Echoing this, *Versloot* reconceptualizes post-contractual good faith as a confined doctrine from an open-ended duty. Unlike a duty, which implies continuing and potentially expansive obligations, a doctrine functions as a principle directed at a specific mischief, namely fraud.

Versloot therefore reinstates that the scope of post-contractual good faith is to be understood in light of its underlying function in insurance law, namely the prevention of fraud.[11] On this basis, sanctions are justified only where the claim itself is fraudulent.[12] Extending the fraudulent devices rule to collateral lies risks severing the connection between good faith and its anti-fraud function.[13] This is also reflected in the Act[14] which treats fraudulent claims as a distinct category under Section 12 and Section 14(1)[15] which abolishes avoidance for breach of utmost good faith.[16] It must be highlighted that the intention of Parliament was not to abolish the duty of utmost good faith altogether, but rather to ensure that it does not operate as an independent basis for a remedy.[17] These reforms, therefore, confine

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[6] Johanna Hjalmarsson, Fraudulent Insurance Claims: Legal Definition and Judicial Consequences (PhD thesis, University of Southampton 2016).

[7] *Black King Shipping Corp v Massie (The Litsion Pride)* [1985] 1 Llyod's Rep 437.

[8] ibid; Marine Insurance Act 1906 (c 41) s 17.

[9] *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1.

[10] Hjalmarsson (n 6) 31.

[11] Peter Macdonald Eggers, 'Remedies for the Failure to Observe the Utmost Good Faith' (2003) Lloyd's Maritime and Commercial Law Quarterly 249, 254.

[12] Peter Macdonald Eggers and Simon Picken, *Good Faith and Insurance Contracts* (Informa Law from Routledge 2018) 300.

[13] Ozlem Gurses, 'What Does "Utmost Good Faith" Mean?' (2016) 27 *Insurance Law Journal* 129.

[14] Insurance Act 2015 (n 4) s 12.

[15] ibid s 14(1).

[16] Hjalmarsson (n 6) 30.

[17] Eggers (n 11) 298.

post-contractual good faith to a limited interpretive role, preserving judicial flexibility, while ensuring that forfeiture is justified only where dishonesty undermines the validity of the claim itself, as affirmed in *Versloot*.[18]

The decision in *Versloot* does not signify a broader retreat from the law's strict response to insurance fraud. The forfeiture rule continues to apply to genuinely fraudulent claims, reflecting the long-established principle that fraud undermines the integrity of the insurance system and ultimately prejudices honest policyholders. These consequences justify the exceptional sanctions imposed on insureds who advance fraudulent claims. Rather than weakening this framework, *Versloot* draws a distinction between genuinely fraudulent claims and fraudulent devices, holding that the latter should not automatically attract forfeiture where the lie is collateral to the validity of the claim. The discussion that follows therefore first considers the categories of fraudulent claims that remain unaffected by *Versloot* before examining the Court's treatment of fraudulent devices and the reasons for departing from the previous rule.

2. Fraudulent Claims: The Continuing Strict Forfeiture Rule

While the Act does not define a fraudulent claim, courts continue to interpret the Act in light of both statutory interpretations and express contract terms.[19] In essence, fraud arises when the insured makes a material statement knowing it to be false, without belief in its truth or recklessly and where the conduct is dishonest by the ordinary standard of reasonable honest person and as recognized in *The Star Sea.*[20] Overall, it can be said that a fraudulent claim falls into a few categories, namely, (i) non-existent loss, which is a wholly invented claim, (ii) genuine claim with exaggerated loss, (iii) suppressing a defence and (iv) genuine claims supported by fraudulent means and devices.

The most straightforward category of fraudulent claim is the first one where the insured presents a claim in circumstances where no loss has in fact occurred. In such cases, the claim is false from start to finish.[21] The law's response is also correspondingly uncompromising: such conduct satisfies the established definition of fraud and justifies forfeiture of the claim.[22] Given it remains unaffected by

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[18] Law Commission, "Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment" (Law Com No. 353), July 2014, paras 22.3, 26.59, 30.5, 30.22–30.23.

[19] Law Commissions of England and Wales and Scotland, *Reforming Insurance Contract Law: Issues Paper 7: The Insured's Post-Contract Duty of Good Faith* (2010) para 3.62 <http://lawcommission.justice.gov.uk/docs/ICL7_Insureds_Duty_of_Good_Faith.pdf> accessed 28 December 2025.

[20] *The Star Sea* (n 9) [62]–[67]. See also John Lowry and Phillip Rawlings, 'Insurance Fraud: The 'Convoluted and Confused' State of the Law' (2016) 132 The Law Quarterly Review 96.

[21] Hjalmarsson (n 6) 39.

[22] ibid.

Versloot, this category confirms that the abolition of the fraudulent devices rule does not change the strict treatment of claims that are substantively fraudulent.

The second category concerns a genuine claim with an exaggerated loss.[23] Historically, some exaggeration has been acceptable to give way for a fairer bargaining position of the insured. In *Galloway v Guardian Royal Exchange*[24], Millet LJ held that it was pertinent to 'consider the fraudulent claim as if it were the only claim, focusing on whether the insured's conduct is sufficiently serious to justify classifying it as fraud'.[25] Here, emphasis was placed not on the extent of the fraud but at the blameworthiness of the conduct of the insured.[26] This sentiment was propounded by Popplewell J that the fraudulent part of the claim had to be substantial 'in the sense of not being insubstantial or immaterial or *de minimis*'.[27] This shows the courts' judicial trend towards substantiality that underlines the doctrine of fraud in insurance contracts. Some may argue that, in practice, this could lead to difficulties in differentiating a fraudulently exaggerated claim from a claim merely inflated with the intention to negotiate.[28] However, this only applies to the figures of the claim itself. Any wholly untrue portion of a claim will always remain fraudulent and dealt with as the first category above.[29]

Thirdly, fraudulent claims also arise where the insured suppresses a defence, which, if disclosed, would defeat or reduce the insurer's liability.[30] In *The Star Sea,* Lord Hobhouse recognized that the deliberate suppression of material facts at the claims stage may justify forfeiture where it prevents the insurer from advancing a valid claim.[31] This fraud is distinguished from collateral lies because the dishonesty operates directly on the insurer's entitlement to resist the claim, which undermines the substantive validity of the claim itself rather than merely its presentation. Accordingly, this category remains untouched by the abolition of the fraudulent devices rule, reinforcing the principled boundary between genuine fraud and non-causal dishonesty.

These first two categories share an important feature: in each case, the dishonesty directly affects the validity or amount of the claim itself. The fraud

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[23] *Galloway v Guardian Royal Exchange* [1997] Lloyd's Rep IR 209.

[24] ibid.

[25] ibid 214.

[26] Hjalmarsson (n 6) 39.

[27] *Versloot Dredging BV and Anor v HDI Gerling Industrie Versicherung AG and others (The DC Merwestone)* [2013] EWHC 1666 (Comm), [156]–[158].

[28] Hjalmarsson (n 6) 40.

[29] *Britton v Royal Insurance Co* [1866] 176 ER 843.

[30] Robert Merkin, *Colinvaux' Law of Insurance,* 9th ed (London: Thomson Reuters (Legal) Ltd, 2010) para 9- 028.

[31] *The Star Sea* (n 9) [64].

therefore bears a direct relationship to the insurer's liability and justifies the law's strict response. Fraudulent means and devices are fundamentally different. Unlike wholly fabricated or fraudulently exaggerated claims, they involve dishonesty deployed in support of a claim that is otherwise valid. This distinction is critical because it raises the question whether the rationale for forfeiture can properly extend beyond fraud that affects entitlement and amount to dishonesty that is merely collateral to the claim.

Overall, the policy of the law has always been against making fraudulent claims. As Lord Hobhouse said in *The Star Sea,* 'the fraudulent insured must not be allowed to think: if the fraud is successful, then I will gain; if it is unsuccessful, I will lose nothing.'[32] This sentiment is reinforced by the statutory remedy imposed by Section 12 of the Act.

Historically, the remedies afforded to insurers for fraudulent claims were not consistent. Although forfeiture was an orthodox response,[33] some cases allowed recovery of honest elements of a claim or treated fraud as affecting only part of the insurer's liability.[34] Section 12 removes this uncertainty. Where a claim is outrightly fraudulent, the insurer is discharged from liability for the whole claim and may treat the contract as terminated from the time of the fraud.[35] The refusal in *Versloot* to impose forfeiture for collateral lies does not weaken the fraudulent claims doctrine, which confirms that forfeiture is reserved for cases where dishonesty goes to the validity of the claim to balance the stringency of Section 12.[36] Insurers thus are fully protected against genuinely fraudulent claims, despite the abolition of the fraudulent devices rule.

3. Pre- Supreme Court Decision in Versloot

The fraudulent claims supported by fraudulent devices originated as an extension of the fraudulent claims doctrine, addressing situations where an insured advanced a genuine claim but used dishonest means to improve its prospect of success. The scope of this rule was authoritatively set in *Agapitos v Agnew (The Aegeon).*[37] This case concerned a marine policy under which the vessel was warranted not to undergo hot works without certification. Although the insured had breached the warranty and the vessel subsequently caught fire, resulting in a genuine loss, a forged affidavit was later submitted at the claims stage denying that hot works had been undertaken so as to avoid the consequences of the breach.[38] It

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[32] ibid [62].

[33] ibid [62] – [67].

[34] *Axa General Insurance Ltd v Gottlieb* [2005] 1 CLC 62 [19]–[22], [31]–[32].

[35] Insurance Act 2015 (n 4) s 12.

[36] Phillip Rawlings and John Lowry, 'Insurance Fraud and the Role of the Civil Law' (2017) 80 *The Modern Law Review* 303.

[37] *Agapitos v Agnew (The Aegeon)* [2002] 2 Lloyd's Rep 42.

[38] ibid [5]–[10].

was held that such fraudulent devices are a subspecies of fraudulent claims.[39] This approach was generally accepted as favoring insurers.[40] In deciding this, Mance LJ defined a fraudulent device as conduct 'if believed, have tended, objectively only but prior to any final determination at trial of the parties' rights, to yield a not insignificant improvement in the insured's prospect'.[41] Crucially, that false statement had to be directly related to the claim, intended to improve the insured's position and objectively capable of doing so.[42] Here, this formulation established a prospect-based materiality test, focused on the lie's potential effect rather than its causal connection to liability.

This remained the binding authority on fraudulent devices, as it did not make much appearance in the courts after *The Aegeon* until *Versloot* appeared at the High Court.[43] In *Versloot*, the insureds suffered a genuine loss when seawater flooded the engine room of the *DC Merwestone,* causing damage of €3.214 million. At the claim stage, the owners relied on a letter from the vessel's general manager stating, without confirmation from the crew, that a bilge alarm had sounded but had not been acted upon. This statement was later admitted being false. Crucially, the untruth neither caused the loss nor engaged any policy exclusion; nevertheless, the underwriters argued that it was used in support of the claim amounted to a fraudulent device and therefore justified forfeiture of the entire claim.[44]

Despite accepting that the loss was genuine and the false statement was a 'reckless untruth' motivated by frustration at delays rather than deliberate dishonesty in relation to the loss itself,[45] Popplewell J felt obligated to apply *The Aegeon* with 'manifest reluctance'. He held that the statement constituted a fraudulent device solely because 'it was intended to promote the claim in the hope of a prompt settlement'[46] while expressly acknowledging that 'to be deprived of a valid claim of some €3.2m as a result of such reckless untruth is a disproportionately harsh sanction'.[47] His judgement exposed the rigidity of the materiality test, which would have 'permitted the court to look at whether it was just and proportionate to

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[39] 'Fraudulent Devices - Versloot Dredging BV v HDI Gerling Industrie Versicherung AG (Supreme Court)' (Clyde&Co, 20 July 2016) <https://www.clydeco.com/en/insights/2016/07/fraudulent-devices-versloot-v-hdi-gerling-supreme> accessed 4 January 2026.

[40] Hjalmarsson (n 6) 41.

[41] *The Aegeon* (n 37) [38].

[42] Hjalmarsson (n 6) 41.

[43] *The DC Merwestone* (n 27).

[44] ibid [8]–[12], [26]–[33].

[45] Angela Bilbow "Gilding the Lily", post-Versloot (Brick Court Chamber, 2016) <http://www.brickcourt.co.uk/document-uploads/gilding_3.pdf> accessed 4 January 2026.

[46] *The DC Merwestone* (n 27) [225].

[47] ibid [225].

deprive the assured of his substantive rights'.[48] Such a test would have produced the same outcome as the Supreme Court by limiting forfeiture to lies that materially affect the claim, rather than minor or irrelevant misstatements.

Although the Court of Appeal upheld the doctrine as a necessary deterrent[49] and emphatically rejected criticisms of the fraudulent claims rule,[50] Christopher Clarke LJ similarly recognised its draconian effect.[51] Earlier judicial observations, particularly in *The Star Sea,* had also questioned the conceptual basis for extending fraud remedies beyond dishonesty that affected the insurer's liability. This growing judicial concern paved the way for the Supreme Court's intervention in *Versloot*, which adopted a narrower approach to collateral dishonesty.

4. Post- Supreme Court Decision in Versloot

When *Versloot* was heard at the Supreme Court, the Court of Appeal decision was reversed, ruling against the extension of fraudulent devices rule to a fraudulent claim. This meant that claims substantiated by collateral lies no longer forfeited the genuine claim. Based on the analysis of *Versloot,* this article finds that the following areas can justify the abolition of the fraudulent device rule.

4.1. Materiality and Causal Link

As discussed above, *Versloot and The* Aegeon found that a dishonest statement will only justify forfeiture where it is material in the sense that it bears a causal connection to the insured's entitlement under the policy. In *The Game Boy,*[52] Simon J proceeded on the assumption that the use of forged documents would forfeit the claim even if it was substantively valid.[53] This assumption reflects a judicial willingness to treat the mere deployment of a fraudulent device without material effect or causal connection to the liability to defeat a genuine claim.[54] This reasoning led to the Supreme Court's intervention in *Versloot.*

In abolishing the fraudulent devices rule, Lord Sumption drew a principled distinction between fraudulently exaggerated claims where 'the insured's dishonesty is calculated to get him something to which he is not entitled' and a collateral lie. Preferring the term 'collateral lie' to 'fraudulent device', he defined it as 'once the facts are found, has no relevance to the insured's right to recover'.[55] Materiality does not depend on the insured's subjective intention to improve his

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[48] ibid [171].

[49] *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2014] EWCA Civ 1349, [75].

[50] ibid [75].

[51] ibid [75]–[76].

[52] *Eagle Star Insurance Co Ltd v Games Video Co SA (The Game Boy)* [2004] EWHC 15 (Comm).

[53] ibid [150].

[54] ibid.

[55] *Versloot Dredging* (n 3) [1].

position but rather on whether the lie bore a causal relationship to liability. In *Versloot,* the false statement concerning the bilge alarm neither caused the loss nor affected the existence of the loss. The liability was determined solely by the ingress of seawater. The majority's reasoning rests on the premise that the insured's right to an indemnity had already crystallised at the time of the loss, rendering the lie legally irrelevant.[56] A misrepresentation that merely seeks to 'gild the lily' and is wholly irrelevant to the insurer's liability cannot retrospectively defeat an accrued entitlement.[57] By insisting on a material and causal link between dishonesty and liability, the Supreme Court confined forfeiture to cases where the lie forms part of the fraud itself, rather than merely accompanying a genuine claim.

A comparable structural logic can be seen in Section 11 of the Act[58] which limits the effect of policy terms that do not define the risk, preventing insurers from relying on breaches that could not have increased the risk of the loss in circumstances in which it occurred.[59] Both doctrines bear similar underlying principles: that severe consequences should be confined to conduct that bears a substantive connection to the insurer's liability. In *Versloot,* the collateral lies failed to meet that threshold, rendering forfeiture a disproportionate response. While Section 11 does not apply to the fraudulent claim doctrine, it is submitted that the parallel illustrates a consistent judicial concern with materiality rather than a general relaxation of insured's obligations.

Critics argue that collateral lies create a 'one-way bet', as insurers bear the risk of dishonesty without affecting entitlement to recover.[60] If a collateral lie succeeds, it may improve the insured's prospects of recovery; if it fails, the insured still recovers under the valid claim. However, as the majority in *Versloot* made clear, that rationale does not apply where the insured gains nothing to which he was not already entitled to and the insurer loses nothing by meeting a liability that has already arisen.[61] As Lord Sumption emphasised, the materiality of a collateral lie can only be assessed with the benefit of hindsight, once it is known whether it had any causal impact on liability. This distinguishes collateral lies from fraudulent claims, where materiality is assessed *ex ante* and goes directly to entitlement.[62] Thus, the decision in *Versloot* is not to be seen as a relaxation of fraud doctrines but rather as a corrective response to the doctrinal excess exemplified by *The Aegeon* and *The Game Boy.* In this sense, the decision not only restores doctrinal coherence to insurance law but also aligns forfeiture remedies with modern proportionality standards.

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[56] ibid [26].

[57] ibid [100].

[58] Insurance Act 2015 (n 4) s 11.

[59] *MOK Petro Energy v Argo (No 604) Limited (The "F1")* [2024] EWHC 1935 (Comm).

[60] *Versloot Dredging* (n 3) per Lord Hughes [93]–[100], [26] (Lord Sumption).

[61] ibid [26] (Lord Sumption), [93]–[100] (Lord Hughes)

[62] ibid [26], [36].

An additional justification for this recalibration is the conceptual distinction between dishonesty that affects entitlement and dishonesty that merely accompanies the claims process. Insurance law has traditionally treated fraudulent claims as fundamentally inconsistent with the indemnity principle because the insured seeks to obtain a benefit to which they are not entitled. Collateral lies, however, do not alter the substance of the insured's entitlement once the loss has occurred. The indemnity principle is therefore not undermined where payment is made for a loss that genuinely falls within the scope of the policy.[63]

Seen in this light, the earlier authorities risked conflating two analytically distinct forms of misconduct. By treating the mere deployment of a dishonest statement as sufficient to defeat the claim, the law extended the doctrine of fraudulent claims beyond its principled foundation.[64] The Supreme Court's reasoning restores conceptual clarity by confining forfeiture to circumstances where dishonesty is deployed to obtain an illegitimate advantage. The decision therefore preserves the core deterrent against fraudulent claims while avoiding the doctrinal overreach that had developed in earlier case law.

4.2. Proportionality

Alongside materiality, the Supreme Court implicitly applied a proportionality reasoning to prevent excessive consequences for insureds. The concern with proportionality was already acknowledged at the High Court where Popplewell J had emphasized that the misstatement was 'at the low end' of culpability and the harshness of the result is most apparent when the Supreme Court has in the end determined that the claim is otherwise valid.[65] He held that 'the blunt instrument of a relatively inflexible test of materiality, reminiscent of *'fraus omnia corrumpit'*, must surely be capable of yielding to a more proportionate response, which can meet the varying circumstances of each case'.[66] The Supreme Court decision to confine the application of fraudulent device and leave collateral lies to be addressed through less severe sanctions such as cost penalties is therefore argued to be proportionate.[67] Given that this decision is applicable to both consumer insurance policies and complex commercial claims,[68] the proportionality reasoning is consistent with a broader judicial reluctance to permit harsh consequences for conduct that does not go to the core of the insurer's risk.

The proportionality reasoning adopted in *Versloot* also sits comfortably with broader principles reflected in Article 1 of Protocol 1 of the European Convention

[63] ibid [26].

[64] ibid [36].

[65] *Versloot Dredging* (n 27) [225].

[66] ibid [171].

[67] *Versloot Dredging* (n 3) [98].

[68] ibid [52].

on Human Rights ('A1P1').[69] A1P1 protects the peaceful enjoyment of possessions and requires a fair balance between individual property rights and legitimate public interest. Once a loss has occurred and the insured's right to an indemnity has crystallised, a valid insurance claim may constitute a proprietary interest. Automatic forfeiture of that entitlement on the basis of collateral dishonesty, unconnected to the existence or scope of liability, risks amounting to a disproportionate interference with that interest.[70] Thus, A1P1 provides a useful comparative framework demonstrating that the decision accords with broader principles of proportionality recognised in European human rights jurisprudence.[71] While the Supreme Court did not expressly ground its reasoning on the European Convention on Human Rights, it insisted that forfeiture should be confined to losses causally connected to the insured's dishonesty.[72] It reflects the A1P1 requirement that interferences with property rights pursue a legitimate aim and maintain a fair balance between the public interest and the protection of individual property rights.

The proportionality consideration also includes the broader remedial framework of insurance litigation. The abolition of the fraudulent devices rule does not leave insurers without recourse against dishonest behaviour. Courts retain a range of procedural and financial sanctions capable of addressing misconduct within the claims process, including adverse costs orders, the possibility of indemnity costs, and reputational consequences arising from judicial findings of dishonesty. Such mechanisms provide meaningful deterrence without automatically extinguishing a valid contractual entitlement. In this sense, the Supreme Court's approach reflects a more calibrated system of sanctions. Instead of imposing drastic consequences of forfeiture in every instance of dishonesty, the decision permits proportionate responses to the seriousness of the misconduct. Minor attempts to embellish an otherwise valid claim may attract judicial criticism or financial penalties, while deliberate attempts to inflate or fabricate claims continue to trigger the well-established doctrine of fraudulent claims.[73] The decision therefore introduces a more nuanced spectrum of consequences that better reflects the varying degrees of culpability in practice. By replacing a rigid all-or-nothing rule with a more flexible framework, the decision in *Versloot* preserves the integrity of the claims process while avoiding outcomes that appear excessively punitive.

Some academics argue that the remedy of avoidance for failure to observe

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[69] Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 20 March 1952, entered into force 18 May 1954) ETS 9, art 1.

[70] Brick Court Chambers, 'Supreme Court Rules That a "Collateral Lie" Does Not Lead to Forfeiture of an Insurance Claim' (20 July 2016) <https://www.brickcourt.co.uk/news/detail/supreme-court-rules-that-a-acollateral-liea-does-not-lead-to-forfeiture-of-an-insurance-claim> accessed 5 January 2026.

[71] James Davey and Keith Richards, 'Deterrence, Human Rights and Illegality: The Forfeiture Rule in Insurance Contract Law' (2015) 131 *Lloyd's Maritime and Commercial Law Quarterly* 315, 322.

[72] *Versloot Dredging* (n 3) [93]–[100].

[73] *The Litsion Pride* (n 8) [476]–[477].

utmost good faith should still be available for breaches of utmost good faith. However, courts should exercise discretion in granting said remedies where its effect would be unjust, disproportionate, or harmful to third-party rights.[74] In this respect, the author favours the decision in *Versloot* that avoidance should depend on judicial discretion rather than operate automatically. In the absence of a statutory definition of 'fraudulent claim,' the Supreme Court was obligated to distinguish circumstances in which collateral lies should attract forfeiture. It balanced competing concerns of protecting insurers against fraudulent claims and ensuring that the disproportionate penalties are not imposed for collateral lies. The Supreme Court's approach is consistent with the author's view that relief should be withheld where it would be unjust, while simultaneously preserving certainty through Section 12. Thus, the Supreme Court's discretion reconciles proportionality with legal certainty to prevent draconian outcomes even under a hypothetical continuation of avoidance for breaches of good faith.

