University College London
Journal of Law and Jurisprudence

Volume 14

Academic Year 2024-2025

First published in 2025 by

University College London (UCL), Faculty of Laws Bentham House,

4-8 Endsleigh Gardens, London WC1H 0EG

Available to download free: https://student-journals.ucl.ac.uk/laj

Issue DOI: 10.14324/111.444.2052-1871.14.1

ISSN: 1463-1725

University College London
Journal of Law and Jurisprudence

Volume 14

Academic Year 2024-2025

LLM Editors

Nijat Ismayilzada

Alexander Ng Clevewood

Yiji Chen

Isabella Barrett Gannon

Ai Zhen Carol Yuen

Lewis Lockwood

Gulsum Qane

Aurora Crain

Charvi Devprakash

Linus Schwenkenberg

Hoi Ching Kristie Rim

Margarita Vesga Benavides

Teresa Di Tella

Fengbo Zhang

Tianwei Pu

Faculty Supervisor

Dr. Stavros Makris

CONTENTS

DOI: 10.14324/111.444.2052-1871.14.1-1

Foreword

The process of assembling a new issue of the UCL Journal of Law and Jurisprudence is always a compelling journey through the varied landscapes of contemporary legal thought. Each volume reflects not only the pressing concerns of our time, but also the intellectual curiosity and normative ambition of scholars at different stages of their academic journeys. Once again, this latest volume delivers a careful selection of articles that traverse disciplinary boundaries and offer fresh perspectives on established emerging legal problems.

Volume 14 offers a particularly rich journey, advancing from the foundational theories of Bentham and the architecture of surveillance, through urgent questions of democratic stability, digital vulnerability, and environmental justice, to the perennial challenges of legislative integrity.

The opening piece, by Jeevan Shemar, 'Examining the Panopticon as an icon of Jeremy Bentham's Philosophical Ideas,' offers a comprehensive analysis of Jeremy Bentham's panopticon, arguing that it serves as an enduring emblem of his philosophical ideas. Beyond symbolising surveillance and control, the panopticon reflects Bentham's broader commitments to utility, transparency, economic efficiency, and societal innovation. Jeevan shows the panopticon's architectural design embodies principles of governance, incentivisation, and public accountability—seeking to maximise community happiness even as it risks oppressive and dehumanising consequences. The article also discusses Bentham's proposals for penal reform, democratic engagement, and economic liberalism, contextualising his ambitions and naiveté within their historical moment. Ultimately, the panopticon is presented as a complex symbol uniting Bentham's theories of ethics, governance, and reform—illuminating both the promise and peril of his utilitarian vision.

Following this, Jana Ruwayha's 'Resilience or Regression? Navigating Legal Transformation in the Era of Permacrisis' maps the evolving terrain of legal systems grappling with continuous crisis. Jana argues that emergency powers, once reserved for extraordinary circumstances, are increasingly normalised and embedded within everyday legal frameworks, posing threats to democratic principles. Drawing on Complex Adaptive Systems theory, the paper analyses the evolution and entrenchment of legal responses, highlighting risks of democratic backsliding. It reconceptualises resilience, suggesting that adaptability must always be paired with strong protections for fundamental rights, and contends that true resilience in law requires commitment to democratic safeguards in a world marked by sustained global uncertainty.

In ‘Authorised Push Payment Fraud: Theorising a Loss Allocation Model,’ Nat Shum analyses the growing problem of Authorised Push Payment (APP) fraud, where customers are tricked by fraudsters into willingly authorising payments to fraudulent accounts. Nat examines and critiques differing loss allocation regimes in the UK and EU, focusing on whether liability should fall to the customer or the bank. He concludes that neither existing framework fully addresses the complexity of APP fraud, and proposes a model based on shared liability—usually a 50/50 split—adjusted for customer fault, bank breaches of duty, and removal of special rules for vulnerable customers. Nat’s approach advocates incentivising both customers and banks to prevent fraud, factoring in moral hazard and alignments with broader regulatory goals. This approach could serve as a foundation for future legal and policy developments in combatting APP fraud.

The fourth contribution, ‘Articulating the Theory of Right-Holding and the Rights of Nature under Earth Jurisprudence’ by Kaden Pradhan, critiques existing accounts of the ‘rights of nature’ within Earth Jurisprudence and proposes an analytically rigorous framework for establishing legal rights for natural entities. Kaden examines philosophical theories of right-holding—including will and interest theories—and argues that both are limited by anthropocentric assumptions. Adopting an Earth-centred perspective, the article contends that ecosystems and other large-scale "holons" should be considered the paradigmatic right-holders, with rights extended to sentient animals and humans only where necessary for broader political morality. Kaden develops an ideal model of rights for nature—existence, subsistence, and persistence—designed to protect the integrity of Earth’s communities, outlines how these rights can be balanced against human interests, and stresses that effective recognition of nature's rights must include state duties to codify, enforce, and restore them when violate.

Closing the issue, Luís Otávio Barroso da Graça’s ‘Complying with Legislative Procedural Rules: Why Legislatures Should Foster This Goal and How It Can Be Done’ examines why legislatures should comply with procedural rules and how such compliance can be fostered. Luís analyses mechanisms for ensuring compliance, including internal enforcement by lawmakers and the use of impartial staff, and recommends protections to ensure their independence from political pressure. The article also considers the role of judicial review, suggesting that courts should defer to legislatures but be open to reviewing procedural breaches under narrowly defined circumstances. Overall, this piece highlights how procedural integrity is not a mere technicality but a cornerstone of legitimacy and representative government, outlining concrete proposals for internal and external enforcement mechanisms capable of strengthening democratic representation and legitimacy.

Collectively, the contributions in this Volume offer a vivid cross-section of current legal scholarship, balancing conceptual inquiry with practical analysis. They are united by a commitment to address not only what the law is, but also what it might become in the face of the challenges and transformations of our time. They also reflect UCL Faculty of Laws' commitment to fostering interdisciplinary dialogue and nurturing normative projects that respond to the challenges of our era.

Writing, reading, reviewing, and the publication process remain indispensable for nurturing creativity, rigorous inquiry, and meaningful scholarly dialogue—especially in an era when artificial intelligence, despite its transformative promise, poses significant challenges to academic integrity. Without these human-centred practices, the nuanced judgment, intellectual integrity, and originality that are essential to vibrant academic communities, risk being diminished. In this spirit, I extend my heartfelt thanks to our authors, the Editors-in-Chief Fidelice Opany and Kevin James, and the entire Editorial Board, for their dedication and scholarly vision. May this Volume catalyse renewed reflection and dialogue, strengthening our shared commitment to a more just and resilient legal order.

Dr. Stavros Makris
Lecturer in Law
UCL Faculty of Laws
UCL Journal of Law and Jurisprudence
November 2025

DOI: 10.14324/111.444.2052-1871.14.1-2

Preface

Dear Readers,

On behalf of the Editorial Board of the UCL Journal of Law and Jurisprudence (UCLJLJ), it is our pleasure to present Volume 14 of the Journal.

Since its inception, the UCLJLJ has consistently attracted high quality articles in every call for submissions. Consequently, the Editorial Board often has to grapple with a tough choice regarding the articles which should proceed to publication from the rich pool that we receive. This year was no exception. We received exceptional articles, the majority of which, if not for time limitations, would have proceeded to publication. After careful consideration, we selected five articles to feature in this Volume. These articles tackle tough, contemporary legal questions ranging from the application of Bentham's panopticon, to the impact of crises on democratic legal orders, through the pressing novel issues in banking fraud, to environmental equity, and lastly, legislative integrity.

In the first article, 'Examining the Panopticon as an Icon of Jeremy Bentham's Philosophical Ideas', Jeevan Shemar evaluates Jeremy Bentham's idea of the panopticon. Jeevan critiques the conventional representation of the panopticon merely as a symbol of totalitarianism and repressive penal policy with detrimental effects on the incarcerated and society as a whole. He argues that a keener examination, in fact, demonstrates that the panopticon is a tool with a broader reach as it unifies Bentham's beliefs about a range of topics, particularly human governance, economics and innovation, and reveals how these aspects can be employed to maximise utility for the human good. Ultimately, the panopticon must be viewed holistically, as a tool that can maximise human pleasure and inflict pain.

In 'Resilience or Regression? Navigating Legal Transformation in the Era of Permacrisis', Jana Ruwayha argues that we are living in an era of permacrisis that is characterised by continuous and overlapping crises which buttress one another. In this state, Jana posits, emergency powers are not being used sparingly, as they ought to, but are rather invoked too frequently, such that they have become embedded in different legal frameworks. She cautions that this trend poses threats to democratic principles. Based on the Complex Adaptive Systems theory, Jana recounts the evolution of legal responses and how they impact (or disrupt) democratic governance. She argues that strong protection of fundamental human rights, resilience, and adaptability remain core in ensuring that democratic legal orders are upheld in the face of recurring crises which define our era.

Following this, Nat Shum, in his article titled 'Authorised Push Payment Fraud: Theorising a Loss Allocation Model' examines Authorised push payment fraud (APP fraud), a trend whereby a bank customer transfers funds from their account to another account that is controlled by a fraudster. He investigates the differing loss allocation schemes that the UK and the European Union have put in place in response to APP fraud, and finds that both regimes are deficient Consequently, Nikita devises a principle-based loss allocation model that properly addresses the concepts of fault and moral hazards that are embedded in APP fraud. Nikita's model takes account of the different factors at play, such as customer fault, the absence of a fixed upper limit on customer liability, and the need for eliminating exceptions for vulnerable customers. In this novel scheme, apportionment of liability is more balanced as customers are incentivised to take reasonable steps to identify fraud patterns, while banks are required to perform specific duties to prevent authorised fraud.