4.3. Public Policy Concern

It was not surprising that Lord Mance who argued for the extension of the fraudulent claim rule to fraudulent devices in *The Aegeon* dissented in *Versloot.* He concluded that an insured's whole lies demonstrated an intention to deceive 'as the assured does not believe or is not confident that he has a good claim'.[75] While concerns were raised that abolition of the fraudulent devices rule may encourage dishonesty, [76] the Supreme Court held that forfeiture of valid claims for collateral lies would be a disproportionate response. [77]

Many have argued that the Supreme Court decision appears to be problematic as fraudulent claims supposedly cost the insurance industry £2 billion every year[78] and the abolition of a remedy for claims using fraudulent devices would encourage fraud. Fraudulent devices on the other hand are materially different as they do not alter the loss suffered and prove irrelevant to the insurer's liability. The Supreme Court therefore used the opportunity in *Versloot* to reinstate that there are 'principled limits to the role which a claimant's immorality can play in defeating his legitimate civil claims.'[79] Lord Hughes found that extending the fraudulent claims rule in such circumstances would be 'too large a sledgehammer

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[74] *Versloot Dredging* (n 3) [93]–[100].

[75] ibid [126].

[76] ibid [130].

[77] ibid [36].

[78] Georgia Hicks, 'The Fraudulent Devices Principle Now Appears to Be Past Praying For' (Devereux Chambers, 2014)<https://www.devereuxchambers.co.uk/assets/docs/publications/the_fraudulent_devices_principle_gh_oct_2014.pdf> accessed 4 January 2026.

[79] Kate Wilson, 'Fraudulent Claims Rule: When Can an Insurer Avoid a Claim? - Park Square Barristers' (*Park Square Barristers* 29 July 2016) <https://www.parksquarebarristers.co.uk/fraudulent-claims-rule-when-can-an-insurer-avoid-a-claim/> accessed 4 January 2026.

for the nut involved.'[80] It was also identified by Lord Hughes that Parliament has already legislated to deal with the mischief of fraudulent claims through Section 57 of the Criminal Justice and Courts Act 2015.[81] By allowing courts to dismiss a fundamentally dishonest and exaggerated claim,[82] this provision provides a stronger response than that available at common law, under which the Supreme Court in *Summers v Fairclough Homes*[83] emphasized that striking out an otherwise valid claim should remain exceptional.

As discussed above, the fraudulent claims doctrine together with Section 12 of the Act remains to reinforce the conclusion that insurers remain adequately protected in cases of genuine fraud. It is argued that the decision reflects a necessary refusal to allow the fraudulent devices rule to operate as a mechanism of moral discipline, especially in the presence of the fraudulent claim doctrine enhanced further with Section 12.[84]

It is interesting to note that the Supreme Court also propounded that insurers who regard collateral lies as unacceptable practice remain free to address this through express contractual terms.[85] This observation does not undermine the abolition of the fraudulent devices rule but rather reinforces its principled bases. The common law no longer imposes forfeiture as a default response to collateral lies but instead shifts the risk to insurers who remain responsible to consciously allocate it through drafting and pricing. Any such clause would remain subject to the usual controls on construction and proportionality and would need to be clearly expressed if it were to defeat a valid claim.[86] While it may represent a shift away from insurer-favoring moral sanctions imposed by law, it is argued that these alternatives preserve contractual autonomy in commercial insurance, thus tilting the balance between insured and insurers. Accordingly, it reflects a principled shift towards a system in which forfeiture arises only where it has been expressly bargained for, rather than imposed by an inflexible rule of law. Thus, the decision in *Versloot* can preserve contractual autonomy while avoiding the disproportionate consequences flowed from collateral lies that did not affect the validity of the underlying claim.

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[80] Andrew Perfect and Sharan Sanghera, 'A Sledgehammer to Crack a Nut, or a Charter for Untruth?' (3PB Barristers, 2016) <https://www.3pb.co.uk/content/uploads/a_sledgehammer_to_crack_a_nut_or_a_charter_for_untruth_-_andrew_perfect_sharan_sanghera_-_august_2016-1.pdf> accessed on 4 January 2026

[81] Criminal Justice and Courts Act 2015 s 57.

[82] *Versloot Dredging* (n 3) [95].

[83] *Fairclough Homes (Appellant) v Summers (Respondent)* [2012] UKSC 26.

[84] Rawlings and Lawry (n 36) 323–325.

[85] Law Commissions (n 19) para 24.

[86] 'Supreme Court Defines the Ambit of the Fraudulent Claims Rule' (HFW, August 2016) <https://www.hfw.com/app/uploads/2024/04/HFW-Supreme-Court-defines-the-ambit-of-the-fraudulent-claims-rule-DC-MERWESTONE-August-2016.pdf> accessed on 12 December 2025.

Conclusion

Ultimately, the decision in *Versloot* represents an intentional recalibration of post-contractual good faith in English insurance law. Prior to *Versloot,* the fraudulent devices doctrine allowed insurers to automatically forfeit valid claims where the insured had deployed collaterally dishonest means in support of recovery, regardless of whether the dishonesty was substantive to the liability. Hence, the Supreme Court's decision is seen to be not a relaxation of standards of honesty but a principled limit on the consequences collateral dishonesty may attract.

In essence, the decision in *Versloot* defines a fraudulent claim by preserving robust deterrence against fraudulent claims through Section 12 while still rejecting an excessively harsh response to collateral lies. Therefore, this decision has shaped English insurance law to reflect a mature understanding of insurance as a compensatory contract, not a vehicle for moral sanction. Moreover, the decision leaves insurers free to address dishonest claims conduct through express contractual provisions, so that severe sanctions such as forfeiture derive from contractual allocation of risk rather than rigid common law doctrine. In this sense, the decision does not weaken the integrity of the claims process but instead aligns deterrence, fairness and contractual autonomy within a more coherent doctrinal framework.

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ARTICLE

What do Uber's Illegal Cross-Border Data Transfers show about Data Subject Rights under the GDPR, and could it do more to protect these?

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ABSTRACT. This article seeks to explore the extent to which the GDPR sufficiently supports data subjects in obtaining compensation and redress for harms suffered by GDPR breaches. It first considers the relevant legal and normative framework of data protection under the GDPR, it then discusses the specific facts of this case including Uber's wrongdoing. This is followed by discussion of data subject rights under the GDPR. It then analyses the potential forms of harm that could have been caused in this case, and how the GDPR could potentially adopt a dualistic role in enforcement, where it focuses on punishing data processors and assisting data subjects in claiming compensation.

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Introduction

This article analyses the 2024 decision of the Dutch Data Protection Authority, the Autoriteit Persoonsgegevens (the AP), regarding Uber's unlawful cross-

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border data transfers from 2021 to 2023.[1] It establishes that while the fine was a sufficient punishment under the GDPR, this demonstrates how the GDPR could strike a better balance between regulatory enforcement and the need for individual redress by data subjects affected by GDPR breaches. The EU's interpretation of personal data is broad and ever-expanding,[2] which highlights the importance of considering the GDPR's potential for individual remedies. First, the applicable law will be outlined in order to provide context for the case study (II), then the background of the case (III), and the disputed legal issues (IV) will be discussed. The effectiveness of the fine will be considered (V), and with regard to the rights of data subjects (VI), whether this case indicates that the GDPR could better help data subjects whose rights are infringed (VII and VIII). Altogether, this will show that the fine is adequate in punishing Uber and deterring future infringements, but the GDPR is insufficient in allowing for individual compensation and redress.

1. Applicable Legal Framework

The crucial aspect of the legal and normative framework is that the starting point for cross-border data transfers under the GDPR is that they are not authorised by default but require some form of authorisation. Processing personal data is what invokes the GDPR. While sounding intuitive, personal data has a specific meaning under the GDPR:

> *'personal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;*[3]

Recital 26 states that the principles of data protection apply to information concerning an identifiable or identified natural person, which when assessing the concept of 'identifiable', adopts a 'reasonable likelihood' test for identification.[4] In assessing whether someone is 'identifiable', regard must be given to the available technology at the time, and the costs and amount of time required for identification.[5]

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[1] Autoriteit Persoonsgegevens, 'Dutch DPA Imposes a Fine of 290 Million Euro on Uber Because of Transfers of Drivers' Data to the US' (26 August 2024) <https://www.autoriteitpersoonsgegevens.nl/en/current/dutch-dpa-imposes-a-fine-of-290-million-euro-on-uber-because-of-transfers-of-drivers-data-to-the-us> accessed 21 April 2025.

[2] Nadezhda Purtova, 'The law of everything. Broad concept of personal data and future of EU data protection law' (2018) 10(1) *Law, Innovation and Technology* 40, 41.

[3] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1 (GDPR) art 4(1).

[4] ibid Recital 26.

[5] ibid.

Personal data is not a static concept; data can change and become 'personal' depending on the circumstances.

For the specific context of cross-border transfers, the GDPR applies to data processing by a controller or processor outside the European Union (EU) by virtue of Article 3, if they provide goods or services to EU data subjects. Chapter V covers transfers of personal data to third countries and starts with Article 44,[6] which states that the level of data protection must not be undermined when these happen.[7] The GDPR does not explicitly define a 'transfer', but the European Data Protection Board (EDPB) provides three criteria: first, the exporter of personal data is subject to the GDPR,[8] they make the data available to another controller or processor by transmission or otherwise, which excludes data made available by the data subject,[9] and the importer is an international organisation or in a third country (outside the EU).[10]

When conducting cross-border data transfers, there are three main ways in which these are legalised: adequacy decisions, safeguards, and derogations. If an adequacy decision is made for this third country concerning its domestic law,[11] respect for fundamental freedoms,[12] and adequacy of an independent supervisory authority enforcing these obligations,[13] then transfers do not need specific authorisation.[14] This means they can be done in the same way that they would within the EU. In the absence of an adequacy decision, safeguards can be used to legalise transfers,[15] such as standard contractual clauses between the importer and exporter which guarantee a certain level of data protection.[16] Additionally, without an adequacy decision and safeguards, derogations for specific situations can be used to legalise transfers.[17]

Evidently, the starting point for cross-border transfers is that they are permitted only where one of the above is present. Data localisation fully avoids the

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[6] ibid art 44.

[7] ibid.

[8] European Data Protection Board, Guidelines 05/2021 on the Interplay between the application of Article 3 and the provisions on international transfers as per Chapter V of the GDPR Version 2.0 (Guidelines, 14 February 2023) 7–8.

[9] ibid 8.

[10] ibid 11–12.

[11] GDPR (n 3) art 45(2)(a).

[12] ibid.

[13] ibid art 45(2)(b).

[14] ibid art 45(1).

[15] ibid art 46.

[16] ibid art 46(2)–(3).

[17] ibid art 49.

need to legalise transfers because this means that data is processed in the same jurisdiction that it is collected in.[18] It is therefore not transferred to the third country. However, this is not an automatic fix because some companies, such as Meta, would be unable to provide services to the UK and EU if it could not transfer data to the US.[19] This shows why Uber may have had to accept the risk and burden of legalising cross-border transfers instead of localising their processing. As for the current framework, the adequacy decision from the 10th of July 2023 governs transfers between the EU and US.[20] However, between this date and the invalidation of the previous EU-US Privacy Shield in *Schrems II* on 16th of July 2020,[21] there was no adequacy decision, meaning that safeguards or derogations were necessary.[22] Uber certified itself under this decision on 27th of November 2023.[23]

Fundamentally, the GDPR takes a 'risk-based' approach where the onus is put on the data processors and controllers to guarantee their own compliance through calibrating and implementing obligations in a sufficient manner to guarantee protection.[24] The GDPR assumes that controllers will act accordingly and make a number of difficult decisions, such as assessing and evaluating the risks to rights and freedoms of data subjects that their processing poses, and how to prevent these.[25] This case study exposes a problem with this, namely that companies cannot always effectively make these decisions, and that effectively making data controllers into decision-makers naturally increases their responsibility here.

Finally, the overarching principles of lawfulness, integrity and confidentiality are relevant because this case concerns the lawfulness of the transfers, and whether the integrity and confidentiality of the personal data were violated.[26] Privacy rights are not confined to the GDPR because the right to respect

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[18] Anupam Chander and Joe Jones, 'What if It Were Illegal to Transfer Personal Data From the European Union to the United States?' (*Lawfare,* 22 June 2023) <https://www.lawfaremedia.org/article/what-if-it-were-illegal-to-transfer-personal-data-from-the-european-union-to-the-united-states> accessed 8 April 2025.

[19] ibid.

[20] Commission Implementing Decision (EU) 2023/1795 of 10 July 2023 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate level of protection of personal data under the EU-US Data Privacy Framework [2023] OJ L231/118.

[21] Case C-311/18 Data Protection Commissioner v Facebook Ireland and Maximilian Schrems (Schrems II) [2020] ECLI:EU:C:2020:559.

[22] GDPR (n 3) arts 45–46.

[23] Autoriteit Persoonsgegevens, *Decision to impose an administrative fine* (machine translation, 22 July 2024) <https://www.autoriteitpersoonsgegevens.nl/system/files?file=2024-08/Besluit%20boete%20Uber%20doorgifte%20naar%20VS.pdf > accessed 8 April 2025 [45].

[24] Claudia Quelle, 'Enhancing Compliance under the General Data Protection Regulation: The Risky Upshot of the Accountability and Risk-based Approach' (2018) 9(3) *European Journal of Risk Regulation* 502, 505–509.

[25] ibid 524–526.

[26] GDPR (n 3) art 5(1)(a) and (f).

for private life and communications, as well as the right to protection of personal data, are both asserted by the Charter of Fundamental Rights of the European Union.[27] This has provided an overview of the relevant legal and normative framework of this case study, which now means that the details of the case can now be considered.

2. Factual Background of the Uber Case Study

This will outline the factual background of the case study in order to put the fine and subsequent discussion of the GDPR into context. The principal place of business for Uber Technologies Inc. (UTI) is the US, which is where they process data.[28] Uber BV (UBV) represents the company in Europe with its main establishment in the Netherlands.[29] As part of their employment, EU Uber drivers create an account on the Uber app and enter their personal data, which is processed by UTI.[30] This is why a cross-border transfer from the EU to the US occurs.[31]

In June 2020, the Commission Nationale L'Informatique et Libertés (CNIL) in France issued a statement received from the Ligue des Droits de L'homme (a French human rights group), made on behalf of 21 Uber drivers.[32] This rose to 172 drivers by September 2020, and an additional complaint was added concerning Uber's legal position following *Schrems II* and the legality of their transfers.[33] After establishing their competence to act as the supervisory authority under the One-Stop-Shop Procedure,[34] the AP opened an investigation into these transfers, which became the focal point of this case.[35]

3. Disputed Legal Issues of this Case Study

After quickly establishing that Uber processed personal data,[36] the issue was whether the transfers from UBV to UTI between 6th of August 2021 and 27th of November 2023 were lawful.[37] While the violation had ended when the case was decided, the AP could still respond to it.[38] Chapter V of the GDPR provides the relevant legal provisions (as discussed), which Uber argued did not apply because

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[27] Charter of Fundamental Rights of the European Union [2000] OJ C364/1 arts 7–8.

[28] Autoriteit Persoonsgegevens, *Decision to impose an administrative fine* (n 23) [16].

[29] ibid [7] and [64].

[30] ibid [11] and [16].

[31] ibid [16]–[18].

[32] ibid [3].

[33] ibid [3]–[4].

[34] ibid [64]; GDPR (n 3) art 56(1).

[35] Autoriteit Persoonsgegevens, *Decision to impose an administrative fine* (n 23) [5].

[36] ibid [59].

[37] ibid.

[38] ibid [138].

their processing already fell under Article 3, and they cannot be applied simultaneously.[39] The AP rejected this and held that both can be applied because the purpose of Chapter V is to ensure that the territorial obligations of Article 3 are not circumvented.[40] The AP then considered the following three issues individually to assess the legality of the transfers. They considered whether these qualified as transfers for the purposes of the GDPR,[41] whether a transfer tool (safeguard) was needed and used,[42] and whether Uber could rely on derogations to legalise transfers.[43]

Using the EDPB's guidelines, the AP decided a transfer for the purposes of the GDPR did occur.[44] The second criterion was contentious because the EDPB excludes a data subject from being an exporter.[45] The drivers entered their own data into the app which would mean the GDPR does not apply.[46] However, the AP took a purposive approach to the meaning of 'exporter', because a strict interpretation would undermine the protection offered to data subjects.[47] The AP appreciated that Uber exercised considerable influence over this process and effectively gave the driver no choice when entering their data.[48] This ensured that the GDPR was not applicable only in a rigid set of circumstances, and effectively understood why many data subjects give their data to controllers and processors, especially in the context of employment where there is a power imbalance and sense of necessity.

Next, the AP held that a transfer tool was necessary, and that Uber should have known this.[49] Uber used standard contractual clauses until the 6th of August 2021 and subsequently argued that none were available to them after this date.[50] Uber clearly understood their obligations under the GDPR but intentionally disregarded them. If Uber were unaware of their requirements, their conduct would appear more negligent than intentional, which is a less severe (but still serious) form of culpability. In regard to Uber's ability to comply with the GDPR, many privacy professionals rated compliance in cross-border transfers as their most difficult task

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[39] ibid [47].

[40] ibid [69]; GDPR (n 3) art 3.

[41] Autoriteit Persoonsgegevens, *Decision to impose an administrative fine* (n 23) [98].

[42] ibid [105].

[43] ibid [118]; GDPR (n 3) art 49.

[44] Autoriteit Persoonsgegevens, *Decision to impose an administrative fine* (n 23) [98].

[45] ibid [85]–[86]; European Data Protection Board, *Guidelines 05/2021* (n 8) 8.

[46] Autoriteit Persoonsgegevens, *Decision to impose an administrative fine* (n 23) [50].

[47] ibid [84].

[48] ibid [89].

[49] ibid [108]–[110].

[50] ibid [109]–[110].

following *Schrems II*,[51] and companies face significant 'technical and managerial challenges' while trying to comply with these obligations.[52] However, Uber is a large company, which should make compliance achievable both in terms of resources and expertise. This is a weak excuse.

Finally, Uber argued that the derogations of Article 49(1)(b) and (c) applied here and made the transfers legal.[53] Article 49(1)(b) is applicable where the transfer of personal data is necessary for pre-contractual measures taken at the data subject's request or the performance of a contract between the data subject and controller.[54] Article 49(1)(c) can be used when the transfer is necessary for the conclusion or performance of a contract in the data subject's interest between the controller and the data subject.[55] The AP rejected this, by virtue of Recital 111 which states that derogations can only legalise incidental transfers,[56] whereas the systematic, repetitive, and continuous nature of these transfers prevents it from applying.[57] These derogations would also exempt Uber from obligations under Articles 7 and 8 of the Charter of Fundamental Rights, which can only occur when objectively necessary.[58] Uber failed to prove this objective necessity.[59] After establishing the illegality of the transfers,[60] the AP considered what action to take against Uber under the GDPR.

4. Analysis of the Fine

Uber was fined €290 million, which is the largest issued by the AP, and the seventh largest ever for a GDPR violation.[61] Violations of Article 44 fall under Article 83(5)(c), and can lead to fines of up to €20 million or 4% of the company's annual turnover, whichever is higher.[62] UBV and UTI were classed as the same undertaking, making their overall turnover higher.[63] The maximum possible fine

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[51] Müge Fazlioglu, 'IAPP-EY Annual Privacy Governance Report 2021'(IAPP Report, 14 October 2022) v; *Schrems II* (n 21).

[52] Yujin Kwon and others, 'SoK: The Gap Between Data Rights Ideals and Reality' (2023) *arXiv* 2312.01511v1, 6.

[53] Autoriteit Persoonsgegevens, *Decision to impose an administrative fine* (n 23) [120].

[54] GDPR (n 3) art 49(1)(b).

[55] GDPR (n 3) art 49(1)(c).

[56] GDPR (n 3) Recital 111.

[57] Autoriteit Persoonsgegevens, *Decision to impose an administrative fine* (n 23) [122].

[58] ibid [121], [127], [133]; Charter (n 27) arts 7, 8.

[59] Autoriteit Persoonsgegevens, *Decision to impose an administrative fine* (n 23) [121], [127], [133].

[60] ibid [135].

[61] ibid [167]; CMS Law, 'GDPR Enforcement Tracker' (*Enforcement Tracker*) <https://www.enforcementtracker.com> accessed 18 April 2026.

[62] GDPR (n 3) article 83(5)(c).

[63] Autoriteit Persoonsgegevens, *Decision to impose an administrative fine* (n 23) [160].

was adjusted to this at €1.369 billion.[64] When issuing an administrative fine, a data protection authority (DPA) considers the guidelines of Article 83(2).[65] They acknowledged that Uber knowingly allowed transfers to happen for a substantial amount of time,[66] and involved special category data that requires greater protection.[67] Given the reasons for invalidating the Privacy Shield,[68] this meant that for nearly two years US authorities could theoretically access this data, which significantly infringes Articles 7 and 8 of the Charter of Fundamental Rights.[69]

The severity of unlawfully processing special category data was considered by the AP earlier in 2024 when they imposed a €30.5 million fine on Clearview AI,[70] which provides facial recognition technology.[71] €20 million came from this infringement,[72] which was the maximum available fine in the circumstances.[73] Ongoing penalty payments were also implemented with the intention of stopping ongoing behaviour which made the AP's action more drastic.[74] Unlike Clearview AI, Uber avoided the maximum penalty because the number of affected data subjects was lower, and because the infringement had ended.[75] While the AP did not disclose the number of affected parties, 172 drivers participated in the complaint which could provide some indication of a minimum number of affected individuals.[76] The affected individuals would be limited to those who worked with Uber, which is not a large portion of society, but still requires protection.

When assessing the proportionality and reasonableness of the fine, Uber argued that notification of the fine could harm their prices at the New York Stock Exchange.[77] The AP replied that if this did happen, it would not make the fine unreasonable or disproportionate because the purpose is to punish unlawful conduct

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[64] ibid [163].

[65] GDPR (n 3) art 83(2).

[66] Autoriteit Persoonsgegevens, *Decision to impose an administrative fine* (n 23) [140], [156].

[67] ibid [157]; GDPR (n 3) art 9(1).

[68] *Schrems II* (n 21) [180]–[200].

[69] Autoriteit Persoonsgegevens, *Decision to impose an administrative fine* (n 23) [151]; Charter (n 27) arts 7, 8.

[70] Autoriteit Persoonsgegevens, *Decision to impose fines and penalty payments* (Machine Translation, 16 May 2024) <https://www.autoriteitpersoonsgegevens.nl/en/system/files?file=2024-09/Decision%20fines%20and%20orders%20subject%20to%20a%20penalty%20Clearview.pdf > accessed 21 April 2025.

[71] ibid [6].

[72] ibid [219].

[73] ibid [211].

[74] ibid [223]–[224], [231], [233], [235].

[75] Autoriteit Persoonsgegevens, *Decision to impose an administrative fine* (n 23) [166].

[76] Autoriteit Persoonsgegevens, Decision to impose fines and penalty payments (n 70) [3].

[77] ibid [173]–[174].

and promote compliance.[78] Uber's stock price did seem to drop in early August of 2024 but recovered quickly.[79] Accordingly, the only punishment imposed is the administrative fine. Given how the past unlawful conduct (the illegal transfers) had ended, other powers under Article 58, such as ordering compliance or suspending data flows, would be redundant.[80]

A similar case requiring a different response arose in 2022 when the CNIL ordered Google to bring its processing into compliance with Chapter V of the GDPR because they were transferring data from the EU to Google LLC in the US with inadequate safeguards.[81] This was appropriate because the violation was ongoing.[82] In May 2023, the Irish DPA fined Meta €1.2 billion for the same infringement and ordered them to bring their processing into compliance.[83] They followed the same guidelines of Article 83 and reached a substantially larger fine (the largest ever imposed for a GDPR violation) because Meta has millions of EU users,[84] therefore millions of data subjects had their rights infringed. This shows how much higher the AP's €290 million fine could have been if the number of affected data subjects was larger, and their other options had the infringement been ongoing. After considering this, the fine is clearly appropriate. However, this does not provide much indication as to how the rights of the data subjects were upheld or protected, or how the harm the data subjects faced was remedied on an individual level.

5. The rights of data subjects

To assess the extent to which the GDPR can protect the rights of data subjects, it is important to determine what these rights are. Data subjects have the right of access to information about the nature of the processing,[85] and the GDPR imposes obligations onto the controllers in order to uphold this. The controller must

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[78] ibid.

[79] Nasdaq, 'Uber Technologies, Inc. Common Stock (UBER) Historical Quotes' (2025) <https://www.nasdaq.com/market-activity/stocks/uber> accessed 19 April 2025.

[80] GDPR (n 3) art 58.

[81] Chair of the Commission Nationale de l'Informatique et des Libertés (CNIL), 'Decision Ordering the Company to Comply' (Redacted Copy from the European Data Protection Board, 10 February 2022) 10 <https://www.edpb.europa.eu/system/files/2022-08/fr_2022-02_decisionpublic_redacted_0.pdf?> accessed 19 July 2026.

[82] ibid 10.

[83] European Data Protection Board, Binding Decision 1/2023 on the dispute submitted by the Irish SA on data transfers by Meta Platforms Ireland Limited for its Facebook service (Art. 65 GDPR) (13 April 2023) <https://www.edpb.europa.eu/system/files/documents/2023-05/edpb_bindingdecision_202301_ie_sa_facebooktransfers_en.pdf> accessed 21 April 2025. This link works fine for me, could you recheck it and let me know whether it is still causing issues? I pasted it in again in case that makes a difference.

[84] European Data Protection Board, *Binding Decision 1/2023* (n 83) [93]; CMS Law, GDPR Enforcement Tracker (n 61).

[85] GDPR (n 3) art 15.

provide the data subject with information relating to the purposes of processing,[86] the recipients of the personal data,[87] and the right to make a complaint with a supervisory authority.[88] This information must be provided in an intelligible and accessible manner which makes it easier for the data subject to understand and use.[89] This holds intrinsic value, because awareness of how personal data is used and the sense of control it provides, is valuable in itself. There is instrumental value as well because this enables data subjects to exercise their rights to due process and effective judicial protection, which is provided for in the GDPR.[90] This relates to the harms that can arise from GDPR breaches, and specifically what may have arisen in this case.

6. Harm Arising from these Unlawful Transfers

The GDPR classes harms caused by infringements as 'physical, material, and non-material'.[91] The reasons behind the invalidation of the Privacy Shield will also be considered, because these are the risks (and therefore harms) that drivers possibly faced as a result of these transfers. This section will use the terminology of 'eventual privacy harm' and 'consequential harm' to differentiate between the effects of non-material, subjective, and material harm caused by illegal data transfers and data misuse.[92] These terms originating from Ignacio Cofone's writing provide more depth into the impact on data subjects than the GDPR terminology does.[93] Eventual privacy harm can be categorised as the non-material and subjective harm arising from the sense of loss of control over data, which corresponds with the intrinsic value of data subject rights.[94] Here, this would arise when a driver realised US controllers and processors could unlawfully access their personal data, and felt they lost control over their privacy. As is the case with non-material and subjective harm in other areas of law (such as tort), this is difficult to quantify in financial terms.

Consequential harm comes from the consequences of misusing personal data, which is more objective, and encapsulates what the GDPR means by 'material' harm.[95] This would arise if US authorities processed data of the drivers which led

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[86] ibid art 13(1)(c).

[87] ibid art 13(1)(e).

[88] ibid art 13(2)(d).

[89] ibid art 12(1).

[90] ibid art 79; Charter (n 27) art 47; Jef Ausloos, Michael Veale and René Mahieu, 'Getting Data Subject Rights Right' (Submission to the EDPB, 2019) paras 15, 19.

[91] GDPR (n 3) Recital 75.

[92] Ignacio Cofone, *The Privacy Fallacy* (Cambridge University Press 2023) 114.

[93] ibid.

[94] ibid.

[95] Cofone (n 92); GDPR (n 3) Recital 75.

to formation of negative opinions about them and possible damage to their reputations. This corresponds with the instrumental value of data subject rights because of its practical consequences for the data subject. The consequential and objective harm to the drivers could be substantial as a result of Uber's transfers because a reason behind invalidating the Privacy Shield was the lack of adequate judicial recourse it provided to EU citizens.[96] This is easier to quantify in financial terms.

Building on this, a problem identified with the Privacy Shield during an annual review was that onward transfers from the US required greater monitoring.[97] An onward transfer is where an external processor or controller transfers the data to another third country or international organisation.[98] This means that the personal data of the drivers may have been transferred elsewhere from the US without their knowledge. If so, this adds to the non-material harm suffered by losing control over personal data, as well as the consequential harm because receiving a remedy from other controllers and processors could be harder.

The same GDPR infringement can lead to different harms arising. A reductionist view prioritises material harms and considers that privacy is worth protecting only to the extent to prevent material harms happening to individuals (the 'privacy fallacy').[99] This disregards the intrinsic value of privacy and the importance of data protection and is not reflective of the GDPR and its approach to harm. Now that the possible forms of harm experienced by data subjects in this case has been discussed, it is important to place this into the context of the GDPR's compensation framework and how these data subjects could have accessed a remedy for these harms alongside analysis of the GDPR's effectiveness.

7. The GDPR's Compensation Framework

Before exploring the compensation framework of the GDPR and possible reforms, it is important to briefly revisit the previous discussion about the fine imposed, by stating that the purpose of a fine under the GDPR is punitive, and it aims to act as a deterrent.[100] However, this is separate to any individual harm suffered, and on its own is insufficient to guarantee a right to compensation for affected data subjects.[101] Through discouraging future similar behaviour, this can

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[96] *Schrems II* (n 21) [65], [195]–[197].

[97] European Data Protection Board, *EU–US Privacy Shield-Third Annual Joint Review* (adopted 12 November 2019) <https://www.edpb.europa.eu/sites/default/files/files/file1/edpbprivacyshield3rdannualreport.pdf_en.pdf> accessed 1 May 2025 paras 8, 25, 113; Gregory Voss, 'Cross-Border Data Flows, The GDPR, and Data Governance' (2020) 29(3) *Washington International Law Journal* 485, 515.

[98] GDPR (n 3) art 44.

[99] Cofone (n 92) 115.

[100] Autoriteit Persoonsgegevens, *Decision to impose an administrative fine* (n 23) [173]–[174].

[101] *UI v Österreichische Post AG* [2023] ECLI:EU:C:2023:370, [40], [42].

inadvertently protect the rights of data subjects, but other than punishing Uber, it does not appear to help the affected drivers. Accountability is reassuring and symbolic, which could help data subjects recover from non-material harm, but still may still be insufficient on its own.

The GDPR allows data subjects to obtain an effective judicial remedy against a controller or processor,[102] and to obtain compensation for material or non-material damage from an infringement.[103] However, this burden falls entirely on the data subject. Cofone states that some EU member states can be more willing than others to provide compensation for non-material and subjective harm,[104] which would further disadvantage data subjects when they try to remedy the harm caused by processors and controllers. However, this assertion now appears outdated, with the *Österreichische Post AG v UI* decision of 2023 finding that Article 82 precludes the imposition of a national rule which requires a data subject to prove a certain level of harm and meet a specific threshold to obtain compensation for non-material harm,[105] as this would undermine the cohesion of the GDPR.[106] Notably, this case failed to define what non-material harm is. Additionally, cases such as this could include a significant power imbalance between the data subject and the controller or processor, which all could mean that the GDPR makes it easier for DPAs to punish wrongdoings than for data subjects to seek relief.

To understand how the GDPR could better address harms faced by data subjects, a tort law perspective is taken. A greater focus on affected individuals (such as the drivers) and putting them into the position they were in prior to the infringement through compensation or judicial remedies could be achieved in two main ways. The first is extending the DPAs' active role in enforcing obligations on controllers and processors to help data subjects seek judicial remedies and obtain compensation when these obligations are breached. Cases with a limited number of affected data subjects (such as the drivers) are instances where this could be achievable. However, in cases such as Meta's unlawful transfers with millions of affected data subjects,[107] this could be impossible. If only certain groups of data subjects can access this assistance depending on their size and the capacity of their respective DPA, this could lead to inconsistent approaches by national courts. This is not ideal and shows it may be best for DPAs to maintain their current (albeit not perfect) role.

The second option is if the GDPR provides a specific framework for data subjects to obtain compensation or a judicial remedy across different EU countries,

[102] GDPR (n 3) art 79.

[103] ibid art 82; GDPR Recital 146.

[104] Cofone (n 92) 115–116.

[105] *UI v Österreichische Post* (n 101) [49]–[51].

[106] ibid.

[107] European Data Protection Board, *Binding Decision 1/2023* (n 83).

similar to how it provides a specific framework for DPAs to be established and cooperate with one another.[108] Instead of putting the entire burden onto data subjects, the GDPR could make the process of obtaining a remedy easier for data subjects when a DPA has established a sufficiently severe breach (such as that committed by Uber). While the finding of a breach by a DPA does not automatically provide a right to compensation for data subjects,[109] DPAs could play a role here. There are groups which help data subjects exercise their rights (such as the Ligue des Droits de L'Homme), but this framework could make the process of obtaining a remedy easier if someone cannot find or access such a group. It could be challenging to implement this because the GDPR is applied in its entirety to many different countries which may have different procedures in place for claiming compensation and damages, but this would ensure that national courts are all equally willing to compensate for the same level of harm. It could harmonise the approach to compensation for data subjects across Member States, which would undoubtedly be a good thing.[110]

However, it could be argued that the current approach of putting this burden onto the data subject is fair. Individuals care about their data rights, but not as many exercise them.[111] This discrepancy between concerns and actual behaviour shows there may not be demand for the GDPR to better assist data subjects. Although this could also prove that the lack of a strong compensation framework from the GDPR is why this discrepancy exists. While many are aware of their rights,[112] not all may be able to exercise them or even know where to begin. The GDPR is currently better suited to enforcement and punishment. The necessity of this is not in question here, but there is scope for the GDPR to become stronger at helping individual data subjects after they have suffered consequential and non-material harm. Creating and implementing a compensation framework for sufficiently serious breaches could allow the GDPR to take on a more dualistic purpose of enabling punishment and relief.

Conclusion

The AP's approach to the transfers guaranteed that the GDPR could be enforced and did so sufficiently. Given the facts, the fine was an effective and proportionate punishment, which would presumably work to deter future breaches

[108] GDPR (n 3) art 60.

[109] *UI v Österreichische Post* (n 101) [40], [42].

[110] It should be noted that the EU implemented the Representative Actions Directive in 2020 (Directive (EU) 2020/1828) which allows for qualified entities to seek redress or injunctive measures against companies through national courts, on behalf of individual consumers. This explicitly covers the GDPR through Article 2(1) and Annex I. This improves access to justice for *consumers*, but the availability of 'qualified entities' for individuals to use to do this can be questioned.

[111] Kwon and others (n 52) 3.

[112] ibid.

of the GDPR and thus protect the future rights of data subjects. In this regard, the GDPR fulfilled its punitive purpose. However, when focusing on the affected data subjects and their rights, the fine does not appear to have remedied the harm done. This is not the fault of the AP, and this does not preclude individuals seeking redress for the damage suffered in this case. It is emblematic of a larger gap within the GDPR, namely the lack of a compensation framework or other mechanism aimed at assisting data subjects in receiving redress. This article has considered the ways in which the GDPR itself can do more to assist data subjects in enforcing their rights, by alleviating some of the burden on them, and by providing a uniform approach to compensation for non-material and material harms.

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ARTICLE

Evaluating the Proposal to Raise the Minimum Age of Criminal Responsibility to Eighteen in England and Wales

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ABSTRACT. England and Wales maintain one of the lowest minimum ages of criminal responsibility (MACR) in Europe at ten. This article critically evaluates the proposal to raise the MACR to eighteen by employing a two-stage analytical framework. The first stage applies an immunity-based analysis to determine whether early criminalisation is normatively defensible. The second applies a capacity-based analysis to assess whether eighteen represents an appropriate threshold for the attribution of criminal liability. This article argues that, while raising the MACR is necessary to shield children from the systemic harms of premature criminal exposure, the proposal of eighteen misconstrues the function of criminal responsibility by equating minimum culpability with full civil autonomy. In its place, a gradual model of responsibility is proposed, operationalised through a reformed *doli incapax,* which requires courts to positively establish a child's understanding on their conduct alongside a welfare-compliant disposal. The article concludes by examining why reform has proven politically resistant, arguing that the conflation of immunity and capacity arguments in political discourse has allowed each question to be bypassed by the other, and that separating them is the necessary precondition for principled reform.

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Introduction

The minimum age of criminal responsibility (MACR) in England and Wales has stood at ten since the Children and Young Persons Act 1963.[1] This threshold was partially moderated by the doctrine of *doli incapax,* which required the prosecution to prove that children aged ten to thirteen understood their actions as seriously wrong.[2] Its abolition by the Crime and Disorder Act 1998, driven by the political fallout of the 1993 murder of James Bulger and New Labour's ensuing 'law and order' agenda, removed that moderating effect entirely.[3] England has since operated without any individualised capacity inquiry below the threshold, leaving it with one of the lowest effective MACRs in Europe.[4] The proposal to raise the MACR to eighteen reflects growing concern about early criminalisation, yet that concern is undermined by a conceptual confusion that existing scholarship has failed to disentangle.

Debates about the appropriate MACR typically oscillate between two fundamentally different questions without distinguishing them. The first is a question of immunity: whether children as a category should be exposed to the criminal justice system at all.[5] The second is a question of capacity: at what point in adolescent development a child possesses sufficient cognitive and moral competence to be held criminally liable.[6] These are not the same question, and the failure to separate them produces incoherent debates.

This article maintains that the immunity-based analysis strongly supports raising the MACR, not because children universally lack capacity, but because the system causes demonstrable harm and consistently fails to achieve its own stated aims. The capacity analysis, however, highlights that eighteen dramatically overshoots the minimum threshold of criminal competence. Taken together, the two frameworks support a gradual model of responsibility, distinguishing relative from full responsibility and operationalised through a reformed *doli incapax* that integrates both questions rather than abandoning one to the other. That this model

[1] Children and Young Persons Act 1963 s 16.

[2] David A Green, 'Comparing Penal Cultures: Child-on-Child Homicide in England and Norway' (2007) 36 *Crime and Justice* 591, 599.

[3] Crime and Disorder Act 1998 s 34; Green (n 2) 599.

[4] Barry Goldson, '"Unsafe, Unjust and Harmful to Wider Society": Grounds for Raising the Minimum Age of Criminal Responsibility in England and Wales' (2013) 13 *Youth Justice* 111, 114.

[5] ibid 116.

[6] ibid 115.

has not been seriously pursued is a consequence of the conflation between immunity and capacity that this article seeks to disentangle.

Analytical Framework

This article proceeds as a socio-legal analysis. Its primary materials are legal doctrine, comparative jurisprudence and human rights standards, but it draws on criminological and developmental evidence where those disciplines highlight questions that legal analysis cannot resolve alone. That disciplinary positioning determines how evidence from different fields is weighted and what kind of claim each form of evidence can support.

The immunity analysis, applied in Part I, asks whether the criminal justice system as an institution can be justified as one to which children should be exposed. It draws on criminological evidence, labelling theory and reoffending data, treating that material as relevant to a normative claim about institutional justification rather than independently determinative. The immunity analysis has a deliberately confined scope. It establishes whether raising the MACR is warranted in principle but cannot determine where the revised threshold should sit.

The capacity analysis, applied in Part II, asks when a child possesses the minimum cognitive and moral competence for criminal liability to attach. It draws on neuroscientific evidence, comparative law and rights-based jurisprudence from the ECHR, in that order, with each carrying progressively greater normative authority. That evidence does not support a single threshold but identifies the constraints any principled threshold would need to satisfy.

Part III is constructive, developing the constraints previously identified and building them into an operating legal test, addressing how relative and full criminal responsibility can be distinguished in practice and what a court should establish at each stage in line with immunity and capacity analyses. Part IV then turns to explanation, examining why change has proven unfeasible despite this warrant, locating resistance not only in adversarial political structures but in how the two questions are addressed in reform discourse.

1. Immunity and the Harms of Child Criminalisation

An immunity-based analysis differs from a capacity-based approach in that it asks if children, as a class, should be shielded from criminal justice exposure, irrespective of whether particular children possess the cognitive prerequisite required for criminal responsibility.[7] Goldson, drawing on Croft, argues that the basis of such an approach lies in addressing the legitimacy of exposing children to criminal justice processes in the first place.[8] This framework serves as the first stage of analysis, since the question of whether the MACR should be raised at all from ten is logically prior to the question of where it should consequently be set.

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[7] ibid 116.

[8] ibid.

Youth custody in England operates through three main institutions: Secure Training Centres, which house vulnerable offenders; Secure Children's Homes, which prioritise rehabilitation; and Youth Offender Institutions, which prioritise containment – a model closer to adult imprisonment.[9] The majority of detained children are held in YOIs despite their structural incongruity with international obligations, including those arising under the UN Convention on the Rights of the Child (UNCRC), affirmed as applicable in *S and Marper v UK,* which requires distinct treatment for youth offenders.[10] Against this background, the immunity analysis rests on two interconnected claims. First, custodial exposure causes demonstrable harm to children. Second, this harm is not incidental but structural, meaning it cannot be resolved through operational reform alone.

1.1. The Structural Harms of Custodial Exposure

On the first claim, the evidence is substantial. Despite almost thirty deaths in youth custody between 1990 and 2005, a systemic culture of violence remains embedded.[11] Between October and December 2020, 588 assaults were recorded across youth secure estates, 35 of them serious.[12] This is a pattern consistent with findings from 2005, in which nearly a quarter of children surveyed in one Young Offender Institution reported physical abuse while in custody.[13]

Although almost a decade apart, YOI Ashfield and Rainsbrook STC were each closed on near-identical grounds: excessive force, inadequate education and prolonged isolation.[14] This pattern, persisting even following the introduction of apparent reforms in pain compliance techniques, supports the second and more significant claim that these are not operational failures against child welfare but structural ones.[15] Goldson's account holds that institutions designed for containment cannot simultaneously function as welfare environments, and the

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[9] Tim Bateman, 'The State of Youth Justice 2020' (*NAYJ Briefing,* 2020) <https://thenayj.org.uk/campaigns-and-publications/> accessed 26 June 2026.

[10] Bateman (n 9) 116; *S and Marper v UK* (2009) 48 EHRR 50.

[11] Barry Goldson, 'Child Imprisonment: A Case for Abolition' (2005) 5 *Youth Justice* 77, 83.

[12] Ministry of Justice, 'Safety in the Children and Young People Secure Estate: Update to December 2020*'* (*GOV.UK,* 29 April 2021) <https://www.gov.uk/government/statistics/safety-in-the-children-and-young-people-secure-estate-update-to-december-2020/safety-in-the-children-and-young-people-secure-estate-update-to-december-2020> accessed 26 June 2026.

[13] Goldson (n 11) 80.

[14] Alan Travis, 'Ashfield youth jail condemned over "unacceptable levels of violence"' *The Guardian* (4 June 2013) <https://www.theguardian.com/society/2013/jun/04/ashfield-youth-jail-violence-bristol> accessed 26 June 2026; Amanda Spielman, 'Letter to the Secretary of State for Justice about Rainsbrook Secure Training Centre' (*Ofsted*, 2020) <www.gov.uk/government/publications/letter-from-amanda-spielman-to-the-secretary-of-state-for-justice-about-rainsbrook-secure-training-centre> accessed 26 June 2026.

[15] Bateman (n 9) 111–112.

recurrence of this failure across institutions a decade apart suggests the contradiction is not incidental to their design but inherent in it.[16]

The structural nature of this harm connects directly to labelling theory, which supplies the framework through which custodial exposure produces recidivism.[17] Lemert's account of secondary deviance identifies how criminal justice contact imposes stigmatising identities that become self-fulfilling.[18] Once labelled, behaviour is interpreted through that label, narrowing legitimate social pathways and increasing the probability for further offending.[19] Goldson applies this foundation specifically to custodial institutions, characterising their effect as iatrogenic – the intervention worsens the condition it claims to address.[20]

The reoffending data is consistent with this account. Some 62.5% of child prisoners reoffended in 2023, a figure that has declined by less than 20% over nearly two decades of reform effort, compared with just 21.3% of those receiving out-of-court disposals reoffended in the same period.[21] This divergence does not establish causation on its own, as the two groups may differ in ways that independently predict reoffending. However, its consistency over time, read alongside the structural analysis above, supports treating custodial exposure as criminogenic rather than corrective for this age group.

An institution whose structure makes harm to children a predictable outcome raises serious questions as to whether it can satisfy the justificatory burden that coercive state intervention requires. Under any credible account of children's rights, including those affirmed in the UNCRC and elaborated in General Comment No. 10, the state carries the burden of demonstrating that criminal justice exposure serves the child's best interests and is strictly necessary.[22] The evidence reviewed gives significant grounds for doubting that burden is currently being met at ten.

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[16] Goldson (n 11) 84.

[17] Edwin M Lemert, *Social Pathology: A Systematic Approach to the Theory of Sociopathic Behaviour* (McGraw-Hill 1951) 315.

[18] ibid 75–77.

[19] ibid 81–82.

[20] Goldson, 'Child Imprisonment' (n 11) 81.