The penultimate article is 'Articulating the Theory of Right-Holding and the Rights of Nature under Earth Jurisprudence' by Kaden Pradhan. Kaden critiques the 'rights of nature' which is one of the core components of Earth Jurisprudence. He argues that scholars have yet to provide a compatible theory of right-holding. Consequently, it is not clear which natural entities can hold rights. Furthermore, different jurisdictions hold conflicting views on the substantive content of the rights of nature. He also contends that while some of the central tenets of the rights of nature do not flow from Earth Jurisprudence principles, others are merely redundant. In response, he constructs a right-holding theory that coheres with the principles of Earth Jurisprudence. To this end, he argues that ecosystems as well as large-scale holons should constitute the right-holders, with animals and humans holding such rights only for the purposes of upholding political morality. He devises a detailed scheme of how the rights held by ecosystems and holons should be balanced against human interests, and how such rights can be enforced and reinstated in the event that they are infringed upon.

The last contribution in this issue is 'Complying with Legislative Procedural Rules: Why Legislatures Should Foster This Goal and How it Can be Done' by Luís Otávio Barroso da Graça. Luís emphasises the importance of adhering to procedural rules in the legislative process. He argues that complying with procedural rules in law-making not only advances the rule of law, but also protects participation and allows lawmakers to present divergent viewpoints, thereby strengthening democratic representation and clarifying the content and purpose of the proposed legislation. Consequently, Luís presents several avenues for upholding legislative procedural rules, such as effective use of points of order, reliance on impartial staff, as well as guaranteeing free expression both within and outside the legislature. Finally, he

contends that although the legislature is the organ of the state charged with the responsibility of making laws, the judiciary should, in approriate but limited circumstances, review alleged procedural breaches by the legislature.

We are grateful to the authors for submitting their artciles to the UCLJLJ, for their efforts in incorporating the editors' comments, and for their paramount patience throughout the editorial process. We would also like to thank all of those who submitted manuscripts which were not accepted for various reasons. Taking the time to put together a manuscript is, in itself, a commendable effort, and we hope that our comments will help you develop your ideas further.

We are indebted to our editors who worked tirelessly to deliver timely and meaningful feedback on the submissions that we received. It is thanks to you that we have been able to put together this Volume, and adhere to the UCLJLJ tradition of double-blind peer review. We are also grateful to the previous Faculty Adsvisor, Dr. Pedro Schilling De Carvalho, for his generosity in inducting us into the practices of the UCLJLJ, and to the current Faculty Advisor, Dr. Stavros Makris, for his unwavering guidance and support throughout this process. Lastly, we thank Ian Caswell from the UCL Press for his technical support.

Fidelice Opany & Kevin James
Editors-in-Chief
UCL Journal of Law and Jurisprudence
November 2025

DOI: 10.14324/111.444.2052-1871.1967

Examining the Panopticon as an Icon of Jeremy Bentham's Philosophical Ideas

Jeevan Shemar[*]

Abstract: Jeremy Bentham (1748–1832) is arguably best known for proposing the panopticon as a tool for maximising societal utility. Despite never actually being constructed, the panopticon is a notorious symbol of Bentham's belief in the imperative of maximising happiness and minimising pain. Commonly, the building is perceived as representing totalitarian control and oppressive penal policy. While not wholly inaccurate, such interpretations are incomplete. Proper analysis of the panopticon reveals that it enshrines Bentham's wider beliefs about human governance, economics, and the need for innovation in society in order to pursue more effectively the principle of utility. Consequently, in-depth examination of Bentham's idea illuminates its conflicting dimensions and historical and contemporary significance. It is the unifying emblem of Bentham's philosophical work.
Keywords: jurisprudence, penal policy, economics, utilitarianism

A. INTRODUCTION

Jeremy Bentham (1748–1832) was a prolific writer who made novel contributions to varied, inadequately theorised fields from ethics to language to commemorative tradition. Arguably, he is best known for proposing the panopticon as a means to pursue societal utility.

Bentham's panopticon is a building structured for a social purpose,[1] namely the maximisation of happiness. The panopticon is a polygonal, several storey structure. It is designed to facilitate simultaneous inspection of a potentially large number of people within it.[2] Through such observation, Bentham envisaged the panopticon would help to govern the behaviour of and procure desired conduct from its inmates. No single panopticon exists: Bentham amended his original panopticon plan numerous times and envisaged that different genres of panopticon would respond to different circumstances. Not one building was ever actually constructed. Beginning with the *Panopticon Letters* in 1786,[3] the panopticon saga spanned many years of Bentham's life. His writings on the panopticon consist of various letters, proposals and later reflective works.

Commonly, Bentham's panopticon is interpreted as a mere symbol of oppression. While such analyses are not baseless, they are inadequate because they do not account

[*] The author holds a Bachelor of Arts degree from the University of Cambridge, an LL.M. from University College London, and a Postgraduate Diploma from King's College London. Email: jeevan.shemar.22@alumni.ucl.ac.uk

[1] Anne Brunon-Ernst, *Beyond Foucault: New Perspectives on Bentham's Panopticon* (Routledge 2012) 7.

[2] Michael Quinn, *Bentham (Classic Thinkers)* (Polity Press 2021) 110.

[3] Jeremy Bentham, *The Works of Jeremy Bentham, Published under the Superintendence of his Executor, John Bowring, Volume Four* (William Tait 1838–1843).

appropriately for the conceptual relevance and historical significance of the panopticon. Proper contextualisation of the panopticon challenges the idea that it can be simply categorised. This article examines the panopticon more comprehensively. It does so by examining the ways in which the panopticon enshrines Bentham's broader ideas about human governance in Part B, economics in Part C, and (c) the need for innovation in society in Part D, in order to pursue more effectively the utility principle. It concludes that consideration of these varied dimensions illuminates the panopticon's ethical and practical implications: some are promising, some are cruel, and some are short-sighted. Hence, in this way, the building is the enduring, unifying emblem of Bentham's philosophical work.

B. HUMAN GOVERNANCE

In the panopticon, Bentham enshrined his belief that happiness can be maximised through good governance. This section analyses the principle of utility and considers Bentham's pursuit of it through both transparency and manipulation of the physical. It highlights that the panopticon is a manifestation of Bentham's broader ideas about human governance.

1. Principle of Utility

Bentham provided a basis for understanding human nature. He proposed that humans are subject to the two sovereign masters of pain and pleasure.[4] Bentham stated that the principle of utility involves assessing actions according to their augmentation or diminution of happiness, so their effect on the balance of pleasure compared to pain.[5] In doing so, Bentham offered insight into both human psychology (by explaining what people do) and normative ethics (by proposing what people should do).[6] Thus, acting in accordance with the principle of utility involves exhibiting behaviour that maximises community pleasure and minimises community pain.[7] This aspiration for maximal happiness explains why Bentham later re-labelled it "the greatest happiness principle"[8] which he believed to be a more accurate term.

[4] Jeremy Bentham, *The Collected Works of Jeremy Bentham: An Introduction to the Principles of Morals and Legislation* (JH Burns and HLA Hart eds, OUP 1996).
[5] Bentham (n 4) ch 1.
[6] Philip Schofield, *Bentham: A Guide for the Perplexed* (Bloomsbury Publishing 2009) 45.
[7] Bentham (n 4) ch 1.
[8] Jeremy Bentham, *The Collected Works of Jeremy Bentham: First Principles Preparatory to Constitutional Code* (Philip Schofield ed, OUP 2015) 232.

Driven by psychological hedonism,[9] Bentham's theory of human action potentiates conflict between the interests of a decision-making individual and their community. The subjection of humans to the self-interested governance of dictatorial pain and pleasure gives rise to sinister interests — interests the pursuit of which contributes to maximising an individual's happiness, rather than that of the community and thus the greatest number.[10] Given that people are governed by their personal experiences of pain and pleasure, legislators must therefore render pursuing sinister interests more painful than pleasurable. Bentham argued that doing so would encourage utility-maximising behaviour. Accordingly, he proposed that legislators should provide conditions, such as incentives and sanctions, in which individuals would decide how to act.[11]

Bentham acted as a quasi-legislator in his panopticon project by drawing upon his theorising of incentivisation and sanction. He did so to align the objectives of the individuals involved with the panopticon—whether inmates, inspectors, or contractors—with those of the wider community.[12] Bentham did this in relation to inmates in two main ways. First, he did so through the panopticon's physical design. The building is generally discussed as being (though need not necessarily be[13]) a circular[14] penitentiary with cells lining the circumference of the walls and an inspector's lodge located in the centre.[15] This architecture would enable the inspector to see simultaneously inside all cells in their line of sight from the inspection tower. The placement of windows and direction of light would both render inmates easily visible to the inspector and obscure the inspection tower to the inmates.[16] Therefore, inmates would be aware that they may be under constant one-way observation. They could be observed at any time for any period, without knowing when or for how long they were being watched. Foucault rightly notes that this renders them objects of observation but never subjects in communication.[17] Bentham intended that this would prompt inmates to modify their behaviour in order to conform to prison rules. They would self-discipline because they would fear being punished for misconduct. Second, Bentham sought to align inmates' objectives with those of the community through resource allocation. Bentham incentivised good behaviour by making

[9] Stella Sandford, ''Envy Accompanied with Antipathy': Bentham on the Psychology of Sexual Ressentiment' in Anthony Julius et al (eds), *Bentham and the Arts* (UCL Press 2020) 76.
[10] Philip Schofield, *Utility and Democracy: The Political Thought of Jeremy Bentham* (OUP 2006).
[11] Schofield (n 10).
[12] Janet Semple, *Bentham's Prison: A Study of the Panopticon Penitentiary* (OUP 1993) 93.
[13] Bentham (n 3) Letter 5.
[14] ibid Letter 2.
[15] ibid 41.
[16] ibid.
[17] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Pantheon Books 1977) 200.

inmates' material conditions dependent on their commitment to work[18] while in the panopticon. He intended that this would align inmates' duty to self-discipline with their practical interests.