[21] House of Commons Committee of Public Accounts, *Youth Offending: The Delivery of Community and Custodial Sentences* (HC 2003–04, 307) para 1; Ministry of Justice, 'Proven Reoffending Statistics: January to March 2023' (*GOV.UK,* 2025) <https://www.gov.uk/government/statistics/proven-reoffending-statistics-january-to-march-2023/proven-reoffending-statistics-january-to-march-2023#fn:6> accessed 26 June 2026.

[22] United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, arts 3, 37, 40; Committee on the Rights of the Child, 'General Comment No 10 (2007): Children's Rights in Juvenile Justice' (25 April 2007) UN Doc CRC/C/GC/10, paras 10, 23, 71 <https://www.refworld.org/legal/general/crc/2007/43085> accessed 26 June 2026.

1.2. The Limits of Diversion

An immunity-based analysis nevertheless requires consideration of the counter-argument that existing diversionary mechanisms already provide sufficient protection, rendering a statutory increase in the MACR redundant. Initially hailed as the 'watchword of the decade', diversion re-emerged as a structuring principle in 2008, achieving an 86% reduction in first-time entrants by 2018.[23] These are substantial achievements, and diversion's welfare-led frameworks, addressing individual offending needs through restorative and community-based responses, are more consistent with the immunity rationale than custodial punishment. Sutherland's differential association theory supports the underlying logic.[24] If deviant behaviour is learned through association, then restorative interventions that foster prosocial interaction are more likely to interrupt the cycle than punitive ones.[25]

However, the immunity framework reveals the structural limits of diversion as an alternative to reform. Diversion is, by definition, a reactive mechanism.[26] It operates after initial criminal justice contact has occurred, by which point the harms of early exposure have already taken root.[27] Stigma, labelling and formal records still persist.[28] Even where outcomes appear out of the system, such as youth cautions, their records still exist in enhanced DBS checks – quietly sustaining the child's association with offending and criminality.[29]

More fundamentally, diversion is selective. Guided by the ACPO Gravity Matrix, access to welfare interventions depends on offence type rather than developmental need, meaning that diversionary protection is often conditional rather than principled.[30] Goldson and Briggs document geographical variation in local Youth Offending Team cultures.[31] Lower-penal areas are more receptive to

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[23] Mark Telford and Sotirios Santatzoglou, '"No More Excuses": The Shaping of Community Interventions in England and Wales in the 1980s' (2013) 3 *IJPLAP* 315; Aaron Brown and Anthony Charles, 'The Minimum Age of Criminal Responsibility: The Need for a Holistic Approach' (2019) 21 *Youth Justice* 153, 156.

[24] Edwin H Sutherland, *Principles of Criminology* (3rd edn, J B Lippincott 1939) 3–6.

[25] ibid 9.

[26] Brown and Charles (n 23) 156.

[27] ibid 156.

[28] ibid 156–57.

[29] Bateman (n 9) 71.

[30] Kate Aubrey-Johnson, Shauneen Lambe and Jennifer Twite, *Youth Justice Law and Practice* (Legal Action Group 2019) 215–219.

[31] Barry Goldson and Daniel Briggs, *Making Youth Justice, Local Penal Cultures and Differential Outcomes: Lessons and Prospects for Policy and Practice* (Howard League for Penal Reform 2021) 5–6.

diversion, higher-penal areas more ambivalent.[32] The result is a significant variation in prosecution outcome determined by geography rather than culpability.

This discretionary logic also permits racial disparities to persist. Between 2015 and 2020, the proportion of sentencing occasions involving Black children increased by 8%, while the proportion involving white children decreased by 12%.[33] Just as racially-informed stop-and-search practices compound over-policing through informal discretion, the selective application of diversion risks embedding inequalities rather than addressing them, in ways that a principled statutory threshold is better placed to address.[34]

Therefore, the immunity-based analysis supports raising the MACR on grounds that are narrower and distinct from the capacity question. The system, as presently constituted, produces structural harm that diversion does not prevent, as diversion operates after that harm has already begun. If the harm of early exposure begins at the point of contact rather than the point of conviction, no mechanism that operates after contact can prevent it, however well-resourced or well-intentioned. A ten-year-old in England can still be brought within these institutions before any diversionary safeguards have the chance to apply. Closing that gap requires establishing a statutory boundary before contact occurs. The question of where the boundary should sit, and whether it should be eighteen, is for the capacity question to answer.

2. Capacity and the Threshold of Criminal Responsibility in Childhood

A capacity-based analysis asks a different question from the immunity analysis. The concern is at what point in development a child possesses the minimum degree of cognitive and moral competence necessary to attract criminal liability.[35]

The concept of minimum competence is significant here. Criminal responsibility does not require full cognitive maturity, nor does it require the complete suite of civil rights available to adults.[36] It requires that a person understand, at some sufficient level, the nature and wrongfulness of their conduct, and that they possess enough volitional control to be treated as the author of it.[37]

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[32] ibid 25.

[33] Ministry of Justice, *Youth Justice Statistics 2019/20: England and Wales* (*GOV.UK,* 2021) 31 <https://www.gov.uk/government/statistics/youth-justice-statistics-2019-to-2020> accessed 26 June 2026.

[34] Lesley McAra and Susan McVie, 'The Usual Suspects? Street-Life, Young People and the Police' (2005) 5 *Criminal Justice* 5; Matteo Tiratelli, Paul Quinton and Ben Bradford, 'Does Stop and Search Deter Crime? Evidence from Ten Years of London-wide Data' (2018) 58 *British Journal of Criminology* 1212.

[35] Goldson (n 4) 115.

[36] ibid.

[37] ibid.

Setting the MACR identifies the lowest point at which the law judges that the minimum threshold to be reliably met.[38]

In assessing the case for setting MACR at eighteen, the relevant inquiry is not whether eighteen-year-olds are criminally capable, but whether eighteen represents the earlier point at which such capacity can properly be said to exist. The analysis here suggests that it does not.

2.1. Neuroscientific Evidence

The adolescent brain is structurally distinct from the adult brain in ways that bear directly on criminal responsibility. The prefrontal cortex, which governs impulse control, moral reasoning and the ability to understand the consequences of one's actions, continues developing into the early-twenties.[39] Neuroscientific research demonstrates that during adolescence, decision-making is disproportionately governed by the emotionally driven amygdala rather than by the reasoned evaluation the prefrontal cortex provides.[40] This pattern is widely accepted and consistently replicated across adolescent development research.[41] The capacity to understand the wrongfulness of one's conduct, which is precisely what minimum criminal responsibility requires, is among the last cognitive functions to fully mature.[42]

Although, as Delmage warned against the over-simplification of scientific data into legal absolutes, neuroscience continues to establish that capacity develops gradually across adolescence, rather than arriving at a fixed point.[43] Thus, a principled MACR should reflect that gradation.

2.2. International Consensus

Across approximately ninety jurisdictions, the average MACR is around fourteen, with most European systems operating at fifteen.[44] England, at ten, sits well below this range.[45] This consistency across diverse legal traditions carries genuine normative weight, reflecting the considered judgement that mid-adolescence is where minimum capacity is sufficiently present to justify

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[38] ibid.

[39] Enys Delmage, 'The Minimum Age of Criminal Responsibility: A Medico-Legal Perspective' (2013) 13 *Youth Justice* 102, 105–107.

[40] ibid.

[41] ibid 108.

[42] ibid 107.

[43] ibid 105.

[44] Neal Hazel, *Cross-national Comparison of Youth Justice* (Youth Justice Board 2008) 7 <https://dera.ioe.ac.uk/id/eprint/7996/> accessed 26 June 2026.

[45] ibid.

attribution.[46] That consensus finds direct expression in the international instruments that guide the capacity threshold.

The UN Committee on the Rights of the Child's General Comment No. 10 establishes twelve as the mandatory minimum MACR but deliberately refrains from specifying an aspirational age, instead directing states to calibrate the threshold against their evolving conceptions of children's rights and social maturity.[47] This approach reflects the broader philosophy of the UNCRC, an internationally binding treaty that underpins youth justice in the child's dignity, protection from degrading treatment, and their best interests.[48] Further, commentary on the Beijing Rules,[49] non-binding yet widely regarded as influential, emphasises the need for a close relationship between criminal responsibility and a child's broader social maturity. This is understood in terms of the child's recognition as an accountable member of society by both themselves and their community.[50] These frameworks do not endorse eighteen as a threshold. They require contextually calibrated judgement informed by rights-based considerations.

2.3. Rights-Based Jurisprudence

Jurisprudence from the European Court of Human Rights resists the equation of capacity with full adult rights-based status. In *T and V v United Kingdom*,[51] the Court did not hold the prosecution of the Bulger defendants to be inherently unlawful on developmental grounds. It was assessed whether the trial process was capable of upholding the defendants' rights as Article 3 and Article 6 claimants.[52] The implication is that the legitimacy of attributing criminal responsibility to children turns not purely cognitive, it also requires that the legal process can treat the child as a rights-holder at every stage. The threshold for a principled MACR would be set as a point where the law can coherently hold a child both responsible for their actions and protected as a rights-bearer throughout the process.

The argument for eighteen draws directly on this intra-jurisdictional coherence. As it currently stands, a child in England and Wales can be held criminally responsible yet legally incapable of buying a pet.[53] While legal capacities are fragmented across adolescence, there is a clear trajectory in which major rights cluster in later stages. Part-time working hours are permitted as young as fourteen,

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[46] Goldson (n 4) 119.

[47] Committee on the Rights of the Child, 'General Comment No 10' (n 22) para 32.

[48] UNCRC, arts 3, 37, 39 and 40.

[49] UNGA Res 40/33 (29 November 1985) UN Doc A/RES/40/33 'United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)' r 4.

[50] ibid rr 4 and 17.

[51] *T and V v United Kingdom* (2000) 30 EHRR 121.

[52] ibid.

[53] Goldson (n 4) 119–120.

yet substantive entitlements begin to develop at sixteen, including joining the armed forces, expand at seventeen, with the right to drive, and are fully conferred at eighteen.[54]

These thresholds track a broader judgement about when adolescents are treated as capable of bearing responsibility. Recent reforms, including raising the minimum marriage age from sixteen to eighteen in 2022 to recognise adolescents' vulnerability to coercion, illustrate a consistent trend of deferring, not accelerating, capacity.[55] Even within the youth justice system, differential treatment of younger adolescents exists compared to their older counterparts. Intensive YROs are typically unavailable for under-fifteens unless deemed persistent offenders, as is the case for DTOs between 12 and 14.[56] There is a principled reluctance, reflected across the legal system, to treat younger adolescents as fully responsible actors.

Nevertheless, under Mill's harm principle, the threshold for legitimate state interference is not the attainment of full autonomous agency but the causing of harm to others.[57] Civil capacity protections shield individuals from the consequences of their own choices.[58] Criminal liability protects third parties from harm.[59] These are structurally different justifications and the age at which they attach does not need to be identical. A sixteen-year-old who causes significant criminal harm to another cannot escape criminal accountability solely because they cannot yet vote, as this would be incompatible with the harm principle and normative basis of criminal law. The civil rights chronology therefore operates as a ceiling on the MACR, not a floor. It marks the point beyond which it would be anomalous to withhold full responsibility, rather than the minimum point at which criminal capacity can first be said to exist.

Eighteen sets the bar too high, equating the ceiling of full civil autonomy with the floor of minimum criminal capacity. Yet ten falls equally outside the range the immunity and capacity evidence identifies. The analysis therefore poses a different question – not where to draw a single line, but whether a single line can ever be principled, given that capacity is a gradual progression across adolescence rather than a fixed point.

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[54] 'Child Employment' (*GOV.UK*) <https://www.gov.uk/child-employment> accessed 26 June 2026; Goldson (n 4) 119–20.

[55] Marriage and Civil Partnership (Minimum Age) Act 2022 s 1; Explanatory Notes to the Marriage and Civil Partnership (Minimum Age) Act 2022 para 7.

[56] Sentencing Council, Sentencing Children and Young People (Sentencing Council, 2017) para 6.4 <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-children-and-young-people/> accessed 26 June 2026.

[57] John Stuart Mill, *On Liberty* (John W Parker and Son 1859) 13, 73.

[58] ibid 94.

[59] ibid 13.

3. Towards a Gradual Model of Responsibility

A principled reformed MACR should reflect a gradation rather than compress it into a single line. Several European jurisdictions adopt a gradual model distinguishing relative responsibility, activated around fourteen, from full responsibility, deferred until majority.[60] A youth subject to relative responsibility is brought within the criminal law but not its full weight, satisfying the harm principle without treating incomplete capacity as complete.[61] Development is a trajectory, not a switch. A gradual model reflects that in its structure, and in doing so, takes seriously what a blunt MACR has appeared incompatible with recognising.

A revised *doli incapax* operationalises this through a two-limbed test. First, the court is required to find positively that the child possesses sufficient understanding of the wrongfulness of their conduct, rather than assuming it from age.[62] Second, courts should be satisfied that the available disposal meets the welfare and rehabilitative obligations identified in Part I, and should not proceed where the proposed disposal includes custodial environments with documented cultures of violence or inadequate rehabilitative provision.

The model thus integrates both questions without subordinating either, ensuring a child is neither punished beyond their demonstrated understanding nor exposed to harm that understanding was never meant to license. This is what the distinction between immunity and capacity makes possible that the existing debate does not. It produces a threshold that answers both questions simultaneously rather than sacrificing one to the other.

Nevertheless, despite the case this analysis establishes, reform has proven persistently resistant to political traction. That resistance is produced by the same conflation this analysis has sought to correct, in which immunity and capacity are routinely used to deflect each other. To understand why requires examining the structural conditions through which arguments for change are filtered and displaced.

4. Reform, Resistance and the Two-Question Problem

The structural conditions that make MACR reform resistant to principled argument have been persuasively analysed by Green, whose account of adversarial constitutional culture provides the foundation for understanding why legally well-grounded proposals have consistently failed to become law in England.[63] Green demonstrates that the post-Bulger trajectory of youth justice policy is not explained by individual political choices alone but by ‘we-they’ frameworks, which create

[60] Goldson (n 4) 119.

[61] ibid.

[62] ibid 114.

[63] Green (n 2).

strong incentives for parties to politicise crime for electoral advantage.[64] Being perceived as lenient on crime carries electoral costs that, under majoritarian systems, parties are rational to avoid.[65]

What Green's account does not fully address, and what the analytical framework developed in this article makes visible, is the argumentative mechanism through which those structural incentives operate at the level of discourse. Goldson locates public debate in England and Wales as trapped in the vexed question of capacity - whether a ten-year-old knows the difference between right and wrong.[66] Politicians invoke common-sense arguments that children are more precocious today, justifying criminal responsibility on perceived cognitive ability alone.[67] That framing is the mechanism through which reform is perpetually deflected.

When immunity-based arguments are advanced, such as claims that the system harms children or that youth custody is criminogenic, they are routinely met not by engaging the institutional question on its own terms, but by invoking capacity-based reasoning.[68] The James Bulger case illustrates this at its most acute. Immunity-based concerns about punitive intervention at ten by experts were not engaged, being effectively relegated.[69] Rather, discourse reframed the debate around the defendants' capacity, constructed as 'adults in everything except years', with senior figures urging society to 'condemn a little more and understand a little less'.[70] The institutional legitimacy question was deferred by reference to individual culpability, as though establishing that the defendants understood their conduct closed the inquiry into what the state was entitled to do with them.

As established, immunity and capacity operate on different registers, concerning distinct perspectives about how the law should respond to children who offend. As the debate treats them as a single question, each can always be made to look like a response to the other. When someone argues the system harms children, the response that they understood their actions sound like an answer - but it is not**.** It addresses culpability, not institutional legitimacy. The deflections produce the appearance of engagement while ensuring neither question is fully addressed.

Scotland's 2019 reform illustrates what happens when only one question is engaged. The Age of Criminal Responsibility (Scotland) Act 2019 raised the MACR from eight to twelve, yet left entirely unaddressed the institutional harms

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[64] ibid 627.

[65] ibid 624.

[66] Goldson (n 4) 116.

[67] Thomas Crofts, 'Catching Up with Europe: Taking the Age of Criminal Responsibility Seriously in England' (2009) 17 *Eur J Crime Cr L Cr J* 267, 285.

[68] Goldson (n 4) 125.

[69] Green (n 2) 597.

[70] ibid 601; Goldson (n 4) 113.

that the immunity analysis identifies as independently serious and intertwined.[71] Investigative powers, including strip searches and forensic sampling, were retained for children beneath the revised threshold, and pre-twelve conduct remains recordable in ways this article has established significantly affect the child.[72] As the Children and Young People's Commissioner Scotland has observed, these maintain life-long negative impacts.[73] Scotland raised the threshold for prosecution capacity without correspondingly raising the threshold for harmful system exposure.

Green's structural account and the conceptual analysis offered here are thus complementary rather than competing. Green establishes the structural conditions, adversarial constitutional culture and penal populism, that make reform systemically resistant. This article's framework highlights the argumentative mechanism through which that resistance is sustained in practice, namely the conflation of immunity and capacity that Goldson's account makes visible. Together, they explain not only why reform has failed but how it will continue to fail so long as the two questions remain fused.

However, the conflation is a product of how the debate has been structured, not an inherent feature of the questions themselves. The two-limbed model proposed in Part III is designed to break that pattern. By requiring courts to establish capacity individually rather than presuming it from age, and by conditioning any finding of liability on the availability of a welfare-compliant disposal, it ensures that neither question can be answered by invoking the logic of the other. A child should not be held criminally responsible beyond what their understanding warrants, nor exposed to institutional harm in its name. Immunity and capacity are distinct obligations, and that reform addressing one question will leave the other unanswered.

Conclusion

The MACR debate in England and Wales has generated substantial argument and negligible reform. This article has suggested that the two are connected. So long as immunity and capacity are treated as a single question, each can be made to look like an answer to the other, and the debate continues without either being resolved. The proposal to raise the MACR to eighteen is the latest casualty of that conflation. It is motivated by legitimate concern about the harms of early criminalisation, but it reaches for a threshold the capacity evidence does not support.

Separating the two questions strengthens the case for reform rather than diluting it. Currently, ten fails because of what the institution does to children who are exposed to it, a failure that holds regardless of what any individual child can be

[71] Age of Criminal Responsibility (Scotland) Act 2019 (asp 7), s 1.

[72] 'Age of Criminal Responsibility' (*Children and Young People's Commissioner Scotland)* <https://www.cypcs.org.uk/positions/age-of-criminal-responsibility/> accessed 26 June 2026.

[73] ibid.

shown to understand. A raise to eighteen fails on different terms. The threshold mistakes the ceiling of civil autonomy, the age by which the law has decided it would be anomalous to withhold full rights, for the floor of criminal competence, the much earlier point at which a person can be said to understand the wrongfulness of their conduct. Yet, no age can reliably mark the day that understanding is complete. The neuroscientific evidence reviewed in Part II shows a capacity that accumulates across adolescence, rather than arriving fully formed at any single point.

A principled reform would need to satisfy both standards at once. It would have to shield children from an institution shown to cause significant harm, while also reflecting that incomplete picture of capacity as something beyond a clean cutoff. No fixed number addresses both obligations, and a single MACR, set anywhere, ends up compromising one obligation to satisfy the other.

That is why the answer proposed here is not a number but a framework. The framework distinguishes relative responsibility, operative from mid-adolescence and subject to the two-limbed revised *doli incapax,* from full responsibility, which attaches at majority. Between those two points, no finding of liability can rest on age alone. By requiring courts to establish a child's understanding individually rather than presuming it from age, alongside conditioning any finding of liability on a welfare-compliant disposal, neither obligation is set at the expense of the other. That is what separating the two questions makes possible and what no single threshold has ever been able to achieve alone.

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ARTICLE

Balancing Human Rights with Migration Control in Post-Brexit UK Immigration Law: An Analysis of Legislative Reform and Case Studies

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ABSTRACT. This paper evaluates whether UK Immigration law effectively balances human rights with the need for orderly control and management of migration. It examines the impact of Brexit, particularly with the removal of free movement, it then analyses key statutes, including the Nationality and Borders Act 2022 and the Illegal Migration Act 2023. The paper then further evaluates the role of the 1951 Refugee Convention, the Human Rights Act 1998 and the ECHR regarding protecting individuals' rights in migration. Then, exploring the Windrush Scandal and the case of *East African Asians v UK*, and how both these case studies highlight policy failure and human rights breaches. Overall, this paper argues that the UK are yet to find a system that meaningfully balances effective migration control whilst upholding human rights.

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Introduction

A person can legally enter the UK either with a visa or as a non-visa national, and those seeking asylum and, refugees can enter through resettlement schemes.[1] If individuals entered the UK through irregular routes, they would be detained pending removal, this also happens to those who breach their conditions of entry and foreign national offenders. Yet, even with the current immigration control system, the net migration has increased in the past years, especially in illegal migration. This leads to the question that, if the UK are effectively controlling and managing the migration into the United Kingdom? The UK government have released Legislation including the Nationality and Borders Act 2022 and the Illegal Migration Act 2023 to try and gain control over the migration and stop people trying to enter through irregular and unsafe routes by evading the border control. These statutes led to people arguing that they breach the human rights obligations that the UK are bound by in the Human Rights Act 1998, the European Courts of Human Rights and the 1951 Refugee Convention. Situations like Rwanda Deportation plan, Windrush, and the Bill of Rights bill have led to the public to not only lose faith in the effectiveness of the policies but individuals, including asylum-seekers and migrants having to fear that their rights are not well protected.

This paper analyses effective balance between maintaining border control and minimising the economic benefit, that rights such as free movement provide. But importantly, it will address whether the current domestic system and the subsequent legislation that was introduced comply with international human rights obligations as set out in the Human Rights Act 1998 and the ECHR. The paper will investigate further whether the current framework is sufficient in balancing both human rights with the need for orderly control and management of migration to the UK.

1. The impact of Brexit on the UK Immigration System

Prior to analysing the UK immigration system this section seeks to examine Brexit and the resulting impact this had. With one of the principal arguments for Brexit being greater control over the borders, this section provides a background for the central argument being that in its current form the immigration system has failed to balance human rights with border control. Not to mention, highlighting the lasting impact of the end of free movement and the labour market shortages that followed.

'Two years ago, the British public voted to leave the European Union and take back control of our borders… for the first time in decades, it will be this country that controls and chooses who we want to come here'. In 2016, the public

[1] Home Office, 'Overview of the immigration system' (7 December 2023) <https://www.gov.uk/government/statistics/immigration-statistics-year-ending-december-2021/overview-of-the-immigration-system> accessed 14 January 2024.

voted to leave the EU with a vote of 52% to 48%,[2] with one of the reasons to leave the EU being to take back control of aspects like migration policies that have previously been determined by EU law. A study by Professor Whiteley 'noted that net migration into Britain had grown sharply in recent years'.[3] The increase of both uncontrolled immigration and controlled immigration from outside the EU has shown the lack of control the government have over the huge influx of migration, potentially swaying more of the British public to vote to leave the EU if it means 'taking back control of our borders'.

For over 15 years, the UK depended on the free movement of workers from the EU to meet skill gaps and the labour shortages, 'almost one in three workers in food production, 15% of construction workers and 15% of workers in science research are EU migrants'.[4] And yet, after Brexit, the main impact within the framework of immigration law and policy was on the ending of the free movement of European Union nationals, causing not only labour shortage issues as there was a more restrictive system for work-related migration from the EU.[5]

Leaving the EU meant that the UK got back 'control' over the border and could remove policies like the free movement and have more legislative autonomy. Yet, before this change, there was already a large influx of irregular migration in the UK, leaving the question, how well they would effectively control the increase, as Brexit alone did not achieve what it was set out to deliver. Leaving the government to strengthen border control whilst balancing human rights.

In summary, Brexit reformed the immigration system and gave greater sovereignty to England over domestic border control, whilst creating economic challenges. Further to the policy impact that reformed the UK immigration system, even with Brexit providing a greater sense of domestic control, it did not change the fact that we remain bound by international obligations to protect human rights.

2. 1951 Refugee Convention

Central to any discussion of asylum protection is the 1951 Refugee Convention, which establishes both the definition of a refugee and the principle of non-refoulement. This section examines the principle of non-refoulement and the impact this has on an individual's safety and human rights yet further seeks to analyse the weaknesses of the convention. Examining the international obligation provides further context for the central argument on whether new legislative

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[2] Paul Whiteley, *Why Britain Really Voted to Leave the European Union* (University of Essex) <https://www.essex.ac.uk/research/showcase/why-britain-really-voted-to-leave-the-european-union> accessed 12 January 2024.

[3] ibid.

[4] Joe Owen and others, 'Managing Migration After Brexit' (Institute for Government, 5 March 2019) <https://www.instituteforgovernment.org.uk/publication/report/managing-migration-after-brexit> accessed 8 August 2026, 11–12.

[5] Jonathan Portes, 'The Impact of the Post-Brexit Migration System on the UK Labour Market' (2023) 18(2) *Contemporary Social Science* 137.

reforms and the immigration system in its current form balances both border control whilst upholding international commitments.

The 1951 Refugee Convention 'provides the internationally recognised definition of a refugee and outlines the legal protection, rights and assistance a refugee is entitled to receive'.[6] Article 33 defines non-refoulement, meaning a refugee who currently faces extreme threats to their life should not be returned, is the core principle in the Convention.[7] This is fundamental in protecting a refugee's human rights and their freedom. However, there are general issues within the convention and its core principle. There are no legal measures to ensure that all countries, within the convention, have a shared responsibility towards an asylum seeker. The Convention's protection only concerns the situation of when an asylum seeker has entered the country of destination, essentially leaving thus country fully responsible to deal with the situation. One of the issues is financial and social complications, especially with the expenses from the point of making an asylum application to then granting a refugee status.[8] Another issue relevant to the extension of protection is the definition of persecution, as according to the 1967 Protocol Relating To The Status Of Refugees: 'there is no universally accepted definition of persecution and various attempts to formulate such a definition have met little success'.[9] The convention and all relevant guidelines do not provide a clear extent and limit for the use of their three purposes of detention.

Although the convention's narrow approach to ensuring a fair balance between human rights for asylum seekers fleeing a country for safety and countries' border control, it did not 'recognise conditions of extreme poverty and material deprivation as grounds for legitimate asylum'.[10] The Convention is crucial as the States that are bound by their protocol to protect a refugee's human rights and ensure that the refugee is not sent back to the country that is putting their life and freedom at risk. In relation to the criticisms listed above, and statistics like how 'in 2022, 45,755 migrants made the crossing, the highest number since figures began to be collected in 2018'[11] and 'more than 63,000 people claimed asylum in the first nine months of 2023',[12] the Convention limits the control a State can have on

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[6] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 1A(2).

[7] ibid art 33.

[8] Gina Clayton and Georgina Firth, *Immigration & Asylum Law* (9th edn, Oxford University Press 2021) 442.

[9] ibid 442–443.

[10] Seyla Benhabib, 'The End of the 1951 Refugee Convention? Dilemmas of Sovereignty, Territoriality, and Human Rights' (2020) 2 *Jus Cogens* 86.

[11] BBC News, 'How Many People Cross the Channel in Small Boats and How Many Claim Asylum in the UK?' (15 December 2023) <https://www.bbc.co.uk/news/uk-53699511> accessed 13 January 2024.

[12] ibid.

controlling the number of asylum-seekers entering. There is a lack of balance between public interest and the obligation to provide humanitarian protection. Additionally, the UK have not effectively processed asylum cases causing 'a backlog of more than 165,000 claims'[13] due to delays in the UK system, showing the incapability to manage the high rates of migration.

This section examined that although governments seek for greater border control, international instruments are fundamental for ensuring legislation and policies remain consistent with human rights. The 1951 Refugee convention, albeit has a narrow approach to ensuring a fair balance between human rights and border control, it provides a sense of direction to assist governments when considering legislative reform, whether the UK has complied with these international obligations remains questionable.

3. Legislative reform after Brexit

3.1. The Nationality and Borders Act 2022

The Nationality and Borders Act 2022 represented the government's first legislative attempt to strengthen England's border control and gain control over migration. This section analyses the reform through its objectives, the two-tier system and its compatibility with human rights, in support of the central argument.

The Nationality and Borders Bill received Royal Assent and became law in April 2022 with the main objectives being; making changes to the UK immigration system as it relates to refugees, by introducing a two-tier system, differentiating refugees based on the method of arrival; reducing the threshold at which someone is considered to have committed a particularly serious crime and potentially not receiving refugee protection; removing stages of appeal or fast-tracking certain cases; introducing penalties for late submission of evidence; and, giving the immigration tribunal additional powers. The Government released the two-tier system with the belief that it would act as a deterrent to asylum seekers with stopping them from travelling illegally.

However, people, including lawyers and UNHCR, have condemned the Bill as being incompatible with the 1951 Refugee Convention despite the government claiming the opposite. In addition, some of the public argue that this legislation is a bad approach towards illegal immigration, and the government needs to take a different approach to ensure the safety of these individuals, such as having more safety routes for people needing to flee danger and realise the reason they are having to migrate into the UK illegally:

Charities who work with refugees every day have shown how criminalising asylum and creating two tiers of refugees is wrong in principle, does nothing to address the reason why people take perilous journeys to find safety in the UK, and is out of step

[13] ibid.

with the British public.[14]

3.2. The Illegal Migration Act 2023

With the establishment of The Nationality and Borders Act 2022, this section evaluates the governments restrictive approach through the implementation of the Illegal Migration Act 2023. This is central to my argument as this was heavily criticised for its compatibility with Human rights.

The government further made the decision to 'pause' the differentiation policy as of July 2023, as they hope that the Illegal Migration Act would 'prevent those entering the UK illegally from claiming asylum and therefore, there would be no need for group 2 refugees, as their claims would not even be considered'.[15]

Even though the legislation's purpose was to increase border control through new frameworks, including a two-tier system with the main priority being to minimise asylum seekers entering through irregular means. Balancing human rights seemed unlikely to succeed with this Act being that it was criticised for its lack of compatibility with Article 31 of the 1951 Refugee Convention.

The Government's attempts to gain control of migration were expanded in the Illegal Migration Act 2023, which implemented a more restrictive approach to assist in tackling illegal migration. The Illegal Migration Act 2023 aims to stop illegal migration into the UK by removing the incentive to make dangerous small boat crossings; speed up the removal of those with no right to be here; prevent people who come to the UK through illegal and dangerous routes from misusing modern slavery safeguards to block their removal; and, ensure that the UK continues to support those in genuine need.[16] The Act imposes a heavy duty on the Home Secretary, for example 'the duty to make arrangements for the removal of people if they have travelled through a safe third country, en route to the UK, and if they require leave to enter or remain do not have it'.[17] The different approach allows for a refugee to be detained for as long as is 'reasonably necessary', this reduces the 'ability of the courts to decide what constitutes a reasonable period of detention, and empower the home secretary'.[18] The bill ultimately gives the

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[14] Luke Stewart, 'Nationality and Border Bill: Cruel Legislation Becomes Law' (*Refugee Council,* 28 April 2022) <https://www.refugeecouncil.org.uk/latest/news/nationality-and-border-bill-cruel-legislation-becomes-law/> accessed 13 January 2024.

[15] Shanaz Ali, 'Government Changes to the Nationality and Borders Act' (*Bindmans,* 12 June 2023) <https://www.bindmans.com/knowledge-hub/changes-to-nationality-and-borders-act/> accessed 13 January 2024.

[16] Home Office, 'Illegal Migration Act 2023' (11 January 2024) <https://www.gov.uk/government/collections/illegal-migration-bill> accessed 13 January 2024.

[17] Alice Donald and Joelle Grogan, 'Illegal Migration Act 2023' (*UK in a Changing Europe,* 15 March 2024) <https://ukandeu.ac.uk/explainers/illegal-migration-act-2023/> accessed 9 August 2026.

[18] Rhys Clyne and Sachin Savur, 'The Illegal Migration Bill: Seven Questions for the Government to Answer' (*Institute for Government,* 10 March 2023)

government more power and the ability to detain most people indefinitely, the government needs to provide some clarification on how they decide to use this power, regarding what criteria will be used for removal and if the government will continue to use a timeframe to make this consideration. The only problem with asylum-seekers being removed to a safe country is that the UK has a limited number of removal agreements in place. Overall, the act was said by Robert Jenrick that 'the bill goes further than before in seeking to deter illegal entry to the UK, so that the only humanitarian route in the UK is through a safe a legal one'.[19]

The IMA 2023 has been criticised as being incompatible with the ECHR with some of the provisions such as the duty to remove and the power to detain being labelled as a radical solution. The suspension of modern slavery protection provision has been said by the Parliamentary Joint Committee on Human Rights that it is 'overwhelmingly clear that this would breach Article 4 of the ECHR, which prohibits slavery, as well as several of the UK's obligations under the Council of Europe Convention Against Trafficking'.[20] Other issues have also been raised around the power to decide whether or not to follow certain measures of the ECHR being given to ministers, which shows a clear breach of our binding obligations with the European Courts under the Human Rights Act 1998. Following this Act and the new Rwanda deportation plan, this arrangement has the risk of potentially violating the UK's international and regional human rights obligations, including the 1951 Refugee Convention; ECHR; Convention against Torture Article 3(1); International Covenant on Civil and Political Rights Article 6 (Right to life); and the International Covenant on Economic, Social and Cultural Rights.

3.3. *R (AAA) v SSHD*

This final section on the legislative reform after Brexit analyses the Rwanda policy which is fundamental in supporting the central argument that the immigration system failed to balance border control and human rights. The overturning of this policy highlighted the UK's willingness to stray from the human articles bound in legislation for a prioritisation on border control.

In June 2023, in the case of *R (AAA) v SSHD,* the Court of Appeal decided that the Government's plan to deport asylum-seekers to Rwanda was unlawful due to significant deficiencies in its asylum system which made it not sufficiently safe. In November 2023, the Supreme Court ruled that the UK government's plan to deport asylum seekers to Rwanda is again unlawful in the case of *R v Secretary of State for the Home Department.*[21] This was consistent with the decision found in *R (AAA) v SSHD*, on grounds that Rwanda is widely acknowledged as having a poor

<https://www.instituteforgovernment.org.uk/publication/illegal-migration-bill> accessed 14 January 2024.

[19] JF Admin, 'Differentiation Policy in July 2023' (*Justice First,* 6 July 2023) <https://justicefirst.org.uk/differentiation-policy-in-july-2023/> accessed 13 July 2026.

[20] Donald and Grogan (n 17).

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

human rights record. A recent Human Rights Watch report 'documented Kigali's use of threats, kidnapping and even killing of Rwandan refugees and migrants abroad',[22] how can the government believe this is a safer alternative for individuals who are seeking refuge? In terms of the Act's alignment with human rights, 'the Government was forced to make the latter statement, in effect admitting that the terms of the Bills were such that it could not state it was compatible with human rights'.[23]

In summary, the legislative reform that followed Brexit demonstrated the governments lack of ability to achieve a fair balance of human rights and border control, with a clear prioritisation being on the latter. Yet, policy failures have highlighted this precedence of border control and the unfair and unlawful outcome of this priority.

4. Human Rights Act and ECHR

Following from the two pieces of legislation introduced by the Government to strengthen border control, it is necessary to examine the role of the Human Rights Act 1998 and the European Court of Human Rights in ensuring a balance is struck between effectively balancing human rights with the need for orderly control. In support of my central argument this section revisits the framework for protection of human rights and further linking in the Rwanda policy and the ECHR interference due to the UK's continuance lack of balance in border control and human rights.

The Human Rights Act 1998 hugely impacted the UK, for example, it enforced rights derived from ECHR by requiring all public authorities to comply with them and gave domestic effect to the Convention rights, enabling them to be enforced directly in UK courts. Anyone present in the country either legally or illegally can make a human rights claim. The ECHR has had a huge impact not only on individuals gaining justice when their case has been wrongfully heard, but also on the immigration law and policy itself. In the case *Soering v UK,* there was a violation of human rights, through the host state's responsibility when deporting a person to a state where they were going to be exposed to a certain degree of risk and the ECHR found the UK to be in breach of Article 3, where no one should be subjected to torture or inhumane/degrading treatment or punishment.[24] This judgement had an impact as it paved the way for the development of non-refoulement principle in international law and shows the importance of the ECHR

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[22] Evan Easton-Calabria, 'UK's Failed Asylum Deportation Plan Puts Rwanda's Human Rights and Refugee Struggles in the Spotlight' (*The Conversation,* 24 November 2023) <https://theconversation.com/uks-failed-asylum-deportation-plan-puts-rwandas-human-rights-and-refugee-struggles-in-the-spotlight-218263> accessed 14 January 2024.

[23] Paul Arnell, Olayinka Lewis, Erika Kalocsányiová and Andrew Forrester, 'The UK Illegal Migration Bill: Human Rights Violated' (2023) 63(4) *Medicine, Science and the Law* 267.

[24] Edmarverson A Santos, 'Soering v United Kingdom Case' (*Diplomacy and Law*, 12 May 2026) <https://www.diplomacyandlaw.com/post/soering-v-united-kingdom-case> accessed 9 August 2026.

and controlling the government's power for a refugee's benefit.

The Human Rights Act 1998 and the ECHR ensure that the government doesn't breach rights and that the authorities don't abuse their power. The ECHR intervened in the Rwanda flight, which could have taken the individuals on the flight to a place where there is a risk of harm, by granting an urgent interim measure. According to Therese Coffey, the former Work and Pension Secretary, 'the UK is likely to challenge the ECHR ruling and is, apparently, already preparing for the next flight to Rwanda'.[25] The ECHR 'enshrined the Convention into British law, allowing the rights guaranteed by the convention to be enforced in UK courts',[26] which is crucial when there is a need for governing the UK immigration law, to check it effectively balances human rights with the need to control migration. However, the government has tried to bring forward a Bill of Rights which has currently been withdrawn. If successful, then this means the removal of the Human Rights Act 1998 and we will see a change in the immigration law, for example, Clause 24 within the bill seeks to prevent domestic judges from having to regard to Rule 39 measures.[27] The introduction of this Bill is seen as an overall negative piece of legislation and the HRA 1998 and its incorporated rights from the ECHR is important in protecting and upholding rights, especially for asylum-seekers. A lack of priority on human right protections could increase the risk of policy failures as demonstrated by the Windrush Scandal and Cases including *East African Asians v United Kingdom*, where it was not until there were human right violations where corrective measures were put into place rather than an attempt to prevent the policy failure in the first place.

5. Case studies of policy failure

5.1. The Windrush Scandal

This subsection examines The Windrush Scandal, which is a significant study that highlights policy failure within the immigration system. This further supports the central argument that not only in the present, but in the past the government has failed to strike a balance between border control and human rights by looking at the background to the scandal, the policy and human right failure and its attempt to restore its systematic failure through a compensation scheme.

In the past, the government has shown policy failure and breached many individuals' human rights in the Windrush Scandal. Individuals arrived in the UK from Caribbean countries between 1948 and 1973 to fill up the labour force in post-war Britain. Everyone who arrived was automatically British citizens and free to

[25] Caroline Davies, 'What Is the ECHR and How Did It Intervene in UK's Rwanda Flight Plans?' (*The Guardian*, 15 June 2022) <https://www.theguardian.com/law/2022/jun/15/what-is-the-echr-and-how-did-it-intervene-in-uk-rwanda-flight-plans> accessed 14 January 2024.

[26] ibid.

[27] Colin Yeo, 'What will be the impact of the Bill of Rights Bill on immigration cases?' (*Free Movement,* 1 August 2022) <https://freemovement.org.uk/what-will-be-the-impact-of-the-bill-of-rights-bill-on-immigration-cases/> accessed 14 January 2024.

permanently live and work in the UK. The issue that occurred was many of the Windrush generation arrived as children on their parents' passports and the Home Office then destroyed thousands of landing cards and other records. As a result, people that were incorrectly deemed as 'illegal immigrants' or undocumented migrants began to face consequences. Many individuals were placed in immigration detention, prevented from travelling abroad and threatened with forcible removal, while some deported to countries they hadn't seen since they were children. This was because many lacked the documentation to prove their right to remain in the UK and the Home Office placed the burden of proof on individuals to prove their residency predated 1973. This was an example of policy failure in the immigration system and a complete breach of these individuals' rights as they suffered undeserved consequences due to the governments incapability.

The government released a comprehensive improvement plan which set out the actions they are taking to put this scandal right, by financial support, a more inclusive workforce, creating a new community and stakeholder engagement hub, and having an inclusive and robust policy making.[28] However, not all victims of this policy failure have received justice as 'despite the initial estimate of around 15,000 people being eligible for compensation, as of the end of September 2021 only 864 people have received compensation payments'.[29] Some contend that the Windrush Scandal is not over. Joint Council for the Welfare of Immigrants argue that the huge backlog of cases still to be resolved; claims take months to process; and the Windrush Scandal compensation scheme is a failure as it is complex to navigate and there is a lack of free legal advice; the compensation offers are insultingly small. The Windrush Scandal highlighted a systematic imbalance in the government's continued attempt to control immigration and the protection of human rights, highlighting the administrative failures resulting in human rights violations through the Hostile Environment legislation. As Griffiths and Yeo state: 'illuminated the human repercussions of the system's flaws, particularly the false assumption that lawful residents have documentary evidence, and the racialised and classed biases encouraged by selective checks and high sanctions facing those 'deputised'.'[30]

5.2. *East African Asians v United Kingdom*

This section further supports the notion of the government's failure to

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[28] Priti Patel, 'Windrush lessons learned review response' (Hansard, 30 September 2020) <https://hansard.parliament.uk/commons/2023-01-26/debates/23012627000014/WindrushLessonsLearnedReviewRecommendations> accessed 14 January 2024.

[29] JUSTICE, 'JUSTICE publishes a report on the Windrush Compensation Scheme for victims of the Windrush Scandal' (*JUSTICE,* 15 November 2021) <https://justice.org.uk/justice-publishes-report-on-the-windrush-compensation-scheme-for-victims-of-the-windrush-scandal/> accessed 14 January 2024.

[30] Melanie Griffiths and Colin Yeo, 'The UK's Hostile Environment: Deputising Immigration Control' (2021) 41(4) *Critical Social Policy* 17.

balance border control and human rights through examining *East African Asians v United Kingdom*[31] as another fundamental case study that highlighted the priority being on control rather than individuals' rights.

In *East African Asians v United Kingdom*[32] the Asian population in 1972 was forced to move out of Uganda and just over 28,000 men, women and children came to the UK.[33] However, British Asian's were deprived of their right of entry on racial grounds and based on the regulations, immigrants had to obtain work permits unless their parents or grandparents were born in the UK. The ECHR found that the UK violated Articles 3, 5, 8, and 14 of Convention,[34] further showing the UK government breaching their human rights obligations.

Similar to the Windrush Scandal, the case highlighted how the framework set up to achieve border control unequally effects individuals, further highlighting the reoccurring risk where human rights safeguards respond to legislative and policy failures rather than preventing them. Both case studies highlight the failures within the immigration system which had a resulting impact on human rights. Not to mention the protections set out under human rights are not a preventative regulation but become present after the failures have occurred.

Conclusion

After considering the above statement with looking at what we do with the unprecedented numbers of people, including illegal immigration, that is both humane and decisive, and looking at the application of legislation and its impact on the control and the treatment of migrants, I believe we are yet to find a system that balances this out. As investigated, post-Brexit caused an influx of migration, especially since the ending of the free movement, the government then implemented the Nationality and Borders Act 2022 and the Illegal Migration Act 2023. I believe the issue is the fact that the government are focusing too much on how to stop the illegal migration and not questioning why the numbers are rising. There are not enough safe routes for individuals looking for refuge and the route to enter the country legally is both intensive and expensive. The government has shown the lack of attention to their human rights obligations with the Rwanda deportation plan. The decision to send individuals who are seeking refuge to a country that is known for having deficiencies in their asylum system, shows a clear breach of human rights. Furthermore, the Windrush Scandal and the *East African Asians v UK* case show both policy failure and the lack of humane treatment from

[31] *East African Asians v United Kingdom* (1973) 3 EHRR 76.

[32] ibid.

[33] The National Archives, 'Marking the 50th Anniversary of the Arrival of Ugandan Asians in Britain (2022)' (The National Archives, 2022) <https://www.nationalarchives.gov.uk/education/outreach/projects/migration-histories/marking-the-50th-anniversary-of-the-arrival-of-ugandan-asians-in-britain-2022/> accessed 13 July 2026.

[34] *East African Asians v UK* (n 31).

the government. In addition, the ECHR and the HRA 1998 is essential in upholding rights and the idea of the replacement with the Bill of Rights, raises the issue of, if refugees' and asylum seekers' rights are going to be upheld and protected.

Currently, I find that the UK immigration law does not effectively balance human rights with the need for orderly control and management of migration. Not only are certain conventions like the 1951 Refugee Convention limiting the ability of the UK regulating the migration but other statutes have failed to show results and only shown the breaches in human right obligation.

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DISSERTATION

How does the representation of women and ethnic minorities within the English Judiciary impact public confidence in the legal system and to what extent is the goal of judicial diversity being achieved?

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ABSTRACT. Judicial diversity has been a goal that is yet to be achieved, with the history of exclusion still haunting the judiciary today. This dissertation will begin by gaining a deeper understanding of judicial diversity by depicting its aims and arguments; then exploring the history of the judiciary and critically analysing the extent of success from past legislative and structural reforms. In the following chapter I will discuss the importance of public trust for judicial legitimacy whilst also analysing the wider implications for the perception of bias and the role of diversity in enhancing trust and legitimacy. This will assist in examining the different levels of trust whilst gaining a deeper understanding of the importance of achieving judicial diversity. In chapter three the dissertation will shift focus onto the barriers present both before and after judicial application, the primary objective of this is to identify the restrictions still in place that is preventing the goal diversity. Following this, using the identified barriers, chapter four critically analyses the effectiveness of current reform strategies and whether the objectives are best suited to tackle the clear barriers preventing equal opportunities into the judiciary.