Thus, the panopticon's architecture (physical structuring) would give rise to self-disciplining (psychological control). The inmates' ignorance as to whether they are being observed would compel them to behave as though they are being scrutinised incessantly. Behaving otherwise would be too risky. Bentham envisaged that this would benefit the wider community because offenders would no longer pose a threat to other persons' security[19] or property. Accordingly, the principle of utility would be pursued.

Yet, the panopticon is rightly criticised. Three critiques are particularly relevant to Bentham's use of incentivisation and sanction. First, he presumes observation will necessarily induce compliance. However, in practice it may not do so. Conditions of tight control are inherently susceptible to rebellion. Inmate disobedience may even require physical engagement from panopticon inspectors. In such an eventuality, the panopticon's architectural design is a hindrance to the inspectors because of its internal bottleneck and the potential for prisoners to siege the inspection tower.[20] Second, the substantial invasion of privacy inherent in the panopticon suggests surveilled inmates will experience undue harm. For example, the installation of constant paranoia in inmates is essential to the panopticon's operation.

Third, Bentham privileged the collective over the individual—a point commonly made in opposition to the principle of utility more generally.[21] He justified subjecting individuals to panoptic conditions, and thus the risk of significant harm, by reference to the need to pursue the interests of the community.[22] He argued that this is necessary in order to maximise utility because it provides the requisite security needed for collective happiness.[23] However, Bentham's approach inadequately accounts for the level of suffering that inmates would foreseeably endure. The brutality of the panopticon's conditions renders it intolerable and outweighs its intended benefits.

Relatedly, by prioritising the happiness of the collective over that of the individual in such a way, Bentham's panopticon might facilitate totalitarianism. The panopticon may represent a convenient stepping stone used to suffocate criminal offenders' individual

[18] Bentham (n 3) Letter 13.
[19] Jeremy Bentham, *The Works of Jeremy Bentham, Published under the Superintendence of his Executor, John Bowring, Volume One* (William Tait 1838–1843).
[20] Philip Steadman, 'The Contradictions of Jeremy Bentham's Panopticon Penitentiary' (2007) Journal of Biological Systems 9, 21.
[21] See John Rawls, *A Theory of Justice* (Belknap Press 1971).
[22] DJ Manning, *The Mind of Jeremy Bentham* (Longmans 1968) 88.
[23] Christian Laval, 'Discipline and Prevent: The New Panopticon Society' (2012) 2(40) Revue Du Mauss I, VI.

liberties[24] under the blanket of social conformity.[25] However, while such a view may be intuitive to 21st century commentators, it seems to have been less so at the time Bentham wrote. His panopticon proposal is disastrously short-sighted and fails to foresee the panopticon's gravest implications, but it should be understood in context. Bentham saw the panopticon as a humane, reformative project designed to rehabilitate inmates by inculcating positive attitudes and behaviours through observation-induced self-discipline. As Howard made clear, prisons contemporaneous to Bentham's writings were squalid and ineffective.[26] In comparison, the panopticon was relatively forward thinking. It emphasised cleanliness[27] and would provide opportunities for inmates to earn money to upgrade their food options[28]. Therefore, Bentham's view that panoptic conditions empower inmates to fulfil their potential as human beings[29] is unsophisticated and brutal, but is illuminated by the historical context in which it was formed.

Bentham also used incentivisation and sanction to align the interests and duties of panopticon inspectors and contractors. Bentham's reliance on transparency to do this conforms with the approach he adopts elsewhere in his philosophical corpus. Transparency is facilitated, first, by public viewing galleries[30] for the Open Committee of the Tribunal of the World.[31] These would enable the public to inspect the activities occurring within the panopticon. Bentham believed doing so would unite panopticon contractors' interest in profit (discussed below) with their duty to reform inmates because public inspection could result in calls for contractors to be removed. He intended that this junction of interest would influence prison operations and minimise the corrupting influence of sinister interests.[32] Second, Bentham proposed economic measures. Envisaging himself as panopticon contractor, Bentham offered to pay the government for every prisoner reconvicted following their release.[33] He also suggested the contractor should publish the panopticon's financial accounts because such transparency would further unite interest and duty.[34] Third, Bentham discussed other types of observation. Mutual observation[35] would involve panopticon staff being themselves subject to

[24] Élie Halévy, *The Growth of Philosophic Radicalism* (Martino Fine Books 1901) 83.
[25] Douglas Long, *Bentham on Liberty: Jeremy Bentham's Idea of Liberty in Relation to His Utilitarianism* (University of Toronto Press 1977) 218.
[26] John Howard, *The State of the Prisons in England and Wales* (CUP 2013).
[27] Semple (n 12) 72.
[28] Gertrude Himmelfarb, *The Haunted House of Jeremy Bentham* (Duke University Press 1965) 56.
[29] Long (n 25) 187–220.
[30] Bentham (n 3).
[31] ibid Letter 6.
[32] Jeremy Bentham, *The Collected Works of Jeremy Bentham: The Book of Fallacies* (Philip Schofield ed, OUP 2015).
[33] Quinn (n 2) 121.
[34] Bentham (n 3) Letter 9.
[35] ibid Letter 6.

the scrutiny of a head inspector. This aimed to prevent inmates from bribing inspectors. Similarly, panopticon management would be scrutinised by public inspections.[36] Bentham intended that this would provide security for both inmates, who would be less likely to be maltreated by observed inspectors, and society, that could ensure management pursues the community's interest in cost-effective reformation.

Arguably, Bentham's reliance on public scrutiny is naive because political processes and public opinion[37] can themselves be corrupted by sinister interests. However, Bentham recognised this. In his wider theorising, he provided a relatively convincing response: public opinion is not infallible and can be co-opted by nefarious interests, so it is important to educate the public about the operation of fallacies in public discourse.[38] Thus, education is an implicit prerequisite in the modes of public-led accountability on which Bentham relied. Accordingly, the panopticon manifests Bentham's broader ideas about the ability of sanction and incentivisation to unite panopticon actors' interests and duties.

(i) Utility Through Transparency

In the panopticon, Bentham pursued utility through transparent governance. The significance Bentham attributes to public transparency[39] in the panopticon is emblematic of his subsequent ruminations on the topic.

First, consider transparency in politics. Bentham proposed the political assembly debating chamber.[40] This near-circular building would enable everyone within it to be heard, with seats rising in an amphitheatrical way and the president being seated above all others, able to see the entire assembly. Motions under debate would be presented visibly and official, verbatim reports of speeches would be produced. Space for reporters and auditors would be provided to facilitate scrutiny of official action.[41] Bentham intended that publicising political debates would enable them to be better overseen. He also considered sinister interests to be too powerful. Therefore, he proposed parliamentary reform. He suggested establishing regular elections, advertising debates and publishing voting records.[42] Doing so would provide the

[36] ibid.
[37] Myles Zhang, 'The Panopticon and Trouble in Utopia' (*myleszhangorg*, 9 July 2015) <www.myleszhang.org/2015/07/09/utopia/> accessed 29 September 2025.
[38] Bentham (n 32).
[39] James E Crimmins, 'Jeremy Bentham' in (Edward Zalta & Uri Nodelman (eds), *The Stanford Encyclopedia of Philosophy Archive* (Stanford University 2021) <https://plato.stanford.edu/archives/win2021/entries/bentham/> accessed 29 September 2025.
[40] See Michael James and others (eds), *The Collected Works of Jeremy Bentham: Political Tactics* (OUP 1999).
[41] ibid 40.
[42] Bentham (n 19) 425–64.

public with opportunities to discover and scrutinise public officials' conduct. This would make politicians more accountable, and the public could enforce its views by disposing electorally of representatives deemed not to be properly pursuing the community's interests. Bentham believed these mechanisms would be effective because they would unite officials' interests and duties. This is consistent with his approach to the panopticon.

Second, consider the ministerial audience chamber[43] where ministers' offices would be arranged in a crescent with the Prime Minister's in the centre. Conducting business in a polygonal room, ministers' affairs would be subject to public view around the periphery.[44] Bentham intended that this design would counter the corrupting influence of sinister interests by subjecting ministers to popular scrutiny, therefore aligning their interests and duties. Again, this shows Bentham to be a community-oriented, architectural planner.[45] Accordingly, both Bentham's panopticon writings and political ideas demonstrate his belief in the power of transparency to maximise the happiness of the greatest number.

(ii) Utility Through Physicality

Bentham's panopticon project is fundamentally about manipulating the physical. Architecture is designed to provide constant surveillance to effectuate discipline, reinforce power structures[46] and thus ensure good governance. This reflects the criticality of the physical in Bentham's broader philosophy.

The panopticon is a circular structure with a central component, and it works by light passing through it.[47] It resembles an eye. Anthropomorphising the building in this way is illuminating, first, because it reflects Bentham's intention that the public should look at and into the panopticon. By so looking, the public will contribute to the exemplarity of the punishments being effectuated.[48] Bentham predicted that the public would be deterred from offending upon witnessing the treatment that would await if it did. Second, public inspection of the panopticon would contribute to uniting interest and duty through accountability. This would further community happiness. Third, anthropomorphising the panopticon as an eye communicates symbolically the need to recognise inmates as part of the societal body politic.

[43] See Jeremy Bentham, *The Collected Works of Jeremy Bentham: Constitutional Code, Vol.1*, (Fred Rosen and JH Burns eds, OUP 1983).
[44] Philip Schofield, 'Jeremy Bentham on Freedom of the Press, Public Opinion, and Good Government' 2019 58(2) Scandinavica 39, 50.
[45] JR Poynter, *Society and Pauperism: English Ideas on Poor Relief, 1795–1834* (University of Toronto Press 1969) 109.
[46] Zhang (n 37).
[47] Bentham (n 3).
[48] Jeremy Bentham, *The Rationale of Punishment* (Creative Media Partners 2018) 130.