This dissertation will use various research approaches including the doctrinal approach, to research the law; the socio-legal approach to examine the impact of the lack of diversity in the judiciary; also, the comparative and historical approach by comparing reform attempts and past and current barriers.

The lack of equal representation for women and ethnic minorities, which this dissertation will focus on, has wider implications on reinforcing stereotypes and deterring individuals from applying for judicial appointment. This leads to marginalized groups questioning whether impartial and fair justice is being provided, or whether institutional racism is prominent during decision making, ultimately knocking individuals' confidence in the legal system. Not to mention, the lack of equal access to judicial appointment has been an emerging call for reform; and without recognising and tackling barriers restricting those during the application process, or even those present during the law profession itself, the goal of diversity is a distant dream.

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† LLM Candidate, University of Winchester. This Law Dissertation is the result of my own independent work and investigation, except where otherwise stated. All sources used have been acknowledged by footnotes, giving explicit references using the OSCOLA referencing system. University of Winchester (2025).

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Introduction

The judiciary holds a crucial role in interpreting and applying the law whilst upholding the rule of law by delivering fair and impartial justice; as stated by Rangaswamy the judiciary, 'stands as a cornerstone of democratic societies'.[1] Public's trust is vital for judicial legitimacy and the underrepresentation within the judiciary undermines that confidence in the legal system, while a more representative judiciary can enhance trust, fairness and legitimacy.

In my first chapter, I will explore the aims and arguments for judicial diversity, to gain a deeper understanding of what previously and continues to be advocated for. By further looking at the emergence of judicial diversity and critically analysing past legislative reforms, including the Constitutional Reform Act 2005; this highlights the importance of achieving the goal of diversity, whilst comparing previous reforms and exclusion barriers to recent attempts of eliminating current barriers. This chapter aims to set a foundation for understanding why judicial diversity matters and explores the historical barriers that excluded marginalised groups like women and ethnic minorities and the legislative reforms for greater diversity.

Chapter two will look at the importance of public trust and examine the perception of racial and gender bias and its further cultural and structural impacts on society. With this, I will discuss the role of diversity in enhancing judicial legitimacy and reinforcing public trust.

Chapter three focuses on present barriers that continue to exclude women and ethnic minorities despite previous reforms and attempts at achieving judicial diversity. I have split the chapter into barriers that apply before judicial application and those apparent after, with this we can identify repeated past challenges, like career progression, to determine how best to achieve the goals of diversity. In the final chapter, I will critically analyse the current attempts including the Judicial Diversity and Inclusion Strategy,[2] and compare its statistical update to measure its success. Then examining recommendations to better improve the lack of representation by tackling structural barriers that are hidden in the root of the law profession and limiting progression into the judiciary, whilst analysing whether other implementations like diversity quotas will better achieve judicial diversity.

Nevertheless, the reform around judicial diversity has been a fight that has lasted over 100 years and will continue until there is a representative bench that reflects the society it serves. The slow rates of success have been criticised, yet with the public's trust and confidence of the judiciary in decline, the threat of damaging

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[1] TR Rangaswamy, 'The Role of the Judiciary in Maintaining the Rule of Law' (2022) 9 *International Journal of Research and Analytical Reviews* 823.

[2] Judiciary of England and Wales, *Judicial Diversity and Inclusion Strategy 2020–2025* (November 2020) <https://www.judiciary.uk/wp-content/uploads/2020/11/Judicial-Diversity-and-Inclusion-Strategy-2020-2025-v2.pdf> accessed 25 July 2026.

the legitimacy of an integral part of the legal system, has further encouraged achieving judicial diversity.

1. Understanding judicial diversity and the history of the Judiciary System

This chapter explores the aims and arguments for judicial diversity and its emergence through tackling sex-based disqualifications and discriminatory barriers. The purpose is to provide an overview of the traditional process of judicial appointments and the Lord Chancellor's role. The chapter will examine the criticisms of the former exclusive system and how the judiciary has evolved through legislative reforms including the Sex Disqualification (Removal) Act 1919, that symbolised progress towards gender diversity within the legal profession and the Race Relations Acts[3] that provided protection against discrimination. Whilst looking at further reforms including the Constitutional Reform Act 2005, which attempted in increasing public trust through greater transparency and diversity; and the Crime and Courts Act 2013 which introduced diversity considerations.

This allows for a deeper and comparative analysis into current barriers preventing judicial diversity and a deeper evaluation of the extent to which the goal of diversity is being achieved today. Whilst, setting the foundation for looking deeper at the importance of public trust for judicial legitimacy.

1.1. Understanding judicial diversity

Historically the judiciary has been predominantly homogeneous, creating both systematic and discriminatory barriers that restricted marginalised groups from entering the judiciary. Pressure for reform has been a persistent argument that has proven to be a challenge to achieve, especially with diversifying senior positions. Judicial diversity aims to achieve equal representation for various marginalized groups including women and ethnic minorities.

As addressed in the Feminist Judgements project, arguments for greater judicial diversity generally include, equality, 'the importance of all qualified practitioners having equal opportunities for judicial appointment'[4]; representation, 'the need for the courts fairly to reflect the broader community … to engender community confidence and establish their democratic legitimacy'.[5] Additionally, the benefit of demographic diversity within the judiciary is the various views and experiences that will be brought to the role enhancing judicial decisions whilst ensuring the judges are self-aware of potential biases. As researched by Kate Malleson, judges have suggested that 'diversity enhances their self-reflection and so promotes judicial impartiality'.[6]

The tackling of barriers through legislative reforms, and continuing

[3] Race Relations Act 1965; Race Relations Act 1968; Race Relations Act 1976.

[4] Rosemary Hunter, Clare McGlynn, Erika Rackley (eds), *Feminist Judgments: from theory to practice* (Hart Publishing 2010) 7.

[5] ibid.

[6] Kate Malleson, 'Values Diversity in the United Kingdom Supreme Court: Abandoning the "Don't-Ask-Don't-Tell" Policy' (2022) 49 *Journal of Law and Society* 3, 13.

advocacy for judicial diversity has been a theme through history. With continuous calls for further reform, the lack of public trust became a prominent issue that continues to threaten the judiciary's legitimacy. As stated by Lady Chief Justice, Baroness Carr,[7] 'we will earn and retain the confidence of the public, court-users and legal professionals and we will promote the values which underpin our legal system'.[8]

1.2 Judiciary's History

Traditionally the process of judicial appointment was predominantly influenced by the monarchy with political influence. The process at the time, 'reflected the close relationship between the judiciary and the executive',[9] as, 'Judges were often chosen by the monarch, either directly or through advisors'.[10] The lack of a formalised system of appointment, meant the judges being appointed all shared similar backgrounds, class and privilege. However, considering, 'the Lord Chancellor, a senior cabinet minister, played a pivotal role in judicial appointments',[11] the lack of diversity on the bench was to be expected. With this, there was an increasing public concern around the political influence over the bench. Considering, a senior member of cabinet, who is 'appointed by the monarch on the advice of the prime minister',[12] held a crucial position to the judicial appointment process, the concern around political bias was not surprising.

During this period, the idea of having a representative bench seemed unlikely as women were legally restricted from entering the legal profession. Similarly, the institutional racism and discrimination excluded individuals with an ethnic background to be considered for judicial appointments. With the systematic and discriminatory barriers, the selection, as critics pointed out, were 'from a rather narrow pool and this did nothing for the diversity of the judiciary'.[13] This limited the confidence people held in the deliverance of fair justice. Individuals who had been historically excluded, began to campaign for equal opportunities to enter the legal profession. Bertha Cave is an example of contesting the barriers that prevented the desired diversity by challenging her rejection from becoming a member of the

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[7] Baroness Carr of Walton-on-the-Hill.

[8] Baroness Carr, 'Lady Chief Justice: Diversity and Inclusion Statement' (Courts and Tribunals Judiciary, 24 September 2018) <https://www.judiciary.uk/about-the-judiciary/diversity/message-from-lcj-judicial-diversity/> accessed 1 May 2025.

[9] Advocatetanmoy Law Library, 'Judicial Appointments in the UK: A Historical Perspective' (Advocatetanmoy Law Library, 12 December 2024) <https://advocatetanmoy.com/judicial-appointments-in-the-uk-a-historical-perspective/> accessed 16 April 2025.

[10] ibid.

[11] ibid.

[12] ibid.

[13] Judicial Appointments Commission, 'Judicial Appointments' (Courts and Tribunals Judiciary, 28 July 2010) <https://www.judiciary.uk/about-the-judiciary/our-justice-system/jud-acc-ind/jud-appts/> accessed 18 April 2025.

Gray's Inn.[14] Even though she was unsuccessful, Cave was an influential figure for other underrepresented individuals in society; As supported by Judith Bourne, 'Cave challenged the male exclusivity of the legal profession'.[15]

In March 1919, the Labour Party introduced the Women's Emancipation Bill,[16] aiming to remove 'certain restraints and disabilities',[17] which were still imposed on women. The clauses aimed to equalise opportunities and minimise gender restrictions, including 'to remove the disqualification of women for holding civil and judicial appointments'.[18] The bill can be recognised as the beginning of judicial diversity advocacy and the breaking down of systematic barriers that prevented equal opportunities and fair representation. After the bill successfully passed through the House of Commons, the government introduced its own separate bill in the House of Lords.[19] Even though, the Labours bill had support through its stages in the House of Commons, the bill was replaced by the Sex Disqualification (Removal) Act 1919.[20] As described by Mari Takayanagi, 'the Women's Emancipation Bill stood no chance against the government bill'.[21]

However, in the SD(R)A 1919,[22] the first clause from the Labours bill remained, permitting women to hold civil and judicial appointments. This was significant as it removed the legal barrier and extended the chance for women to enter the legal profession and the opportunity to join the judiciary. As supported by Takayanagi the act 'really was a significant advance on the previous situation'.[23] It showed recognition of women's efforts to gain equality and their vital role during a time of international conflict. As further reinforced by Rachel Lafferty, 'the Act being brought forward was a turning point in history, the voices of many women were being heard'.[24]

Yet, the legislation's effectiveness seemed limited with the slow progress in

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[14] Judith Bourne, 'Bertha Cave' (Inner Temple, 5 December 2019) <https://www.innertemple.org.uk/women-in-law/pioneering-women-in-law/bertha-cave/> accessed 22 April 2025.

[15] ibid.

[16] Mari Takayanagi, 'Sacred Year or Broken Reed? The Sex Disqualification (Removal) Act 1919' (2020) 29 *Women's History Review* 565.

[17] HC Deb 4 April 1919, vol 114, cols 1561–627.

[18] Takayanagi (n 16).

[19] ibid.

[20] Sex Disqualification (Removal) Act 1919.

[21] Takayanagi (n 16).

[22] Sex Disqualification (Removal) Act 1919.

[23] Takayanagi (n 16) 575.

[24] Rachel Lafferty, 'Women Working in the Judiciary System' (The Open University Law School, 28 July 2023) <https://law-school.open.ac.uk/blog/women-working-judiciary-system> accessed 21 April 2025.

diversifying the judiciary. As stated by John Tribe, '1956 is significant as this is the year in which we had the first ever female judicial appointment'.[25] During this year, Dame Rose Heilbron was appointed as the Recorder of Burnley. Yet, it took decades for further progress after the passing of the SD(R)A 1919[26], especially with entry into senior judicial positions. It was not until 1965 when Elizabeth Lane, was the first woman to be appointed a judge of the High Court.[27] This highlight's the poor enforcement of the act and judicial resistance in appointing women for senior roles. As Takayanagi argues, 'It removed barriers rather than actively giving women rights'.[28] With women like Heilbron[29] and Lane[30] and their successes into the judiciary highlighting the legislation's progress, the reality remained that most women still found it a challenge entering and progressing within the legal profession.

Judith Bourne goes further to claim that the SD(R)A 1919[31], 'did not remove barriers to the practice of law or end inequality'.[32] The legislation did not consider other vulnerable societal groups like the working class or ethnic minorities, resulting in discriminatory barriers remaining and the goal of diversity remaining limited. Yet, individuals like Eric Irons challenged the racial injustice and became an influential figure when he became the first Black Justice of the Peace in 1962.[33] Irons highlighted the importance of improving race relations, which had significance post-World War 2, with the influx of immigration, and England's persisting issue of racial hostility. As supported by Sandy Dutczak, Iron, 'had a significant impact on the integration of Nottingham's ethnic minority population within British society'.[34] Additionally, the Race Relations Act 1965, was significant in providing protection against discrimination. The act, 'prohibited discrimination on grounds of race in public places and established the Race Relations Board'.[35]

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[25] John Tribe, 'Dame Rose Heilbron' (University of Liverpool) <https://www.liverpool.ac.uk/law/130-year-anniversary/our-history/liverpool-law-school-luminaries/rose-heilbron/#_edn8> accessed 23 April 2025.

[26] Sex Disqualification (Removal) Act 1919.

[27] Hollie Fletcher, 'Elizabeth Lane DBE' (*First 100 Years*, 13 June 2018) <https://first100years.org.uk/elizabeth-lane/> accessed 23 April 2025.

[28] Takayanagi (n 16) 575.

[29] Dame Rose Heilbron.

[30] Elizabeth Lane.

[31] Sex Disqualification (Removal) Act 1919.

[32] Judith Bourne, 'Great Expectations and Hard Times: The Advent of the Sex Disqualification (Removal) Act 1919 and Women's Entry to the Legal Profession' (2022) 32 *Women's History Review* 793, 804.

[33] Sandy Dutczak, 'Eric Irons OBE – UK's First Black Magistrate' (*Institute of Advanced Legal Studies*, 20 October 2021) <https://ials.sas.ac.uk/ials-blog/browse-past-posts/eric-irons-obe-uks-first-black-magistrate> accessed 24 April 2025.

[34] ibid.

[35] Jennifer Brown, 'An early history of British race relations legislation' (Briefing Paper No 8360,

However, individuals found fault with the lack of extension to cover area's including employment and housing, as Jennifer Brown supports, 'the Act was criticised for the limited protection from discrimination it provided'.[36] Nevertheless, the legislation played a pivotal role in influencing the passing two further Race Relations Acts[37] in 1968 and 1976, which increased the level of protection against discrimination.

Yet ethnic minorities confidence in public services remained minimal and their trust in judiciary to provide fair justice was scarce. The case involving the death of David Oluwale[38] in 1969, displayed the continued issue of police misconduct and racial prejudice within the legal system. During the trial there was, as described by Harmit Athwal, 'no effort to humanise David'.[39] In addition to this, the judge's remarks demonstrated clear racial bias and prejudicial attitudes with comments, recited from Aspden, describing Oluwale as 'a dirty, filthy, violent vagrant', 'menace to society,' and, 'a frightening apparition to come across at night'.[40] Despite the fact that that other police officers spoke positively of Oluwale, and, throughout the police inquiry and the trial evidence of abuse was revealed, the manslaughter charges were dropped and the defendants were only found guilty of two assaults on Oluwale.[41] The case exposed the institutional racism and discriminatory attitudes through the judge's comments through the trial. This led to questioning the judiciary's ability to deliver impartial and fair judgements. Which contributed to a decrease in the public's confidence and trust in the legal system and brought attention to the need for judicial diversity, not only to provide equal representation but to bring a broader understanding to the experiences from marginalised groups within our society. As Max Farrer quoted, 'I'm sure David's death and the trial had some impact not just on black people and white radicals, but on the city as a whole'.[42]

Despite, the passing of multiple Race Relations Acts,[43] continued

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House of Commons Library 2018) < https://researchbriefings.files.parliament.uk/documents/CBP-8360/CBP-8360.pdf> accessed 25 April 2025.

[36] ibid.

[37] Race Relations Act 1968; Race Relations Act 1976.

[38] *R v Ellerker and Kitching* (Leeds Assizes, 1971).

[39] Harmit Athwal, 'The Hounding of David Oluwale' (*Institute of Race Relations*, 3 May 2007) <https://irr.org.uk/article/the-hounding-of-david-oluwale/> accessed 24 April 2025.

[40] Leeds Beckett University, '1971 - An Unfair Trial' (*Leeds Beckett University*) <https://www.leedsbeckett.ac.uk/school-of-humanities-and-social-sciences/remembering-oluwale/1971-an-unfair-trial/> accessed 24 April 2025.

[41] ibid.

[42] Jon Robins, 'Memorial to Be Unveiled for David Oluwale "Hounded" to Death by Racist Police' (*The Justice Gap*, 25 April 2022) <https://www.thejusticegap.com/24066-2/> accessed 25 April 2025.

[43] Race Relations Act 1965; Race Relations Act 1968; Race Relations Act 1976.

advocation for diversity within the legal system, and cases displaying the perpetuation of racial bias influencing judicial decisions. There was a continued struggle in diversifying the entry into senior judicial positions, as it was not until 1979 when Sir Mota Singh QC became a part-time recorder and further elevated to a full-time circuit judge in 1982.[44] A common theme that highlighted itself through history is the slow progress of appointing both women and ethnic minorities into senior roles. With this, substantive change for women with an ethnic background did not occur until October 2004 where, 'Dame Linda Dobbs DBE became the first non-white high court judge in the UK, having been appointed a Deputy High Court Judge in 2003'.[45]

With the vital role judges hold with the deliverance of justice and the slow progress of judicial diversity, the calls for reform became stronger. As expressed by Kate Malleson, during the 1990's 'Senior judges themselves were by then openly acknowledging that the perception of the judiciary as old, white, upper-class male and out of touch undermined public confidence in the courts'.[46] The lack of transparency within the judicial appointment process and visibly seeing a homogeneous bench deterred applicants from underrepresented groups. As supported by academics; Hunter, McGlynn and Rackley[47] in the Feminist judgement projects, 'under the old system, judges were chosen by means of consultations among the senior judiciary, a sure-fire way of reproducing the judiciary's traditional class, gender and ethnic profile year after year'.[48] With the role of the chancellor still being significant, there was an increasing concern over the perception of bias on appointment with a priority being on an individual's political status rather than merit. It was considered 'that judges were appointed in the image of existing judges'.[49] In response to these growing concerns, judicial diversity became a priority, leading to the enactment of the Constitutional Reform Act 2005.

1.3. Constitutional Reform Act 2005

This piece of legislation was a major turning point for the judiciary, with the fact that it made changes to the constitutional framework. It not only enshrined judicial independence within the law, but it created an independent Judicial

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[44] Thomas Connelly, 'UK's First Ethnic Minority Judge Dies Aged 86' (*Legal Cheek*, 14 November 2016) <https://www.legalcheek.com/2016/11/uks-first-ethnic-minority-judge-dies-aged-86/> accessed 25 April 2025.

[45] Bonavero Institute of Human Rights, 'Dame Linda Dobbs' (Faculty of Law, University of Oxford) <https://www.law.ox.ac.uk/people/dame-linda-dobbs-dbe> accessed 25 April 2025.

[46] Kate Malleson, 'Diversity in the Judiciary: The Case for Positive Action' (2009) 36 *Journal of Law and Society* 376, 378.

[47] Rosemary Hunter, Clare McGlynn, Erika Rackley.

[48] Hunter, McGlynn and Rackley (n 4) 7.

[49] Judicial Appointments Commission (n 13).

Appointments Commission to select candidates with merit as the sole criterion.[50] Many argue the legislation was pivotal in achieving a more independent judiciary, which not only strengthens the rule of law but also prevents abuse of power and minimises the perception of political bias. In a summary of Robert Hazell's written evidence on whether the 2005 reforms were successful, he concluded that 'judicial independence is stronger'.[51] With the act's establishment of the Supreme Court, it not only represented the separation of powers but a reformed and transparent judiciary that is not a victim of political bias. However, the focus was heavily criticised with how a clear balance of independence and judicial responsibility was not established. As challenged by Erin Delaney, 'the CRA privileged independence in a context of constitutional uncertainty'.[52]

Further issues arose after the enactment of the CRA 2005[53], with the focus on prioritizing the judiciary gaining autonomy and separating from Parliament, it failed in effectively implementing and achieving judicial diversity. Similarly to previous statues like the SD(R)A 1919[54], the CRA[55] relied on the assumption that by making the appointments process fair, it would 'only be a matter of time before [they] 'trickle-up' into the judiciary'.[56] Academics like Delaney claim that the 2005 reforms were unsuccessful in the goal of diversity, but set a foundation for further reforms, as she states 'the clear failure of the CRA to result in meaningful changes in the make-up of the judiciary allowed for a measure of consensus to develop around a new approach'.[57]

As emphasised by Lord Crickhowell 'The real danger is the gulf between the view of the general public and the judiciary'.[58] He further identified the relationship between the lack of diversity and undermining public confidence, which threatened the judiciary's legitimacy. To amend the limited success of the

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[50] Courts and Tribunals Judiciary, 'Constitutional Reform' (Courts and Tribunals Judiciary, 19 February 2010) <https://www.judiciary.uk/about-the-judiciary/our-justice-system/constitutional-reform/> accessed 26 April 2025.

[51] The Constitution Unit, 'The Constitutional Reform Act 2005 Led to Greater Judicial Independence: Politicians and Parliament Must Continue to Support It' (*The Constitution Unit Blog*, 27 April 2022) <https://constitution-unit.com/2022/04/27/the-constitutional-reform-act-2005-led-to-greater-judicial-independence-politicians-and-parliament-must-continue-to-support-it/> accessed 27 April 2025.

[52] Erin Delaney, 'Searching for Constitutional Meaning in Institutional Design: The Debate over Judicial Appointments in the United Kingdom' (2016) 14 *International Journal of Constitutional Law* 752*,* 756.

[53] Constitutional Reform Act 2005.

[54] Sex Disqualification (Removal) Act 2005.

[55] Constitutional Reform Act 2005.

[56] Delaney (n 52) 762.

[57] ibid.

[58] ibid 761.

CRA 2005[59] and reaffirm the public's trust within the judiciary, the Crime and Courts Act 2013 was introduced. Part two of Schedule 13[60] of the statute amended Section 63[61] of the CRA 2005[62], by clarifying that 'diversity considerations where candidates for judicial office are of equal merit'[63] is permitted. This amendment was vital with shifting from a strict merit-based criteria to recognising the importance of achieving judicial diversity.

However, the fight for a representative bench is far from over and the historical challenges like diversifying senior judicial positions remains. Whilst legal and systematic barriers have been broken down through the enactment of legislations, the continued lack of diversity and the slow pace of progress, it could be suggested that many barriers remain. As supported by Graham Gee and Kate Malleson, 'change has been slower than expected, and improvements have largely been concentrated in the lower ranks, and particularly in non-legal tribunal appointments, with the upper ranks of the judiciary remaining substantially untouched'.[64]

Conclusion

This chapter has depicted the aims and arguments for judicial diversity, whilst briefly discussing its importance for judicial legitimacy. By exploring the traditional process of judicial appointment, and the Lord Chancellors pivotal role, I analysed the criticisms of the judiciary's lack of representation and systematic and discriminatory barriers preventing equality on the bench. From Bertha Cave challenging the male exclusivity in the legal profession to the Labour party introducing the Women's Emancipation Bill, advocacy for removing those restrictive barriers began. We further analysed the Sex Disqualification (Removal) Act 1919, which was significant for tackling gender discrimination, its slow success and lack of consideration for other marginalised groups, called to question the act's failure in enforcement. By further looking into the Oluwale case, this exposed racial bias and prejudice views within the legal system, which ultimately caused a decline in both trust and confidence that fair justice was being given. This chapter further demonstrated the continuous challenge of achieving judicial diversity within senior positions, for both women and ethnic minorities visible, especially in higher courts. With this and the continued criticism of lack of transparency, the Constitutional Reform Act 2005 was introduced resulting in a systematic reform and a heavier

[59] Constitutional Reform Act 2005.