This counters the idea that criminals are disregardable irredeemables. Bentham considered that contemporaneous punishments, such as transportation, encouraged the public to view offenders in such a way.[49] Rather, the public should concern themselves with the panopticon's outcomes because doing so benefits the community. In these varied ways, the building is an instrument for deciphering human nature for the benefit of all.[50]

Bentham similarly pursued the principle of utility by the operation and manipulation of the physical in his other philosophical work. Consider his theory of language. First, Bentham's theory of language underpins his utilitarianism and conveys the physical basis of his ontological ideas.[51] Bentham believed pain and pleasure to be corporealities. Accordingly, his theory of language is based on the physical. He distinguished real versus fictitious entities,[52] believing real ones to be those based in physical reality. In light of this, he emphasised the significance of the linguistic tools 'phraseoplerosis', paraphrasis and 'archetypation'.[53] Phraseoplerosis logically occurs prior to paraphrasis and involves filling out a phrase by rendering explicit its meaning. Paraphrasis involves translating in a phrase the name of a fictitious entity into that of a real entity. Archetypation involves identifying the physical image at the root of a phrase.[54] For example, phraseoplerosis changes the declarative statement "it is on Jeremy" into "the obligation is on Jeremy", paraphrasis translates "the obligation" into "pain in the event of non-performance", and archetypation transmutes this into the image of physical pressure bearing downwards on Jeremy so as to prevent non-compliance with his obligation. Bentham believed these tools would help to prevent against the holding of erroneous beliefs[55] by translating phrases into their physical reality-based counterparts. Accordingly, they illuminate Bentham's view that utility is both constituted by and pursued through the physical.

Also, consider Bentham's auto-icon. This is a tangible manifestation of his pursuit of utility maximisation through the physical. It enables the living to derive more pleasure from the dead. For example, Bentham donated his body for medical education[56] and his auto-icon welcomes people to University College London. Also, auto-iconisation is a performative act.[57]

---

[49] Tim Causer, '"The evacuation of that scene of wickedness and wretchedness": Jeremy Bentham, the panopticon, and New South Wales, 1802-1803' (2019) 21 Journal of Australian Colonial History 1, 3.
[50] Christian Welzbacher and Elisabeth Lauffer, *The Radical Fool of Capitalism: On Jeremy Bentham, the Panopticon, and the Auto-Icon* (MIT Press 2018) 86.
[51] Schofield (n 6).
[52] Jeremy Bentham, *The Works of Jeremy Bentham, Published under the Superintendence of his Executor, John Bowring, Volume Eight* (William Tait 1838–1843).
[53] ibid.
[54] ibid.
[55] Crimmins (n 39).
[56] ibid.
[57] ibid.

Bentham's auto-icon serves as a physical representation of his ideas and corpus of work. Thus, his theories about how best to pursue the principle of utility can better endure into the future through their representation in physical reality. Hence, Bentham's focus on the tangible aspects of the panopticon reflects the significance he attributed to the physical generally.

Consequently, the panopticon is emblematic of Bentham's ideas about human governance. It reflects his utilitarian theory about human behaviour being controlled by pain and pleasure, the need for transparency in effective societal governance, and the basis of these ideas in physical reality. These beliefs are echoed in Bentham's work on politics, language and commemorative tradition. This adds interesting insight to the common interpretation that the most important aspect of the panopticon is its facilitation of psychological control. Like Bentham's ideas about human governance more broadly, it is fundamentally an idea about the physical.

C. Economics

In addition to being a penal scheme, Bentham's panopticon is a significant economic project. He aimed to use the scheme to render inmates productive societal actors. This section assesses how Bentham enshrined in the panopticon his theories on the subordinate ends of utility and the rule of economy. It illustrates how Bentham seeks to pursue efficiency through economic liberalism and thus that the panopticon should be more comprehensively understood as an economic project.

1. Subordinate Ends of Utility

In *Principles of the Civil Code*,[58] Bentham discussed the subordinate ends of utility. These are security (the protection of life, property and status), abundance (the creation of wealth), subsistence (satisfaction of basic necessities), and equality (equal happiness for all). Bentham stated that the effective pursuit of these objectives would maximise utility. He also explains that security is foundational: its future-embracing nature means its existence is necessary in order to attain the other subordinate ends. Thus, Bentham's ideas about material abundance are premised in his belief in the necessity of security within a community.[59]

The panopticon provides security both internally and externally. Internally, first, it protects property rights through observation. By facilitating inspection, the building's architecture is designed to prevent undesirable conduct by inducing self-discipline in inmates

[58] Bentham (n 19) ch 2.
[59] Quinn (n 2) 98.

and inspectors. Bentham intended that the potential for constant observation would shape the interactions both amongst inmates and between inmates and inspectors. This would help to prevent inmates from rebelling against inspectors.[60] Thus, it would provide security for internal operations. Second, Bentham envisaged that contractors would exploit the inmate workforce by establishing production processes within panopticons.[61] He intended[62] that inmates would be trained into skilled workers capable of economic production.[63] Therefore, security helps to ensure that labour power exists for this purpose.

Externally, the panopticon provides further security. It does so, again, through its architecture. First, the shape of cells and narrow passageways are designed to prevent inmates from escaping.[64] Second, the panopticon is structured to facilitate public inspection. Bentham hoped that this would increase exemplarity because the public would see the inmates and therefore be deterred from offending. Public inspection also has the potential to make it more difficult for escaped inmates to evade recapture because the public might be more likely to recognise fugitives.[65]

Using this security as a foundation, Bentham also pursued abundance through the panopticon. He did so through inmate labour. First, consider the glorification of production within the panopticon penitentiary. Bentham based this panopticon on his brother Samuel Bentham's designs for a building that would enable Russian labourers to be surveilled.[66] In doing so, Bentham fashioned the panopticon penitentiary to promote the idea that work is the greatest good.[67] For example, he proposed that different types of labour power within the panopticon could perform different roles in businesses' operations[68] and thus produce profit for them.[69] The economic possibilities offered by the panopticon partly explain why Bentham advocated the project over contemporaneous forms of penal policy, such as the death penalty and transportation.[70] Second, consider the pauper panopticon. Envisaged as an engine for wealth creation,[71] Bentham's panopticon for the poor sought to respond to contemporaneous

[60]Matthieu Verry, 'Panoptique - Jeremy Bentham' (*ResearchGate*, December 2021) <www.researchgate.net/publication/356790702_Panoptique_-_Jeremy_Bentham> accessed 29 September 2025.
[61] Bentham (n 3).
[62] ibid Letter 21.
[63] ibid Letter 19.
[64] ibid Letter 7.
[65] Bentham (n 48) 130.
[66] Simon Werrett, 'Potemkin and the Panopticon: Samuel Bentham and the Architecture of Absolutism in Eighteenth Century Russia' (1999) 2(1) Journal of Bentham Studies 1.
[67] Bentham (n 3).
[68] ibid Letter 10.
[69] Ibid, Letter 15.
[70] Bentham (n 3).
[71] Semple (n 12) 298.

economic welfare issues in society.[72] Contractors would be able to establish businesses within pauper panopticons and engage the internal labour force.[73] Inmates would be provided with the opportunity to work and, resultantly, a means of survival. This would conform to the subordinate end of subsistence[74]. By ensuring that inmates' basic necessities were taken care of, long-term stability would be provided for businesses that would benefit from the existence of a sustained, exploitable workforce. This would enable the continued pursuit of the subordinate end of abundance into the future.[75]

Bentham's pursuit of the subordinate ends of utility through the panopticon further illustrates that the project is emblematic of his broader philosophical approach. Bentham saw abundance as foundational in progressing towards equality.[76] He believed that pursuing the principle of utility would gradually produce greater equality in the distribution of material goods,[77] citing post-feudal Europe as evidence of this phenomenon.

While it is unclear how substantial their direct influence has been, Bentham's ideas about the imperatives of security and equality through abundance have more modern application. The Rawlsian difference principle[78] arguably mirrors Bentham's theory by proposing the pursuit of equality through security and economic production. Alternatively, Thatcher's critique of the concept of relative poverty[79] arguably reflects Bentham's idea of the non-conflict between abundance and subsistence.[80] Interestingly, Bentham's approach to abundance contrasts with that of JS Mill. JS Mill's belief in the stationary state[81] assumes there to be limits to the pursuit of abundance. These differing viewpoints illustrate the complexity of utilitarian economic thought.

Importantly, however, Bentham failed to engage satisfactorily with the effects of the inequalities produced by the panopticon.[82] First, most obviously, is the exploitation inherent in the panopticon's internal dynamics. Inmates are subjected to dehumanising conditions from which contractors are entitled to benefit. Yet, Bentham did not meaningfully consider the

[72] See Charles F Bahmueller, *The National Charity Company: Jeremy Bentham's Silent Revolution* (University of California Press 1981) 211.
[73] Bentham (n 3).
[74] Ibid, Letter 17.
[75] ibid, Letter 10.
[76] Richard Hildreth (ed), *Theory of Legislation, Translated from the French of Etienne Dumont* (Adamant Media 2005).
[77] Crimmins (n 39).
[78] John Rawls, *A Theory of Justice* (Belknap Press 1971).
[79] Felix Römer, 'Poverty, Inequality Statistics and Knowledge Politics Under Thatcher' (2022) 137(585) The English Historical Review 513.
[80] See Bentham (n 19).
[81] John Stuart Mill, *Principles of Political Economy and Chapters on Socialism* (OUP 2008).
[82] Quinn (n 2) 96.

detrimental psychological impact of the panoptic environment on inmates. Second, Bentham did not convincingly address the risks posed by contractors pursuing sinister interests. Their involvement in the panopticon scheme means contractors would enjoy increased political and financial power. Predictably, they would intend to exercise this influence in their own interests, rather than for the benefit of the community. Bentham recognised the threats posed by such a dynamic. Accordingly, he emphasised the role of political scrutiny. Bentham relied on the popular sanction,[83] which essentially consists of public opinion and the ethical determinations of a community, as an important tool for maximising utility. Also, he emphasises the importance of informing the public about fallacious argumentation.[84] He believed that better societal understanding of logical fallacies, such as appeals to authority, would improve public discourse and strengthen the ability of the community to protect itself against sinister interests. This is not necessarily wrong. However, while effective political engagement is a valuable aspect of governance, it is insufficiently preventative. The public scrutiny that Bentham envisaged would not preclude contractors from aggregating undue power and resources in the first place. Further, it would not necessarily protect against sinister interests because neither the public itself nor its political enforcement processes are clearly defined concepts. Recognising the insufficiently preventative nature of Bentham's approach helps in understanding why he has been described as a genius in bourgeois stupidity.[85]

2. Rule Of Economy

Bentham further manifested his economic beliefs in the panopticon by pursuing through it the rule of economy. This rule emphasises efficiency. It provides that the panopticon must be managed with as much regard to frugality as is consistent with preserving life and health and that public expense must not be incurred merely to indulge inmates.[86] Pursuant to this, Bentham intended that his panopticon project would be based in contractual relationships, involve profit-maximising conditions and be controlled by a dominant contractor.