[60] Crime and Courts Act 2013, sch 13 pt 2.

[61] Constitutional Reform Act 2005, s 63.

[62] Constitutional Reform Act 2005.

[63] Crime and Courts Act 2013, sch 13.

[64] Graham Gee and Kate Malleson, 'Judicial Appointments, Diversity and the Equal Merit Provision' (*UK Constitutional Law Association*, 6 May 2014) <https://ukconstitutionallaw.org/2014/05/06/graham-gee-and-kate-malleson-judicial-appointments-diversity-and-the-equal-merit-provision/> accessed 27 April 2025.

focus on achieving judicial diversity. Nevertheless, the progress made so far has laid a foundation for further legislations, like the Crime and Courts Act 2013, to better achieve judicial diversity.

2. The importance of public trust and the impact of lack of diversity on the perception of bias

This chapter focuses on why public trust is fundamental to the judiciary's legitimacy. Whilst, exploring the impact of the lack of diversity including, racial bias, gender bias its wider impact on reinforcing stereotypes and the legal profession. Then looking at the impact of diversity on enhancing the legitimacy of judicial decisions which would result in increasing public confidence. This chapter is crucial in determining why public trust is important in the legitimacy of the judiciary and will set a foundation for the impacts of an underrepresented bench and the democratic need for reform to uphold the rule of law.

2.1. Public trust in the judiciary: Foundation for legitimacy

In upholding the Rule of Law, it is crucial that the core values; independence, impartiality and integrity are consistently adhered to, not only to guarantee a fair trial but to ensure the public have both trust and confidence in our legal system. With the judiciary possessing the power of statutory and common law interpretation, there should be a solid foundation of public trust that the justice system produces unprejudiced and unbiased results, which is fundamental for judicial legitimacy. As stated by Alexander Nunn, 'Given that legitimacy is the lifeblood of the judicial branch, maintaining public respect for the judiciary as an institution driven by legal principles is a structural imperative'.[65] However, as referenced by academics Anne Wallace and Jane Goodman-Delahunty, 'declining trust in public institutions, including courts, has been a feature of democratic societies for some time'.[66]

In a survey by YouGov, they found 38% of all adults had a fair amount of confidence in the judiciary system.[67] In their annual survey's on trust in the judiciary, YouGov have repeatedly reported the differential levels of trust in judges, from men having more confidence than women to white people trusting the system more than individuals with an ethnic background.[68] We can clearly identify that the level of trust is varying which can have a negative impact through creating social division and disparity which ultimately weaken the judiciary.

As stated by Amany Jabir, 'a representative bench is one that reflects the population it serves in order to understand the lives of the people it hears and the

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[65] G Alexander Nunn, 'Introduction: Perceived Legitimacy and the State Judiciary' (2017) 70 *Vanderbilt Law Review* 1813, 1814.

[66] Anne Wallace and Jane Goodman-Delahunty, 'Measuring Trust and Confidence in Courts' (2021) 12(3) *International Journal for Court Administration* **2.**

[67] YouGov, 'Confidence in the British Judicial System' (*YouGov*) <https://yougov.co.uk/topics/society/trackers/confidence-in-the-british-judicial-system> accessed 11 February 2025.

[68] ibid.

lives upon which it rules'.[69] However, as of April 1st, 2024, women make up 43% of all judges,[70] where the representation of ethnic minorities gradually increased to 11%.[71] With diversity significantly lower within senior judicial positions, particularly from and above the High Court. Whilst the gender gap has shown to be closing, representation for the ethnic minority remains significantly lower. In the High Court, women represent 31% of high court judges, compared to ethnic minorities accounting for 8%.[72] In the Court of Appeal, women make up 25%, while ethnic minorities only represent 3%.[73]

The unrepresentative judiciary is undermining the public's trust, which as established is a critical factor in the legitimacy of the legal system. Without judicial diversity, this can have long-term consequences for the public's belief in its fairness. The current disparity in public trust in the judiciary suggests that parts of society still feel marginalised. The implication of underrepresentation is increasing the public's perception of bias within the judiciary, undermining the moral legitimacy of our legal system and further removing confidence in achieving judicial diversity.

2.2. Impact of lack of diversity – perception of bias wider impacts

2.2.1. Racial bias

The failure to recognise the lack of confidence from individuals from marginalised social groups has contributed to an increase in the perceptions of bias and discrimination in legal decisions, impacting the judiciary's ability in maintaining public trust. Institutional racism has been under spotlight in the recent years, with an increase of advocacy and demand for this significant injustice to be recognised. A judge that acts in a prejudicial way against ethnic minorities that have been historically underrepresented, undermines the Rule of Law that governs our legal system and significantly impacts the idea of fair and equal justice. Current cases and reports have emerged, highlighting the continuing issue of racial bias and the impact it has for the public's trust in our legal system.

Keir Monteith and Eithne Quinn along with university researchers surveyed legal professionals in May 2022 with the aim to investigate racism in the English and Welsh judiciary. They reported '55.6% of legal professionals say they have

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[69] Amany Jabir, 'Does Judicial Diversity Matter?' (*Young Legal Aid Lawyers*, 12 October 2020) <https://younglegalaidlawyers.org/does-judicial-diversity-matter> accessed 11 February 2025.

[70] Ministry of Justice, *Diversity of the Judiciary: Legal Professions, New Appointments and Current Post-Holders - 2024 Statistics* (*GOV.*UK, 11 July 2024) <https://www.gov.uk/government/statistics/diversity-of-the-judiciary-2024-statistics/diversity-of-the-judiciary-legal-professions-new-appointments-and-current-post-holders-2024-statistics#main-points> accessed 31 March 2025.

[71] ibid.

[72] ibid.

[73] ibid.

witnessed one or more judges act with racial bias in their treatment of defendants'.[74] With the judiciary having power to make life-changing judgements over defendant's, it's vital that when determining a sentence an individual is not prosecuted because of the colour of their skin and made to feel lesser than white defendants. In the report of the above investigation, someone quoted, 'I have witnessed first-hand sentencing disparity between black and white defendants. The black defendant with the least serious offence received an immediate custodial sentence whilst the white defendant received a fine'.[75] The imbalance of sentencing has not just highlighted judicial discrimination but illustrates the preferential treatment for white defendants. Not only is the persistent issue of racial bias breaking down the foundational principles of democratic legality but for some it's making the institution that is there to provide justice a system to fear.

However, several respondents in the survey rejected the possibility of racial bias with one stating 'judges are by definition in our jurisdiction impartial, and of course colour blind'.[76] Respectively judges 'by definition' are impartial and the individual's ethnicity does not affect a judge's view, but it does. As declared by Amany Jabir, 'the odds of a prison sentence for BAME individuals are 240% higher than for their white counterparts'.[77] With statistics illustrating that racial bias in the judicial system remains a current issue, can we confidently say that every defendant brought into court has entered with the right to a fair trial and judged fairly and equally.

2.2.2. Gender bias

The lack of judicial diversity not only compromises the legitimacy of our legal system through the evidence of racial bias and discrimination but also the disparity in treatment for women and apparent gender bias in the judiciary. The consequences of this can impact someone receiving justice, like a women may not be believed in a sexual assault case because the judge may unconsciously or consciously hold prejudices views on how a women should carry themselves and behave. On the other hand, gender bias can also extend to impact males in areas like family law, where historically the state has favoured women in custody disputes, potentially dismissing the father's role.

An ongoing feminist concern is around the judiciary's failure in providing consistent justice for domestic abuse victims. As supported by the feminist judgement projects,[78] 'judicial responses to domestic violence have to date failed to recognise consistently the seriousness and systematic nature of men's violence

[74] Keir Monteith, Eithne Quinn and others, 'Racial Bias and the Bench: A Response to the Judicial Diversity and Inclusion Strategy (2020–25)' (University of Manchester 2022) 14.

[75] ibid.

[76] ibid 12.

[77] Jabir (n 69).

[78] Edited by: Rosemary Hunter, Clare McGlynn and Erika Rackley.

against women'.[79] In *R v Dhaliwal*,[80] the judge illustrated the failure to understand and acknowledge the psychological effects of domestic abuse which contributed to the defendant's wife committing suicide. The views expressed by Judge Roberts can be argued that they not only highlighted gender bias but also the failure of the male judge to fully understand the psychological damage caused by domestic abuse.

Sadly, this is one woman in millions, and with the lack of consistent retribution for victims of domestic violence, public trust is declining. The crime survey for England and Wales estimated that '2.3 million people aged 16 years and over… experienced domestic abuse in the year ending March 2024'.[81] Yet, there were only 51,183[82] domestic abuse-related prosecutions in England and Wales, less than the previous year prosecution rate. With the fact that domestic abuse is a current rising issue, the public are left to ask how are the prosecution rates dropping?

2.2.3. Perception of Bias wider impacts

As stated by Professor Eithne Quinn, 'Our judiciary as an institution is just as racist as our police forces, our education system and our health service - this is something that cannot be ignored for any longer'.[83] The English legal system is defined to be impartial and fair, however if discrimination remains a factor in decision making, its legitimacy will continue to erode. The perception of bias has wider societal impacts with how it reinforces stereotypes into society and alienating underrepresented communities, through the reinforcement of prejudices views. This undermines the public's trust with being treated equally and creates long-lasting systematic inequalities by making it harder for certain groups to receive justice. Institutional racism and discrimination question the fairness of the judiciary, negatively impacting the legal system as a whole and presents the system as disconnected from the diverse needs of society. As further support by Amany Jabir, 'the lack of judicial diversity affects the credibility of our justice system which leads to a trust deficit between all citizens and the State'.[84]

Additionally, the lack of diversity and perceptions of bias directly affects legal practitioners, suggesting that not only is trust and confidence broken from the public at large but damaged on the inside to. Alexandra Wilson, a barrister, was repeatedly mistaken for a defendant solely because of the colour of her skin. Despite Wilson's legal profession, the multiple prejudicial assumptions exemplify the

[79] Hunter, McGlynn and Rackley (n 4) 19.

[80] *R v Dhaliwal* [2006] EWCA Crim 1139.

[81] ONS Centre for Crime and Justice, *Domestic Abuse in England and Wales Overview* (Office for National Statistics, 2024) <https://cy.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwalesoverview/november2024> accessed 13 February 2025.

[82] ibid.

[83] Monteith and others (n 74).

[84] Jabir (n 69).

persistence of racial stereotypes within the legal system. As brought forward by Simon Davis,[85] 'This type of prejudice highlights the need for us all to reflect on the actions we can take to tackle discrimination'.[86] Peter Herbert, accused high profile figures of 'racism, bullying and victimisation'.[87] Herbert was sceptical about the case success, powerfully stating, 'I'm accusing judges of racism and I'm going before a white man. It's hard to go up against the Establishment'.[88] Institutional racism continues to exist in the Judicial System and remains discriminating against not only minorities in public but those in the legal profession. 'If the Judiciary cannot treat their own colleagues fairly what hope is there for our community?'[89]

A survey out of 700 women in the legal professions highlighted gender discrimination and found that '58% had experienced or witnessed sexism first hand'.[90] The respondents also expressed the challenges of progressing in a career that is not only dominated by men but also the difficulty in balancing personal life and work life, with '39% said their working hours were not compatible with family life'.[91] And as further supported by the Law Society's report on the need for gender equality in the legal profession, 'Unconscious bias, issues with remuneration and gender pay gap, and limited flexible working have been identified as the main obstacles preventing women from progressing in their careers'.[92] The historic barriers that women worked relentlessly to overturn remain and continue to impact women progressing in a career of law.

Fundamentally, with the process of becoming a judge requiring at least five to seven years post-qualification experience in a legal profession and a struggle for marginalized minorities to progress as a legal professional, which we have a deeper

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[85] Former President of the Law Society.

[86] Monidipa Fouzder, 'Investigation Launched after Black Barrister Mistaken for Defendant' *Law Gazette* (24 September 2020) <https://www.lawgazette.co.uk/news/investigation-launched-after-black-barrister-mistaken-for-defendant/5105752.article> accessed 13 February 2025.

[87] Izin Akhabau, 'Peter Herbert: A Black Judge Said Racism Existed in the Judiciary, and Was Almost Dismissed - His Legal Battle against 'Racism and Bullying' in Judicial Institutions Continues' (*The Voice*, 13 January 2021) <https://www.voice-online.co.uk/news/2021/01/13/peter-herbert-a-black-judge-said-racism-existed-in-the-judiciary-and-was-almost-dismissed-his-legal-battle-against-racism-and-bullying-in-judicial-institutions-continues/> accessed 14 February 2025.

[88] ibid.

[89] ibid.

[90] Thomas Connelly, 'Over Half of Female Lawyers Have Experienced or Witnessed Sexism at Work' (*Legal Cheek*, 18 February 2020) <https://www.legalcheek.com/2020/02/over-half-of-female-lawyers-have-experienced-or-witnessed-sexism-at-work/> accessed 13 February 2025.

[91] ibid.

[92] Christina Blacklaws, 'Influencing for Impact: The Need for Gender Equality in the Legal Profession' (The Law Society, March 2019) <https://www.law.ox.ac.uk/sites/default/files/migrated/influencing_for_impact_-_the_need_for_gender_equaluty_in_the_legal_profession_-_women_in_leadership_in_law_report.pdf> accessed 13 February 2025.

analytical look in the following chapter; And with the unpromising homogeneous judiciary, vulnerable individuals with an ethnic background and women are being deterred from participating in the justice system. Resulting in undermining the integrity and effectiveness of the legal system, whilst also making individuals feel discouraged from entering the judicial system. As further supported by Amany Jabir, 'negatively affecting the administration of justice',[93] causing a further decline in public trust and confidence.

2.3. Role of diversity

With a diverse judiciary, we can enhance the legitimacy of decision-making, increase public trust and reestablish confidence. Additionally, individuals will bring differing life experiences when determining the outcome for a case. In cases of domestic abuse, a female judge may have a better understanding of all the effects from physical to psychological and can ensure that effective justice is brought for the victim. As reflected by Isha Amir, 'this diversity enriches the discourse and leads to more well-rounded judgements'.[94] This expansion of diverse perspectives also can assist solidifying the democratic legitimacy of the judicial system, as stated by Rosemary Hunter, with the same argument being applied to representation for ethnic minorities, 'a bench including women is more representative of the wider society which it serves than a bench with no women'.[95]

Diverse judicial panels can assist the legal system in more inclusive, fairer and equitable legal decisions, by reducing unconscious bias. With a diverse judiciary that reflects the population in terms of gender and ethnicity, there will be a broader understanding being considered resulting in balanced and fair decisions. In an article on unconscious bias the authors support that bias can be 'mitigated as part of a multidisciplinary approach to diversity and inclusion'.[96] With dedication to reforming the current lack of judicial representation, the perception of bias, which significantly decreases the public's trust and confidence in our legal system, we can remove the use of racial and gender bias, upholding moral legitimacy.

As further reported by Rosemary Hunter, 'the presence of women judges signals equality of opportunity for women in the legal profession who aspire to judicial office'.[97] With the increasing judicial diversity, it will encourage individuals who have been historically excluded from the judiciary to entering the profession, thus eliminating the racial and gender imbalance that is a current and significant

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[93] Jabir (n 69).

[94] Isha Amir, 'Diversity on the Bench: The Importance of Representation in the Judiciary' (*The Student Lawyer*, 21 February 2024) <https://thestudentlawyer.com/2024/02/21/diversity-on-the-bench-the-importance-of-representation-in-the-judiciary/> accessed 14 February 2025.

[95] Rosemary Hunter, 'More than Just a Different Face? Judicial Diversity and Decision-Making' (2015) 68 *Current Legal Problems* 119, 123.

[96] Ginevra Bicciolo, Hana Tawfik and Lianne Craig, 'Unconscious Bias: Uncovering the Root Cause of Gender Disparity in the Legal Profession' (2018) *Hausfeld & Co LLP* 3.

[97] Hunter (n 95) 123.

injustice. And as confirmed by Isha Amir, 'This representation nurtures a feeling of inclusivity and validation',[98] which is what a system of justice should symbolise.

Conclusion

This chapter has shown the importance of public trust in the judiciary for the rule of law and the perception of legitimacy, yet surveys including YouGov have reported varying levels of trust; The impact of a lack of diversity on the perception of bias and how this has wider impacts on reinforcing stereotypes and the legal profession itself. This chapter finally highlighted the benefits of judicial diversity for legitimacy, encouragement and increasing the public's trust. It's clear that a representative bench is not only democratically fundamental but also crucial for the public's perception, yet despite systematic reform, barriers to judicial diversity remain.

[98] Amir (n 94).

3. Barriers to judicial diversity

This chapter will examine the barriers that exist before and during judicial application. The chapter will begin identifying the socio-economic and educational barriers including the high education costs, favouring higher-ranked universities and unequal support, that apply prior to application. Then evaluating the structural and cultural barriers including the lack of representation and career progression within the law profession, whilst exploring the notion of homophily. The chapter will then further look at the structural barriers apparent during the application process including the preference for barristers over solicitors and the unclarity around the concept of merit leaving it open to subjective interpretations. Lastly, turning attention to the clear disparity between white and ethnic minority individuals in application progression highlighting the bias and inequality present during the process. By focusing on the barriers to judicial diversity, this allows for a deeper evaluation on whether the current reforms in place are effectively tackling the inequalities, and a comparative analysis of historical barriers of exclusion.

3.1. Pre application barriers

3.1.1. Socio-economic and educational barriers

Depending on the type of judge an individual wants to be, you must have worked as a legal professional for between 5 and 7 years.[99] Yet, in order to become a legal professional, there are requirements and qualifications needed, it was estimated that the average cost of obtaining a degree in the UK, including tuition and cost of living, is about £68,349.[100] Following this, in order to qualify there are various requirements, including passing qualifying exams, that require preparation courses, legal training and qualifying work experience, all that additionally cost an extensive amount of money. For individuals with low-income backgrounds the high cost of education and unpaid work experience can make the entry into the law profession extremely difficult, if not impossible. As supported by Michael Johnson Jr, 'the cost of legal education in the UK is also a significant barrier to entry, with many students facing significant debt upon graduation'.[101] With access to becoming a legal professional expensive and continuing to rise, less individuals are pursuing a career, resulting in fewer applicants for judicial appointment.

Not only do the high education costs reinforce the historical perception of exclusivity of the legal profession, but the favouring of individuals that have attended high-ranking universities further highlights the preference for privilege.

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[99] National Careers Service, 'Judge' (*National Careers Service*) <https://nationalcareers.service.gov.uk/job-profiles/judge> accessed 5 May 2025.

[100] Tom Allingham and Hannah Williams, 'How Much Does University Cost?' (*Save the Student*, 24 April 2025) <https://www.savethestudent.org/student-finance/university-study-cost.html> accessed 5 May 2025.

[101] Michael Johnson Jr, 'Elitism in the Legal World: A Comparison between the U.K. and U.S.A' (2023) *ScholarWorks@Arcadia* 16.

As supported by Johnson,[102] 'graduates of the most prestigious universities still dominate the top law firms in the UK'.[103] The Ministry of Justice commissioned the National Centre for Social Research (NatCen) to compile and appraise evidence about judicial diversity and its barriers of achievement.[104] Their evidence supported this claim of the legal sector favouring those who have attended 'top' universities.[105] This preference not only disadvantages and discourages individuals but also a considerable number of potential applicants for judicial appointment are being dismissed and looked over from the beginning of their legal career. As NatCen's evidence indicated, this preference can, 'disadvantage individuals from lower socio-economic backgrounds and black, Asian and minority ethnic individuals who are more likely to attend 'newer' universities with less prestigious reputations'.[106]

The preference for 'high-ranked' universities can result in many law firms neglecting to engage with 'lower-ranked' universities and many law prospects missing the opportunity to network and build connections. In a critique of The Fairness Project, this notion of unequal opportunities was evidenced through how one of the participants from the focus group, 'explained her frustrations with the barriers that she faced in securing a training contract due to her socio-economic background, gender and ethnicity'.[107] With socio-economic and educational barriers like the high costs, favouring elite universities and unequal support, the opportunity for achieving diversity will remain limited.

3.1.2. Structural and cultural barriers

Although the increase of diversity on the bench is a significant advancement from past judicial representation, it still does not reflect society. Not only does this cause a decline in public confidence but can create a sense of exclusion that discourages and deters individuals from entering judicial roles. As concluded by the National Centre for Social Research, it was suggested that 'the lack of female judges may create an image that the judiciary is an unwelcoming working environment for women and further eligible female lawyers from applying for a judicial role'.[108] With the even less representation for ethnic minorities and the lack of visible role models, this provides a barrier to judicial diversity by further discouraging marginalised individuals. As previously supported by Amany Jabir, 'the lack of diversity among our judiciary deters individuals from under-represented groups

[102] Micheal Johnson Jr.

[103] Johnson Jr (n 101).

[104] Jennifer Barton-Crosby and others, 'Judicial Diversity: Barriers and Initiatives' (National Centre for Social Research, February 2023) 6.

[105] ibid 74.

[106] Barton-Crosby and others (n 104) 74.

[107] Tina McKee and others, 'The Fairness Project: The Role of Legal Educators as Catalysts for Change. Engaging in Difficult Dialogues on the Impact of Diversity Barriers to Entry and Progression in the Legal Profession' (2020) 55 *The Law Teacher* 305.

[108] Barton-Crosby and others (n 104) 75.

from participating in the justice system'.[109] Historically the judiciary has shared similar characteristics which led to a negative public perception being reflected, without visibly seeing change and equal representation, the negative perception is repeatedly reinforced.

The number of women lawyers has now exceeded that of men, with an additional increase in the proportion of lawyers with an ethnic background.[110] However, the lack of diversity within senior positions remains limited and marginalised groups continue to be underrepresented. From this, we can see the reoccurring historical challenge of a barrier preventing career progression for both women and ethnic minorities. As supported by a report presenting the findings from SQW's research, they found that 'white men dominate barristers and solicitors senior ranks'.[111] If underrepresented individuals face barriers that restrict career progression, this can result in lack of confidence on pursuing a career within the judiciary.