Bentham envisaged that contractual processes[87] would be important to the panopticon scheme. Consider the tendering process by which the state delegates management of the panopticon to the private party offering the best terms. To Bentham, this privatisation of penal

[83] See Bentham (n 4) ch 3.
[84] Bentham (n 32).
[85] Karl Marx, *Capital: Volumes One and Two (Classics of World Literature)* (Wordsworth Editions 2013) vol 1, ch 24.
[86] Bentham (n 3).
[87] ibid Letter 9.

justice is warranted: people like bargains.[88] Bentham's freedom-to-contract ideal reflects his belief in the advantages of the free-market[89] and correspondingly small state.[90] He contended that governmental non-interference would pursue the principle of utility because individuals would, subject to the application of incentivisation and sanction, make decisions for themselves as they generally know how best to do. The centrality of the contractual process to the panopticon suggests that Bentham's project is inseparable from economic liberalism.[91] Recognition of this relationship helps in understanding how and why there may be a link between the development of capitalism and the origins of the modern prison.[92]

Also, the panopticon's profit-maximising conditions further exemplify Bentham's commitment to frugality. First, Bentham designed the panopticon so that inmates could be instrumentalised by management as tools for production[93] and that inmates' material conditions would be dependent on their commitment to work.[94] This would achieve a junction of their basic interests in food and social interaction with their duty to produce. Such economic production contributed to why Bentham favoured the panopticon as a form of penal policy over existing practices. For example, he opposed transportation because he (likely erroneously)[95] believed it failed to reintegrate prisoners economically back into society so yielded no produce.[96] Rather, Bentham argued for a penal policy that he believed made better economic sense. This is exemplified by his appeals to the 1798 Finance Committee's report—for which he prepared materials, performed calculations and drafted statements used in the final publication.[97]

Second, Bentham sought to minimise unnecessary costs associated with the panopticon. Aiming for a waste-free utopia,[98] he manipulated the building's architectural design to save costs. He provided precise prescriptions regarding the construction of the panopticon. He set out its measurements to ensure efficient use of materials and advocated recycling (though in a limited way[99]) by proposing the panopticon penitentiary should be constructed near clean

[88] ibid.
[89] Crimmins (n 39) §8.
[90] Philip Smith, *Punishment and Culture* (University of Chicago Press 2008) 4.
[91] Laval (n 23).
[92] See Dario Melossi and Massimo Pavrani, *The Prison and the Factory* (Macmillan 1981) 40.
[93] Long (n 25) 188.
[94] Bentham (n 3) Letter 13.
[95] John Braithwaite, 'Crime in a Convict Republic' (2001) 64 MLR 1, 11–50.
[96] Bentham (n 3).
[97] RV Jackson, 'Luxury in Punishment: Jeremy Bentham on the cost of the convict colony in New South Wales' (1988) 23(90) Australian Historical Studies 42, 48–55.
[98] Cyprian Blamires, *The French Revolution and the Creation of Benthamism* (Palgrave Macmillan UK 2008) 35.
[99] ibid.

water[100] and be self-sustaining.[101] Such resourcefulness is emblematic of Bentham's approach to other aspects of his work. For example, it underpins part of the logic behind auto-iconisation. Bentham donated his body to medical science to enable further utility to be extracted from it following his death. It was put to another good use.

Also, the panopticon's architecture facilitates efficient production. Bentham intended that the risk of constant surveillance would force inmates to work diligently. The influence of this idea extends beyond penal policy. For example, it has broader manifestations in modern choice architectures and nudge theory.[102] Smartphones encourage self-monitoring. They enable people to record others' behaviour on video at any moment, corporations and governments can track a device's location in real-time, and individuals' data can be collected, stored, analysed[103] and sold. These actions can be taken with a view to increasing the economic productivity of the subject. Digital spaces are shaped by theoretical choice architectures, echoing how Bentham shaped the physical structure of the panopticon. Also, consider how the panopticon's design reduces expenditure on inspectors. The inability of inmates to see whether or at which points they are being surveilled means that, in theory, no inspectors may actually be needed at all. The fear of being inspected might well be sufficient to inculcate self-discipline. However, in practice, it is inevitable that undesirable behaviour will be committed by inmates. At this point an inspector would need to respond. Failure to do so risks undermining the threat of observation that is fundamental to the panopticon's operation. To this end, a single inspector at a time might be sufficient to operate one panopticon. Inspectors would not need to be skilled; they would only need to be capable of observation.[104] This means inspectors would not need costly training and so would be more easily replaceable and thus more economically exploitable.[105] Additionally, consider the physical segregation that inmates are subjected to. Being separated from their peers removes opportunities for interactions that are not directly economically productive. Therefore, through the panopticon, Bentham would pursue efficiency and profit maximisation.

---

[100] Welzbacher and Lauffer (n 50) 27.
[101] Bentham (n 3) Letter 15.
[102] Richard Thaler and Cass Sunstein, *Nudge: improving decisions about health, wealth and happiness* (Penguin 2009).
[103] Anurag Mehra, 'The Digital Panopticon and How It Is Fuelled by Personal Data' (*The India Forum*, 20 October 2020) <https://www.theindiaforum.in/article/digital-panopticon-and-how-it-fuelled-personal-data> accessed 29 September 2025.
[104] Emily Horne and Tim Maly, *The Inspection House* (Coach House Books 2014) 17.
[105] Michael Yates, 'Panopticon' (*Monthly Review*, 2022) <https://monthlyreview.org/articles/panopticon/> accessed 29 September 2025.

Moreover, Bentham adhered to the rule of economy in his proposal that a dominant contractor would manage the panopticon.[106] Contractors would be positioned monarchically within the panopticon regime. Contractors could establish businesses within panopticons according to what would benefit them personally,[107] tax inmates' earnings[108] and inflict force against the imprisoned.[109] Interestingly, these dynamics resemble the powers of a ruler in a state. A king is able to institutionalise the nobility and necessity of work,[110] such that their subjects come to internalise the impulse to labour, and they can unilaterally direct economic and social affairs to pursue improved efficiency. Bentham's belief that a panopticon should have a dominant overseer is not entirely inconsistent with his contemporaneous ruminations on the structure of the state in which he envisaged a monarchical sovereign existing.[111] Accordingly, the panopticon enshrines Bentham's beliefs about economic production and the structures needed best to facilitate it.

However, this must be understood in light of the fact that Bentham intended that he would occupy the leadership role.[112] Therefore, to a significant extent, the panopticon must be recognised as a project of financial self-interest. This also assists in explaining why Bentham desired so strongly for the building to be seen by the public; he hoped it would be impressive and resultantly that the public would want to expand the scheme. This would enrich Bentham further. This understanding, additionally, is congruent with Bentham's pragmatic approach to the implementation of his other philosophical ideas. For example, he sought to profit from his codification services by offering them to governments internationally.[113] Hence, Bentham's estimations of the panopticon's cost-effectiveness and general efficacy must be assessed with appropriate caution.

Consequently, Bentham enshrined in the panopticon much of his wider economic beliefs. The panopticon promotes private enterprise, facilitates economic production, and emphasises efficiency. This economically liberal approach, notwithstanding Bentham's later

[106] Himmelfarb (n 28) 58.
[107] Bentham (n 3).
[108] ibid.
[109] ibid.
[110] See Verry (n 61) 12.
[111] Jeremy Bentham, *Plan of Parliamentary Reform, in the Form of a Catechism, with Reasons for Each Article* (AMS Press 1977).
[112] Jeremy Bentham, *The Correspondence of Jeremy Bentham, Vol.4: October 1788 to December 1793* (Alexander Taylor Milne ed, UCL Press 2017) 340.
[113] Michihiro Kaino, 'Bentham's Constitutional Code and His Pannomion' in Philip Schofield and Xiaobo Zhai (eds), *Bentham on Democracy, Courts, and Codification* (CUP 2022).

turn to increased statism,[114] is a less discussed feature of the project. Foucault argued that there exists a symbiotic relationship between the establishment of disciplinary institutions akin to the panopticon, their resultant forms of psychological self-control, and the emergence of capitalism.[115] Further analysis on these points and on the panopticon being a microcosm of Bentham's broader economic beliefs is warranted.

D. INNOVATION IN SOCIETY

Discernible throughout Bentham's writings is his belief in the need for innovative thinking and change in order for society to conform better to the principle of utility. Alongside his critique of Blackstone's approach to law[116] and the varied matters already discussed, this is evident in Bentham's work on the panopticon. This section considers Bentham's commitment to transforming penal policy, manifesting democratic ideals, and reforming society. It demonstrates that the panopticon was an innovative device[117] and that such creative thinking is characteristic of Bentham's work. As a result, the panopticon should be analysed as emblematic of Bentham's heterogenous philosophical approach.

1. Penal Policy

All punishment is evil. Thus, Bentham provided that the principle of utility only accepts it as far as it promises to exclude greater evil,[118] such as by providing the conditions for political societies and government to exist.[119] Bentham assessed that the primary aim of punishment is to deter the commission of offences.[120] Accordingly, he designed the panopticon penitentiary to facilitate deterrence and prevent internal deviance.[121]

Bentham recognised the rule of lenity, which provided that panoptic conditions must not be detrimental to health or life.[122] Pursuant to this rule, he emphasised the importance of deterrence through symbolism.[123] Bentham envisaged something melodramatic, comparing the panopticon to a theatre.[124] First, he proposed painting panopticon penitentiaries different

[114] See PJ Kelly, 'Utilitarianism and Distributive Justice: The Civil Law and the Foundations of Bentham's Economic Thought' (1989) 1(1) Utilitas 62.
[115] Janet Semple, 'Foucault and Bentham: A Defence of Panopticism' (1992) 4(1) Utilitas 105, 106.
[116] Jeremy Bentham, *The Collected Works of Jeremy Bentham: A Comment on the Commentaries and A Fragment on Government* (JH Burns and HLA Hart eds, OUP 1977).
[117] Foucault (n 17).
[118] Bentham (n 4) 158.
[119] Bentham (n 19) 528.
[120] Bentham (n 4) 166.
[121] Bentham (n 19) 429–431.
[122] Bentham (n 3) 123.
[123] Semple (n 12) Introduction.
[124] Bentham (n 3).

colours depending on the severity of the offences committed by their inmates.[125] Those deemed deserving of permanent imprisonment would be detained in the Black Prison whereas those held pending judicial verdict would be in the white-walled House of Safe Custody. Second, Bentham sought to deter through emblems. Skeletons would furnish the doors of the Black Prison to remind inmates of their inevitable death within its dark confines.[126] This was intended to encourage inmates to submit to the panoptic regime by disengaging from deviant conduct and viewing rebellion as futile. These measures aimed to increase the exemplarity of the punishments in an efficient manner. The public, through its role as external observer, would see such measures, understand their associated symbols and therefore be deterred from offending in order to avoid being subjected to similar treatment.[127]

Bentham believed the panopticon penitentiary constituted better penal policy than transportation. He viewed transportation as unexemplary and thought that it failed to properly deter; the pain induced in the colonies would be unknown to the public because of the substantial physical separation between the two. Bentham's perception that transportation failed to prevent crime and that it did not even guarantee offenders would desist motivated him to crusade against the colonies.[128]

However, Bentham's application of his penal theory to the panopticon fails to account for the causes of undesirable behaviour. While he perceived that not working and alcohol consumption contributed to the commission of deviant conduct,[129] his proposed solutions do not properly respond to these causes. He undertook no meaningful analysis of these factors nor of how depriving people of basic liberties and requiring them to work unduly long hours in the panopticon's conditions[130] would address them at their root. In this way, Bentham's altruistic aspirations are naive to the tyrannising reality of his proposals.

Nonetheless, Bentham did express ideas about the treatment of inmates that were forward thinking for the time. Being influenced by Howard's findings,[131] Bentham criticised contemporary prisons. Having discovered that gaols were unhygienic, criminogenic and corrupt, Bentham aimed to treat panopticon penitentiary inmates better.[132] To do this, he proposed measures that were premised in the belief that delinquent individuals are still

[125] Semple (n 12).
[126] Bentham (n 19) 429–31.
[127] Bentham (n 48) 353.
[128] Causer (n 49).
[129] Bentham (n 3).
[130] ibid.
[131] Howard (n 26).
[132] Semple (n 12).

members of the community. This meant that their interests must be properly accounted for, though could be sacrificed for the benefit of the community where appropriate.[133] For example, in contrast to existing centres of detention,[134] the panopticon penitentiary would provide inmates with clean water and clothes. In effect, Bentham endowed prisoners with rights.[135]

Conceivably, Bentham's rule of lenity and corresponding provision of basic essentials to inmates could derive from natural law ideals: contemporaneous developments in France and the USA emphasised inalienable human rights.[136] Perhaps, even, Bentham pioneered such ideas and extended their application to animals[137] by focussing on their capacity to suffer. Alas, such an analysis is erroneous. First, Bentham expressly rejected the concept of natural rights.[138] He believed that the idea of naturally imprescriptible rights that cannot be taken away amounts to nonsense upon stilts because it lacks sufficient ontological basis[139] and merely propagates personal desires. Bentham's express rejection of natural rights does not necessarily mean such ideas do not implicitly motivate his beliefs. But analysis of his broader ideas and other potential explanations suggest a different purpose drove his thought. Second, relatedly, if Bentham had been motivated by humanitarianism, his critique of the colonies does not convey that. He rarely criticised them on the basis of indigenous peoples' interests, whom he described as quarrelsome brutes constituting the dregs of savage life.[140] Third, Bentham's approach is more convincingly explained by appeals to economy. Generally, harmed people are less productive.[141] Accordingly, the panopticon effectuates a shift from the physical domination prevalent at the time[142] to psychological submission. Bentham innovated beyond contemporary emphases on chains and restraint[143] as means of control. In significant ways, Bentham transforms discipline from a material state of affairs to an internal state of mind. In doing so, he implicitly treated panopticon inmates as laboratory subjects on whom new disciplinary techniques should be tested.[144] Again, this gives rise to a central criticism of utilitarianism: it minimises the value of

[133] Bentham (n 19) 396–398.
[134] Welzbacher and Lauffer (n 50) 25.
[135] Janet Semple, 'Bentham's Haunted House' (1987) 11 The Bentham Newsletter 44.
[136] Welzbacher and Lauffer (n 50) 27.
[137] See Bentham (n 4) ch 17.
[138] Jeremy Bentham, *The Collected Works of Jeremy Bentham: Rights, Representation, and Reform: Nonsense upon Stilts and Other Writings on the French Revolution* (Philip Schofield and others eds, OUP 2002).
[139] Philip Schofield, 'Jeremy Bentham's 'Nonsense upon Stilts'' (2003) 15(1) Utilitas 1.
[140] Barbara Arneil, 'Jeremy Bentham: Pauperism, Colonialism, and Imperialism' (2021) 115(4) American Political Science Review 1147, 1154.
[141] Verry (n 61).
[142] Howard (n 26).
[143] Foucault (n 17).
[144] ibid 203.

the individual in favour of the desires of the majority.[145] Similarly, Bentham changed his position away from arguing that inmates should endure absolute solitude.[146] This can be explained on the basis that collaboration can be more efficient. Internal interactions can create relationships and mini-communities in which idleness is akin to treason.[147] This entrenches the imperative of economic production. Hence, Bentham's panopticon exemplifies his fresh thinking and innovative approach.

2. Democratic Beliefs

Further, Bentham demonstrated his creativity through the panopticon's pursuit of democratic ideals. This is illustrated in two main ways. First, the contractual tendering process would enable members of the public to become involved in managing a panopticon. It would be an opportunity for citizens to participate in penal policy and to shape institutions that aim to deliver justice. By running businesses in their panopticons, contractors would have material stakes in the penal policy decisions being made: effective discipline would mean productive labour which would result in profit accrual. Unifying interest and duty would maximise utility. The public would similarly hope that inmates self-discipline because their doing so would make the wider community safer and enable it to benefit from the products being made. Second, Bentham pursued democratic accountability through architectural design. Public viewing galleries[148] would provide transparency to the Open Committee of the Tribunal of the World.[149] Through the panopticon's physical structuring, the public could scrutinise the behaviour of the inspectors and contractor. Bentham intended that democratic engagement would prevent corruption and other wrongdoing. He sought to fortify such accountability by educating the public about fallacious argumentation[150] in order to ensure that it could scrutinise effectively.

However, the practical, democratising power of these measures should not be overstated. Inside the panopticon, inmates would have almost no control over their lives or the governance to which they were subjected. Outside, it is likely that only already wealthy parties would be able realistically to participate in management. This is because of the tendering process that Bentham envisaged by which contracts would be entered with the highest bidder. Accordingly, effective protection against sinister interests may well require that those implementing penal justice be more directly accountable politically and democratically.

[145] Halévy (n 24) 83.
[146] Himmelfarb (n 28) 45.
[147] Quinn (n 2) 121.
[148] Bentham (n 3).
[149] ibid Letter 6.
[150] Bentham (n 32).

Bentham pursued similar democratic ideals in his wider theorising. First, he frequently challenged the power of the church. He felt internally conflicted about whether to waive his beliefs by subscribing to relevant Church of England precepts in order to receive his degree from the University of Oxford.[151] Later, Bentham commendably challenged received wisdom regarding sexual morality[152] and the needless oppression of non-heterosexual relationships.[153] He argued that such sexual nonconformity harms no one[154] and that, rather, measures criminalising it conflict with the principle of utility.[155] In death, Bentham's promotion of auto-iconisation was an attack on aristocratic, legal, and religious authority.[156] He sought to change the nature of the posthumous spectacle[157] by individualising monumentalisation.[158] By rejecting existing funerary methods which involved making payments to the church, Bentham sought to change what it meant to engage in commemorative ritual. He encouraged individuals to take control of the post-death process and therefore to withdraw power from the state and church[159] and subvert the influence of sinister interests. Similarly, he aimed to empower individuals by offering his organs for medical education. Even in death, he sought to maximise utility by enabling people to learn from his cadaver: the epistemological value of such education was subsequently recognised by the enactment of the Anatomy Act 1832.