The barrier to career progression can be argued that the lack of flexibility and the profession's large demand, deters individuals, particularly women, from applying to senior positions or pursuing a career as a barrister or within the judiciary. As supported by NatCen's evidence, 'the culture of long hours, the expectation of '24/7' availability, and the lack of flexible working were identified as barriers to both the retention of women in the sector and their career progression'.[112] The intensity of a legal profession can be difficult for individuals, especially women returning from maternity leave with caring responsibilities to meet the professions demands. This not only deters individuals from applying for a senior role, but it can also cause unequal barriers of gaining the necessary years of experience to hold a judicial appointment, which may result in indirect discrimination. As further supported by NatCen, 'diversity appears to be concentrated in less senior positions and within less 'prestigious' and less financially lucrative areas of practice'.[113] The challenge of achieving diversity within senior positions has been a prominent theme through history and contributes to strengthening the perception of an elitist culture and creates a barrier for those who do not 'fit' the physical stereotype, especially within senior positions.

The notion of homophily, 'the tendency for people to associate and interact with people who share similar characteristics to themselves',[114] might suggest a reason for the challenge in diversifying senior positions. With majority of senior

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[109] Jabir (n 69).

[110] Solicitors Regulation Authority, 'Diversity in Law Firms' Workforce' (*Solicitors Regulation Authority*, 3 January 2025) <https://www.sra.org.uk/sra/equality-diversity/diversity-profession/diverse-legal-profession/> accessed 5 May 2025.

[111] SQW, 'Profiling the Diversity of the Judicial Talent Pipeline' (Legal Services Board 2024) 33.

[112] Barton-Crosby and others (n 104) 75.

[113] ibid 7.

[114] ibid 26.

roles being dominated by white, privileged males, there is going to be a preference to those who share the similarities. As supported by NatCen, 'the notion of homophily may provide an explanation for how and why the (belief of the) elitist culture of the legal professions can present a barrier to career progression for individuals from less privileged backgrounds'.[115] In turn, if we apply this notion and the preference of 'high-ranked' universities as evidenced above by Johnson and NatCen, it can further explain the barrier for marginalised groups around receiving mentoring, support and limits confidence for progressing into a career within the judiciary, limiting the pool of applicants.

3.2. Post application Barriers

3.2.1. Structural barriers

Through the application process, structural barriers can be identified to explain the limitation in achieving judicial diversity. According to the 2024 statistics, the female population represent 40% of barristers and 53% of solicitors whereas the representation of ethnic minorities accounts for 17% of barristers and 19% of solicitors.[116] Marginalised groups are less represented among barristers, yet there is a preference for that particular profession, with a disparity identified in the recommendation rate.[117] As evidenced in a report by the SQW, 'Solicitors are 46% less likely to be recommended from application in comparison to barristers'.[118] The inequality in recommendations for different legal professions, and an identified preference for barristers who have less diversity, has consequences for the ability of achieving judicial diversity considering it further restricts the pool of applicants. As supported by the JAC's[119] judicial selection exercises, 'we can be confident that a disparity of practical significance exists between solicitors and barristers'.[120] This not only further reinforces the perception a professional hierarchy within the legal sector, with the favouring of barristers, but its undermines the experiences and skills a solicitor can bring to the judiciary, with additionally discouraging other legal professionals from progressing their career to within the judiciary.

Since the Constitutional Reform Act 2005, the sole criteria for candidates applying for judicial appointments was based on merit, with further incorporating the equal merit principle to encourage achieving diversity. The ideology of the principle of merit holds hope for underrepresented individuals with limiting other

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[115] Barton-Crosby and others (n 104) 26.

[116] Ministry of Justice, *Diversity of the Judiciary: Legal Professions, New Appointments and Current Post-Holders - 2024 Statistics* (11 July 2024) <https://www.gov.uk/government/statistics/diversity-of-the-judiciary-2024-statistics/diversity-of-the-judiciary-legal-professions-new-appointments-and-current-post-holders-2024-statistics> accessed 6 May 2025.

[117] ibid.

[118] SQW (n 111) 59.

[119] Judicial Appointments Commission.

[120] Ministry of Justice (n 116).

structural barriers and equalising the appointment criteria, however, the lack of a clarity and definition has raised questions on whether it aids or hinders achieving judicial diversity. As identified by NatCen, 'Subjective interpretations of what constitutes merit may have implications for the diversity of the legal professions, from entry-level positions through to the most senior judicial appointments'.[121] As quoted by Tamas Gyorfi, Erika Rackley argues that the concept of merit should be redefined as it 'reflects the expectations of the present members of the judiciary and that this helps the judiciary to replicate itself'.[122] As much as Gyorfi does not objectify redefining merit with a focus on contribution as well as competence, they further argue 'that diversity is an important epistemic asset and, therefore, appointing judges solely on the basis of merit, if merit is understood as the competence of the individual judge, is simply wrong'.[123] Ultimately, with an unclear definition of merit, it could be exploited by systematic biases, as supported by NatCen, 'this lack of clarity may lead to subjective interpretations of merit, which may limit progress towards diversity within the legal professions and the judiciary'.[124] this suggests that redefining and clarifying the concept of merit, as argued by Rackley; whilst not just focus on experience and qualifications but also an applicant's contribution, as supported by Gyorfi.

3.2.2. Bias and discrimination barriers

As supported by NatCen's research, 'Evidence from the literature and stakeholder consultation indicates that there is a perception of prejudice and discrimination within the judicial selection and appointment processes'.[125] Evidence from SQW showed that where 'female barristers and solicitors are more likely to be shortlisted and recommended than their male equivalents'.[126] Whereas Ethnic minorities have less chance, regardless of their professional background.[127] As further highlighted by the judicial selection exercises, 'ethnic minority individuals accounted for 31% (1,995) of applications, and for 16% (111) of those recommended for appointment'.[128] This disparity in progress between white and ethnic minorities applicants suggests that a barrier to achieving judicial diversity lies within the application process itself.

The notion of homophily may explain this apparent inequality in the application process. With how individuals may be appointed based on those who

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[121] Barton-Crosby and others (n 104) 33.

[122] Tamas Gyorfi, 'Why Is the Equal Merit Principle (Almost) Straightforwardly Wrong?' (2017) 80 *The Modern Law Review* 1065.

[123] ibid 1072.

[124] Barton-Crosby and others (n 104) 8.

[125] ibid 31.

[126] SQW (n 111) 17.

[127] ibid 27.

[128] Ministry of Justice (n 116).

share characteristics and reflect many existing judges. And for marginalised groups including ethnic minorities who constitute only 11% of all judges,[129] this would suggest why they are at a disadvantage during the application process. As concluded by SQW, 'further investigation is needed to rule out any underlying prejudices or biases in the judicial selection process that disadvantages applicants from ethnic minorities'.[130] With this bias and inequality apparent during the process, and lack of transparency in understanding the decisions made, it creates a barrier that prevents achieving judicial diversity, no matter the structural reform.

Conclusion

I have identified the apparent barriers that apply both before and after judicial application. From education inequalities like, high costs gaining the required academic qualifications, favouring high-ranked universities and unequal support; with structural barriers including a lack of visible representation and a disparity in career progression to senior positions. It can be argued that the challenge in achieving judicial diversity is deep rooted, prior to judicial application, but within the legal profession itself. Many of the barriers identified had greater impact on deterring and discouraging individuals but also restricting underrepresented individuals from progressing and considering judicial roles.

The structural barriers recognised like the preference for barristers over solicitors not only reinforced the perception of professional hierarchy, but it further narrows the pool of applicants. Additionally, the unclear definition and unclarity around the principle of merit has left it vulnerable to subjective interpretations, that as Rackley argues allows the judiciary to replicate itself. And finally, by identifying the clear disparity in those more likely to shortlisted and recommended and this puts ethnic minorities at a disadvantage. All these barriers contribute to failure in achieving judicial diversity and these inequalities need to be addressed and tackled to better ensure fair access within the judicial, which will assist establishing fair representation within the judiciary.

[129] ibid.

[130] SQW (n 111) 51.

4. Reforms

The chapters focus is to firstly analyse the effectiveness of the Judicial Diversity and Inclusion Strategy implemented in 2020 with comparing its statistical success in 2024. Whilst, looking at other action plans including the Judicial Diversity Forum's theory of change and whether their differing objectives are better suited for achieving judicial diversity. Finally, I will address recommendations including diversity quotas, addressing whether this is a deep-rooted issue within the law profession, researching into the appointment process and clarifying the definition of merit. This chapter will assist in concluding whether the current reforms are achieving the goal of diversity by tackling the barriers identified in chapter three.

4.1. Current reform analysis

The publication of the Judicial Diversity and Inclusion Strategy in 2020 aimed 'to increase the personal and professional diversity of the judiciary at all levels'.[131] Four core objectives were adopted to not only improve the diversity of the judiciary but also to support a more inclusive culture. The objectives included, 'creating an environment in which there is a greater responsibility for and reporting on progress in achieving diversity and inclusion',[132] which required leadership judges to promote and report actions taken to support judicial diversity. 'Supporting and building a more inclusive and respectful culture and working environment',[133] through diversity and inclusion training and support for all judicial office holders including the topic of bias, whilst examining gaps in training to ensure effective results. 'Supporting and developing the career potential of existing judges',[134] by developing training to better ensure equal and focused support for judge's career progression. 'Supporting greater understanding of judicial roles and achieving greater diversity in the pool of applicants',[135] with varying platforms to ensure better outreach and using visible role models to highlight the diversity.

The latest strategy[136] update released in 2024, reported on the positive work around training on diversity and inclusion, including conducting training needs analysis to determine strengths and improvements needed around the current training provision. In terms of supporting and developing existing judges' career, the continuance of the Judicial Peer Mentoring Scheme, launched in 2021 received positive responses, highlighting the effective impact of this opportunity. Additionally, work around removing socio-economic and educational barriers was evident with an increase in engaging both in-person and virtually with universities

[131] Courts and Tribunals Judiciary (n 2) 10.

[132] ibid 11.

[133] ibid 13.

[134] ibid 16.

[135] ibid 17.

[136] Judicial Diversity and Inclusion Strategy 2020–2025.

and colleges, which enhances opportunities for individuals to get involved, not to mention, the focus was made on increasing internships for under-represented groups. Furthermore, it was noted that the Targeted Outreach Programme, that was piloted in September 2020 by the JAC,[137] 'has proven to be a success, demonstrating both progression and recommendation of candidates',[138] including women, ethnic minorities and solicitor candidates. Progress like this is significant in breaking down structural barriers, including career progression, disparity in application progress and tackling the preference for barristers, that prevent achieving judicial diversity. Although, as recognised by Lady Justice Whipple[139], 'progress has been made in increasing the personal and professional diversity of the judiciary across some areas and in relation to some groups, but the update highlights several areas where more sustained work is necessary'.[140]

The change in representation since 2020 highlights the limited success of the Judicial Diversity and Inclusion Strategy. Most success was found with female judicial office holders, with a 6% increase in court judges and tribunal judges, 4% increase in non-legal members and 1% increase in magistrates.[141] However compared to Black, Asian and minority ethnic judicial office holders progress remained limited. There was a 1% increase in all court judges, tribunals judges, non-legal members and magistrates within the Asian and mixed ethnicity[142]; and for the black ethnicity there was no change for all court judges, tribunal judges and magistrates other than a 1% increase in non-legal members.[143] With the change in representation highlighting the lack of statistical and visible success, it has left the strategy open to criticism's and recommendations to better tackle the barriers preventing judicial diversity.

In a response to the Judicial Diversity and Inclusion strategy 2020-2025, the Racial Bias and the Bench report found 'racial bias plays a significant role in the justice system',[144] and further evaluated the weaknesses of the above strategy's objectives. With a clear challenge of increasing judicial representation for ethnic minorities, the report identified the legal systems resistance in acknowledging institutional racism that not only effects the appointment process but the legitimacy of deliverance of justice. The strategy introduced in 2020, 'does not even consider the issue of racism. Indeed, the words 'racial bias' and 'racism' are not even

[137] Judicial Appointments Commission.

[138] Judiciary of England and Wales, *Judicial Diversity and Inclusion Strategy Update 2024* (14 January 2025) 19.

[139] Lady Justice (Philippa) Whipple, Chair of the Judicial Diversity Committee of the Judges Council.

[140] Judiciary of England and Wales (n 138) 3.

[141] ibid 6.

[142] ibid 7–8.

[143] ibid 7.

[144] Monteith and others (n 74) 6.

mentioned, and the word 'race' appears only once, in a footnote'.[145] As further shown through the NatCen's research and the Ministry of Justice 2024 statistics, there is a clear disparity of progress for ethnic minority judicial applicants with evidence of perception of prejudice and discrimination through the application progress. Yet, the resistance in recognising the institutional racism apparent is limiting the chances of tackling those systemic barriers. And as emphasised by the Racial Bias and the Bench report, 'the consequence is that we are left with a strategy that contains no firm proposals to combat racism in the justice system'.[146]

The first three objectives set out in the Judicial Diversity and Inclusion Strategy, aim for supporting existing judges and building a more inclusive and positive environment within the judiciary, whereas the fourth objective aims to target the barriers that are present before applications. Yet, as identified by the Racial Bias and the Bench report, 'the language of the strategy conveys no sense of urgency or even focus',[147] not to mention the lack of focus on the application process itself and the differing levels of success. As supported by Geoffrey Bindman, 'the strategy pays little attention to the selection process itself',[148] the absence of attention on the Merit criteria creates the impression that the procedure is fair and equal, yet statistics are continuously proving the opposite. As Bindman further states, 'however strong the commitment to diversity, it cannot be achieved without a fair selection process'.[149] The core objectives in the strategy that commenced in 2020 have been criticised for being ineffective and failing to address and tackle the systematic barriers including the unfair selection process. With the 2020 strategy coming to an end, it has been announced that it will be replaced by a new Diversity and Inclusion Strategy in 2026.[150] We are yet to see the objectives and of the new strategy and whether they will retain the original objectives or set new targets. However, it is time we recognise the structural barriers preventing judicial diversity so we can properly tackle them. As supported by Keir Monteith and others in their report,[151] 'Without an acknowledgment of structural and informal exclusionary mechanisms in the system, the Strategy will not be able to achieve its

[145] ibid 8.

[146] ibid.

[147] ibid 22.

[148] Geoffrey Bindman, 'Judicial Diversity: a long way to go?' (*New Law Journal*, 10 December 2021) <https://www.newlawjournal.co.uk/content/judicial-diversity-a-long-way-to-go-> accessed 6 May 2025.

[149] ibid.

[150] Baroness Carr LCJ and Keith Lindblom SPT, 'Message from LCJ and SPT: Judicial Diversity and Inclusion Update 2024' (*Courts and Tribunals Judiciary*, 14 January 2025) <https://www.judiciary.uk/guidance-and-resources/message-from-lcj-and-spt-judicial-diversity-and-inclusion-update-2024/> accessed 12 May 2025.

[151] Racial Bias and The Bench.

purported aims'.[152]

Other action plans have slowly been recognising the importance of understanding and addressing the barriers that exist both before and after application. The Judicial Diversity Forum's theory of change similarly to the above strategy focuses on ensuring an inclusive and supportive culture, however, expands focus to addressing the barriers to application and career progression; whilst identifying and eliminating structural barriers to appointments.[153] This is a significant step in directing attention to the importance of determining what the structural barriers are and removing them to ensure fair and equal access into the judiciary. As much as the ideology behind the theory of change is promising, with little success previous strategies had, highlights the challenge between announcing the strategy's framework and the physical implementation.

4.2. Recommendations

The argument of introducing diversity quotas has increased, with the need to put pressure on achieving judicial diversity and tackling the resistance to change. As supported by Stephen Clear, 'Without systematic reform, such as introducing diversity quotas, the situation is unlikely to change in the foreseeable future'.[154] By implementing quotas it can assist in the target of fair representation, but it's important to identify the problems of this radical route to judicial diversity. By prioritising certain characteristics, even if that individual is less qualified, they may succeed over someone else who has more experience, not only does this threaten the quality of the judiciary but it can be argued to be a form of reverse discrimination. In countries including Norway and Germany, when implementing quotas, they saw visible success and an increase in representation,[155] however whether we should introduce quotas in England continues to be a controversial argument. As stated by Alexander Williams, 'Quotas can be an important tool in increasing representation, but they must be part of a broader strategy that addresses underlying biases and fosters inclusivity at every level of an organisation'.[156]

As previously identified, barriers are present both before and after judicial application, to successfully achieve judicial diversity, it has been argued that we

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[152] Monteith and others (n 74) 31.

[153] Judicial Diversity Forum, *Priorities and Actions for 2025* (Judicial Diversity Forum, February 2025) <https://judicialappointments.gov.uk/wp-content/uploads/2025/02/Judicial-Diversity-Forum-Priorities-and-Actions-for-2025-Final.pdf> accessed 12 May 2025.

[154] Stephen Clear, 'Judicial Diversity in the UK Is in Decline – Here's Why That Is a Problem' (*The Conversation*, 2 September 2022) <https://theconversation.com/judicial-diversity-in-the-uk-is-in-decline-heres-why-that-is-a-problem-189168> accessed 12 May 2025.

[155] Joe Caccavale, 'Should You Use Diversity Quotas? Pros, Cons and Evidence' (*Applied*, 31 August 2021) <https://www.beapplied.com/post/diversity-quotas> accessed 12 May 2025.

[156] Alexander Williams, 'Diversity Quotas: Progress or Political Correctness Gone Mad?' (*LGBTIjobs*, 26 November 2024) <https://lgbtijobs.co.uk/resources/blog/2024/11/diversity-quotas-progress-or-political-correctness-gone-mad/> accessed 12 May 2025.

need to address the root problem that is starting within the legal profession. As recommended in the barriers and initiatives report, there is a need to 'address the deep-rooted elements of the professional culture that continue to disadvantage under-represented groups'.[157] Without determining what is preventing career progression within the legal profession strategies implemented to assist diversity within the judiciary, as proven by the judicial diversity and inclusion strategy 2020, will lack statistical success.

Disparity around the success of applicants for judicial appointment, has highlighted the need for structural reform around the process itself. As quoted by Stephanie Boyce, 'We know a diverse pool of candidates is applying ... They're just not making it through the process in the same numbers. It is time for the whole appointments system to be overhauled to deliver a more diverse judiciary'.[158] With this, research is needed to determine what is preventing equal and fair success within the appointment process, whether its racial or unconscious bias or indirect discrimination. Additionally, the subjective interpretations on the principle of merit and the continued lack of clarity may be an explanation to the lack of fair result within the process. As supported in a report by Justice, 'In the assessment of "merit", the ability to contribute to a diverse judiciary should be taken into account'.[159] The lack of focus on the appointment process itself has disadvantaged the pace of progress in achieving judicial diversity. However, the Judicial Diversity Forum's theory of change has put a priority on eliminating the structural barriers preventing success, so if implemented and followed, visible representation may be achieved.

Conclusion

This chapter has sought to analyse the effectiveness of current reforms and identify the weaknesses of the Judicial Diversity and Inclusion Strategy (2020-2025). Despite the strategies achievements including increased engagement, it failed to acknowledge the institutional racism that is not only affecting the public's confidence in deliverance of justice but fairness in the appointment process; the strategy also paid little attention to the selection process. The lack of success in achieving judicial diversity is apparent in the strategy's 2024 report where statistically representation had not improved majorly since 2020. Whereas the Judicial Diversity Forum's action plan involved identifying and eliminating the structural barriers to appointment, yet the promising ideology is still to prove its success with the goal of diversity. This chapter also identified recommendations that may better assist in achieving fair representation and equal access to judicial appointments, including diversity quotas, which may carry the threat of

[157] Barton-Crosby and others (n 104) 9.

[158] Monidipa Fouzder, 'Controversial Judicial Selection Tool to Be Dropped in Some Circumstances' (*Law Gazette*, 31 March 2022) <https://www.lawgazette.co.uk/news/controversial-judicial-selection-tool-to-be-dropped-in-some-circumstances/5112064.article> accessed 12 May 2025.

[159] Nathalie Lieven QC, *Increasing Judicial Diversity* (JUSTICE 2017) 7.

discriminating against other candidates. Also, tackling the deep-rooted issue of fair and equitable access into the legal profession and failure to diverse senior positions, researching into the appointment process to determine what is causing a disparity in applicant's success; and redefining the principle of merit to include an individual's contribution. Historic barriers of exclusion still haunt the judiciary today and without effective reform, achieving judicial diversity will continue to be a challenge.

Conclusion

To conclude, public trust is fundamental for judicial legitimacy, yet the varying levels of public trust highlights that the goal of diversity is far from being achieved. The lack of equal judicial representation has proven to be a prominent theme through history, with legislative and structural reform, from the SD(R)A 1919[160] to the CRA 2005,[161] being heavily criticised from not only its slow progress but the reliance on if the appointment process is fair then diversity will soon be achieved. Following this, I discussed how trust is democratically fundamental for maintaining judicial legitimacy and with the lack of diversity, this had wider implications for the perception of bias on reinforcing stereotypes and negatively impacting the legal profession; then looking at the role of diversity in enhancing judicial decisions and encouraging those who have been historically excluded from entering the judiciary. Not to mention, the identified sentencing disparity is causing a decrease in public's trust within the legal system and raises questions with are the judges providing fair and impartial justice.

From Chapter three, I shifted focus to investigating and analysing the barriers that are present before and after judicial application, highlighting the importance of visible representation not only for enhancing public trust but removing the sense of judicial exclusion. From this chapter, the argument was raised on whether the challenge of achieving judicial diversity is deep rooted within the legal progression; further identifying structural barriers including preferences on top-ranked universities and barristers. Additionally, the disparity of success rates for ethnic minorities during the appointment process compared to females highlighted the need for investigating whether racial bias or indirect discrimination is causing this inequality.

In the final chapter, I critically analysed the current reforms including the Judicial Diversity and Inclusion Strategy, which statistically showed very limited success. Criticism's rose including its lack of acknowledging institutional racism, lack of urgency and how the strategy paid little attention the appointment process itself. However, the ideology behind the JDF's[162] theory of change shows promises with its focus on identifying and eliminating structural barriers to appointment and shifting away from relying on individual 'trickling-up' into the judiciary. Nevertheless, whether or not its physical implementation will lead to success in increasing representation is yet to be determined. Further recommendations were analysed including diversity quotas, that carries the risk of further discrimination, and structural reform including challenge of career progression within the law profession, investigating biases present during the application.

The judiciary holds power over individuals' liberty and with an increasing

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[160] Sex Disqualification (Removal) Act 1919.

[161] Constitutional Reform Act 2005.

[162] Judicial Diversity Forum.

diverse population, a visible homogeneous bench does not provide the public with confidence that fair and impartial justice is being provided. During this critical analysis, I discussed the barriers that ethnic minorities and women face, while it's clear that the gender gap is closing, focus needs to be put on increasing representation for ethnic minorities. Yet, it's important to further address the intersectionality of gender and ethnicity and the combination of barriers that women with an ethnic background face. The lack of equal representation and sentencing disparity has directly affected the public's trust in the legal system, the public want to believe that judges are impartial and fair, however, how can a homogeneous judiciary understand and represent the diverse experiences and perspectives of the current population it serves.