Second, Bentham increasingly turned against established institutions which he perceived to be corrupted by sinister interests. Bentham's frustration at the lack of development of his panopticon project led him to distrust political decision-makers and moneyed interests, such as Members of Parliament and influential landowners. He believed that, too often, they acted as impediments to his plan to maximise utility.[160] To similar ends, the French Revolution[161] seemingly crystallised ideas that were present in Bentham's mind[162] about the

[151] Philip Schofield, 'Political and religious radicalism in the thought of Jeremy Bentham' (2013) 20(2) History of Political Thought 272.
[152] Lea Campos Boralevi, *Bentham and the Oppressed* (Walter de Gruyter 1984) 37–81.
[153] Carrie Shanafelt, *Uncommon Sense: Jeremy Bentham, Queer Aesthetics, and the Politics of Taste* (University of Virginia Press 2021).
[154] Sandford (n 9).
[155] Jeremy Bentham, *The Collected Works of Jeremy Bentham: Of Sexual Irregularities, and Other Writings on Sexual Morality* (Philip Schofield and others eds, OUP 2014).
[156] Schofield (n 10) 342.
[157] Chris Haffenden, *Every Man His Own Monument: Self-Monumentalizing in Romantic Britain* (Acta Universitatis Upsaliensis 2018).
[158] Amy Gates, 'Fixing Memory: The Effigial Forms of Felicia Hemans and Jeremy Bentham' (2014) 21(1) Women's Writing 58.
[159] Philip Schofield, *Utility and Democracy: The Political Thought of Jeremy Bentham* (OUP 2006).
[160] Peter Lythe, 'Utility, Truth, and God: Religion in the Thought of Jeremy Bentham' (PhD thesis, University College London 2022).
[161] Mary Mack, *Jeremy Bentham: An Odyssey of Ideas, 1748–1792* (Heinemann 1962).
[162] JH Burns, 'Bentham and the French Revolution' (1966) 16 Transactions of the Royal Historical Society 95, 110.

importance of checks on government power, the need for substantial democratic reform[163] and the equation of security with basic liberties.[164] Thus, the panopticon is central to the development of Bentham's ideas on these topics as well as being inherently emblematic of them.

3. Commitment

Importantly, the panopticon is a symbol of Bentham's dedication to maximising utility. Bentham revised his ideas to ensure they best pursued desirable ends and expended large amounts of time and resources to ensure those ideas would come to fruition.

First, consider Bentham's theoretical work on the panopticon. He revised his central panopticon penitentiary plans numerous times. In the *Panopticon Postscripts*,[165] he moved away from preferring absolute isolation[166] by proposing the eradication of single-occupancy cells.[167] Also, Bentham devised different genres of panopticon: including structures designed to hold mentally ill people, paupers, and the youth.[168] This even included a proposal for a Panopticon Town which would be akin to a neighbourhood where there are available everyday amenities such as farming, artistic attractions and a local newspaper.[169] These suggestions exemplify how Bentham crafted the panoptic principle such that it could be adapted to work in diverse institutions seeking to combine inspection and economy in the pursuit of utility.[170] They demonstrate Bentham's dedication to his belief in the need to experiment constantly and develop novel mechanisms for societal improvement.[171]

Second, consider Bentham's determination to see his project come to fruition. He endured postponement and obfuscation from politicians whom he believed were motivated by sinister interests. Bentham perceived that his struggle to find an appropriate location to build the panopticon was caused by a combination of offensive nonchalance and explicit opposition to his proposals. Landowners did not want a penitentiary in their proximity.[172] Also, the French Revolutionary Wars diverted political attention and funding away from the panopticon

[163] JR Dinwiddy, 'Bentham's Transition to Political Radicalism, 1809–10' (1975) 36(4) Journal of the History of Ideas 683.
[164] Fred Rosen, *Jeremy Bentham and Representative Democracy: A Study of the Constitutional Code* (OUP 1993).
[165] Bentham (n 3).
[166] ibid Postscript.
[167] Causer (n 49) 117.
[168] Bentham (n 3).
[169] Semple (n 12) 284–288.
[170] Verry (n 61) 3.
[171] Semple (n 12) 283.
[172] LJ Hume, 'Bentham's panopticon: An administrative history—I' (1973) 15(61) Historical Studies 703.

project.[173] Subsequently, Bentham wrote *A Picture of the Treasury* and *History of the War Between Jeremy Bentham and George III*: a lengthy, semi-autobiographical recount of the panopticon saga—though the accuracy of his emotive retelling is objectively questionable.[174]

Bentham exhibited similar commitment to the principle of utility in his approach to his other work. He offered his constitutional codification services across the world.[175] In doing so, he supplied himself as a thinker willing to pioneer through novel challenges in order to maximise utility at national levels.[176] Comparably, he amended his will multiple times; on each occasion he presumably pursued closer conformity to the principle of utility. Initially, Bentham intended to be buried according to Church of England tradition. However, he eventually expressed his desire for auto-iconisation and for his body to be used for anatomical study. He believed that through these measures he would, even in death, produce more happiness.

Hence, Bentham was deeply committed to the principle of utility. The panopticon manifests his creative thinking in the realms of penal policy, democracy and societal reform. The panopticon is a symbol of innovation (whether for better or worse ends, in practice) and Bentham's dedication to his ideals.

E. Conclusion

The panopticon is a notorious symbol of psychological control and physical oppression. Yet, while such an analysis is not unfounded, it is unsatisfactory.

Bentham's panopticon is complex. Physically, it is multilayered and precisely designed. Conceptually, the commendable intentions underlying it are dwarfed in significance by the detrimental effects it risks having on both inmates and wider society. Examination of the panopticon's approach to human governance, economics and innovation has shown that Bentham's idea represents more than just bad penal policy. The historical context in which Bentham devised the project illuminates his benevolent intentions. Also, the panopticon's significance as a defining emblem of Bentham's work is clear: it draws together Bentham's varied ideas about architecture, accountability, and autonomy.[177] The panopticon represents Bentham's fantasy world[178]—encompassing both good and bad features. It must be analysed more comprehensively and accurately as such.

[173] ibid 705.
[174] Causer (n 49).
[175] Kaino (n 114).
[176] Schofield (n 6).
[177] LJ Hume, *Bentham and Bureaucracy* (CUP 1981) 241.
[178] Semple (n 12) 286.

DOI: 10.14324/111.444.2052-1871.2006

Resilience or Regression? Navigating Legal Transformation in the Era of Permacrisis

Jana Ruwayha[*]

Abstract: This paper examines how permacrisis—defined by continuous and overlapping crises—has reshaped legal and governance structures, blurring the traditional distinction between exception and normalcy. It argues that emergency powers, once confined to extraordinary circumstances, are increasingly normalised, embedding exceptional measures into ordinary legal frameworks and thereby threatening democratic principles. Drawing on insights from Complex Adaptive Systems (CAS) theory, the paper analyses how legal responses to crises evolve, adapt, and sometimes entrench themselves beyond their original scope. Considering ongoing democratic backsliding, it reconsiders the concept of legal resilience, proposing that adaptability must be tempered by strong protections for fundamental rights. Ultimately, the paper contends that responding effectively to the permacrisis requires a rethinking of resilience—not as flexibility alone, but as a commitment to democratic safeguards in times of sustained global uncertainty. The tension between resilience and regression is presented as central to the future of democratic legal systems.

***Keywords*:** Liberal democracies; emergency powers; democratic backsliding; crisis governance; legal resilience; rule of law.

A. INTRODUCTION

"There are centuries in which nothing happens and years in which whole centuries pass".[1]

Throughout history, crises have served as turning points, reshaping societies, economies, and governance structures. From the fall of empires to global financial crashes, crises have long served as catalysts for change. Today's era of "permacrisis" is marked by an unrelenting succession of crises. This concept, voted as the Collins Dictionary's 2022 Word of the Year,[2] describes "a long period of great difficulty, confusion, or suffering that seems to have no end".[3] It refers to a prolonged state of instability where crises—ranging from financial meltdowns and geopolitical conflicts to climate disasters and pandemics—intersect and reinforce one another. Recent years have seen an exponential rise in the frequency and severity

[*] The author is a PhD Candidate at the Faculty of Law, University of Geneva, Switzerland, and a Researcher and Teaching Assistant at that university's Global Studies Institute (GSI). Email: jana.ruwayha@unige.ch

[1] Homero Aridjis, 'Sefarad, 1492' in Ojos de otro mirar. Poesía 1960–2001 (Fondo de Cultura Económica 2002) 612–17, 613. ("*Hay siglos en los que no pasa nada y años en los que pasan siglos*").

[2] David Shariatmadari, 'A Year of Permacrisis' (*Collins Dictionary Blog*, 1 November 2022*)* <https://blog.collinsdictionary.com/language-lovers/a-year-of-permacrisis/> accessed 8 January 2025.

[3] 'Permacrisis', *Cambridge Dictionary Online* <https://dictionary.cambridge.org/dictionary/english/permacrisis> accessed 8 January 2025.

of crises that require urgent intervention.[4] Amid this turbulence, legal systems face a fundamental question: Does this accumulation of crises mark the decline of democratic governance, or does it open pathways for institutional renewal?

The reality of contemporary governance suggests that the traditional cycle of crisis and recovery is no longer viable. With little respite between successive shocks, legal frameworks face mounting pressure to evolve. As Marie Goupy observed, "it could be […] that the feeling of living in a situation of crisis constitutes one of the great feelings of the twentieth century".[5] This sentiment has only intensified in the 21st century, as escalating existential threats—including climate change and the risk of nuclear conflict—undermine the very foundations of legal stability. The key challenge is no longer just managing crises but determining whether legal systems can withstand continuous shocks while upholding democratic values, or if this transformation has already begun, subtly reshaping democratic governance in ways that remain underexamined.

As Glancy suggested, "we are living, it seems, in an age of permanent crisis; stumbling blindly from one calamity to the next".[6] If legal systems fail to adapt, democratic backsliding and the entrenchment of emergency governance could erode fundamental rights. Conversely, permacrisis may act as a catalyst for structural legal reform, prompting institutions to strengthen their resilience against systemic instability. This debate is not confined to legal scholars but extends to policymakers and civil society, as the implications of permacrisis reach beyond governance into the core fabric of democratic societies.

This paper aims to offer a diagnostic account of how the permacrisis has produced a "new normal" in liberal democracies: a sustained state of exception in which emergency powers have shifted from rare, extraordinary tools to embedded and institutionalised features of legal orders. Its central question is whether this shift represents democratic renewal – by fostering resilience – or instead reflects a deeper process of democratic backsliding or the rise of illiberal or authoritarian governance. At this stage, the immediate task is to map this

[4] For instance, see Angus Urquhart and others, *Global Humanitarian Assistance Report 2023* (Development Initiatives, 20 June 2023) <https://devinit.org/resources/global-humanitarian-assistance-report-2023/> accessed 9 February 2025 (showing that in 2013, approximately 80 million people globally needed humanitarian aid, a number that doubled to nearly 200 million by 2018 and surged to over 406 million by 2022).

[5] Charles Baud, 'Marie Goupy, L'état d'exception ou l'impuissance Autoritaire de l'État à l'époque du Libéralisme' (*Lectures*, 5 December 2016) <https://journals.openedition.org/lectures/21864#quotation> accessed 6 January 2025.

[6] Josh Glancy, 'Will the Permacrisis Ever End?' (*The Times*, 26 February 2022) <www.thetimes.com/world/russia-ukraine-war/article/permacrisis-ever-end-covid-pandemic-brexit-ukraine-crisis-latest-fpznr05qk> accessed 12 January 2025.

paradigm shift. Once its contours are better understood, policymakers can then reflect on how to re-engineer emergency provisions best to safeguard democracy in the age of permacrisis.

The rest of this paper is structured as follows. Part B examines how the increasing interconnectedness of crises in a globalised world intensifies systemic risks, exposing the limitations of traditional legal responses. Next, Part C explores how the boundaries between temporary disruptions and prolonged emergencies have become increasingly blurred, leading to the normalisation of exceptional powers within legal systems. Follow this, Part D introduces key concepts from Complex Adaptive Systems (CAS) theory – such as nonlinearity, feedback loops, bifurcation and hysteresis – to explain how legal and institutional responses to crises become entrenched over time. Finally Part E, it rethinks the concept of legal resilience in an era of ongoing uncertainty, considering how a democratic legal framework can adapt to persistent shocks while preserving democratic values.

B. The Age of Permacrisis: Interconnected Crises and Challenges of Global Governance

The modern world is increasingly defined by the interplay of crises that no longer occur in isolation but instead reinforce and accelerate one another. While crises have always punctuated history, today's landscape is marked by the tangled interplay of financial instability,[7] climate disasters,[8] public health emergencies and geopolitical conflicts.

[7] On financial instability and inequality, see Miguel A Centeno and others, 'The Emergence of Global Systemic Risk' (2015) 41 Annual Review of Sociology 65, 65–85 <www.annualreviews.org/content/journals/10.1146/annurev-soc-073014-112317> accessed 12 January 2025; Dirk Helbing, 'Globally Networked Risks and How to Respond' (2013) 497 Nature 51 <www.nature.com/articles/nature12047> accessed 5 February 2025; Dani Rodrik, *The Globalisation Paradox: Democracy and the Future of the World Economy* (WW Norton & Co 2011). These sources showcase how economic shocks, often amplified by neoliberal policies, expose gaps in international regulatory mechanisms. See also Michael Lawrence and others 'Global Polycrisis: The Causal Mechanisms of Crisis Entanglement' (2024) 7 Global Sustainability e6, 9 <www.cambridge.org/core/journals/global-sustainability/article/global-polycrisis-the-causal-mechanisms-of-crisis-entanglement/06F0F8F3B993A221971151E3CB054B5E> accessed 11 February 2025; Nancy Birdsall and Francis Fukuyama, 'The Post-Washington Consensus: Development After the Crisis' (2011) 90(2) Foreign Affairs 45; Dani Rodrik, 'Globalisation's Wrong Turn: And How It Hurt America' (2019) 98(4) Foreign Affairs 26-33 <www.jstor.org/stable/26798223> accessed 15 January 2025.

[8] On the issue of climate change, see James Hansen and others, 'Global Warming in the Pipeline' (2023) 3(1) Oxford Open Climate Change <https://academic.oup.com/oocc/article/3/1/kgad008/7335889> accessed 10 February 2025 (highlighting how greenhouse gas emissions drive extreme weather events). See also Adrien Detges and others, '10 Insights on Climate Impacts and Peace: A Summary of What We Know' (*Adelphi Research and Potsdam Institute for Climate Impact Research*, June 2020) <https://weatheringrisk.org/sites/default/files/document/10%20Insights%20on%20Climate%20Impacts%20and%20Peace%20Report_0.pdf> accessed 9 February 2025; Tobias Ide and others, 'Multi-Method Evidence for When and How Climate-Related Disasters Contribute to Armed Conflict Risk' (2020) 62 Global Environmental Change <www.sciencedirect.com/science/article/pii/S0959378019307307?via=ihub> accessed 9 February 2025; Carl-Friedrich Schleussner and others, 'Armed-Conflict Risks Enhanced by Climate-Related Disasters in Ethnically Fractionalized Countries' (2016) 113(33) Proceedings of the National Academy of Sciences 9216,

Globalisation[9] – accelerated by technological advancements,[10] urbanisation, and population growth – has created an interconnected system where disruptions in one region can cascade rapidly across economies, societies, and governance structures,[11] transforming what were once temporary emergencies into sustained volatility.[12] Whereas traditionally crises were seen as finite disruptions followed by recovery, contemporary crises unfold in self-perpetuating cycles. For instance, the 2008 financial crisis not only destabilised economies but also fuelled public distrust in institutions, laying the groundwork for populist political movements and protectionist policies that continue to shape global governance.[13] Meanwhile, the climate crisis is accelerating humanitarian emergencies, altering migration patterns, and intensifying security threats, further entrenching systemic instability. Similarly, the Covid-19 pandemic began as a public-health crisis but quickly disrupted supply chains, deepened political polarisation, triggered economic downturns, and exacerbated social inequalities worldwide.[14] Likewise,

9221 <www.pnas.org/doi/full/10.1073/pnas.1601611113> accessed 9 February 2025 on how the climate crisis worsens conflicts and displacement with significant implications for international human rights and refugee law.

[9] The exact definition and different periods of globalisation have been widely analysed and debated. For an overview, see David Held, Anthony McGrew, David Goldblatt and Jonathon Perraton, *Global Transformations: Politics, Economics and Culture* (Stanford University Press 1999) 540; see also George Ritzer, *The Blackwell Companion to Globalisation* (Wiley eBooks 2007) <https://onlinelibrary.wiley.com/doi/book/10.1002/9780470691939> accessed 10 February 2025.

[10] For more on this issue, see David Harvey, *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change* (Basil Blackwell 1989).

[11] Carl Folke and others, 'Our Future in the Anthropocene Biosphere' (2021) 50 Ambio 834, 869 <https://link.springer.com/article/10.1007/s13280-021-01544-8#citeas> accessed 5 January 2025. See also Jeffrey Sachs and others, *Sustainable Development Report 2021: The Decade of Action for the Sustainable Development Goals* (CUP, June 2021).

[12] Centeno (n 7); Helbing (n 7); Rodrik, *The Globalisation Paradox* (n 7); Lawrence (n 7); Jocelyn Boussard and others, 'Global Shocks Unfolding: Lessons from Fragile and Conflict-affected States' (2024) IMF Working Papers 2024/214, A001, <www.elibrary.imf.org/view/journals/001/2024/214/001.2024.issue-214-en.xml> accessed 31 January 2025. These works showcase that the interlinked architecture of global systems is central to the current polycrisis because it worsens the risks ranging from pandemics, economic inequality, turmoil and ideological extremism.

[13] Didier Wernli and others, 'Understanding and Governing Global Systemic Crises in the 21st Century: A Complexity Perspective' (2023) 14 Global Policy 207, 228 <https://onlinelibrary.wiley.com/doi/10.1111/1758-5899.13192> accessed 13 December 2024; Ian Goldin and Tiffany Vogel, 'Global Governance and Systemic Risk in the 21st Century: Lessons from the Financial Crisis' (2010) 1 Global Policy 4 <https://onlinelibrary.wiley.com/doi/10.1111/j.1758-5899.2009.00011.x> accessed 12 February 2025. See also Folke (n 11); Ettore Greco, Federica Marconi and Irene Paviotti, 'Crisis and Geopolitical Reordering: Covid-19 from a Comparative Perspective' (Zenodo, 13 June 2023) <https://zenodo.org/records/8032860> accessed 16 December 2024.

[14] See Stéphanie Hennette-Vauchez, 'The State of Emergency in France: Days Without End?' (2018) 14(4) European Constitutional Law Review 704-6 <www.cambridge.org/core/journals/european-constitutional-law-review/article/state-of-emergency-in-france-days-without-end/4187319346967B43779DE75B1E59AF87> accessed 12 December 2024; See also on the concerns of racial and religious profiling in the French anti-terrorism context with consequent effects on the enjoyment of rights for particular minorities: UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, 'Preliminary Findings of the Visit: UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism Concludes Visit to France' (OHCHR, 15 May 2018) <www.ohchr.org/en/press-releases/2018/05/preliminary-findings-visit-un-special-rapporteur-promotion-and-protection?LangID=E&NewsID=23128> accessed 12 December 2024. See also Theo Van Leeuwen and Ruth

Russia's 2022 invasion of Ukraine generated ripple effects beyond military conflict, fuelling an energy crisis, worsening global food shortages and shifting the geopolitical order. These developments illustrate how a crisis originating in one sector or region can rapidly escalate, rendering the world more sensitive to systemic shocks.[15] The latter can be defined as shocks associated with large-scale failures or changes of a system that can alter or impair the functioning of core institutions, infrastructures, or legal systems.[16] Such shocks are distinguished not only by their scope and intensity, but also by their capacity to trigger cascading effects across interconnected sectors, undermining governance stability.

Despite this evolving reality, legal and political systems have largely struggled to adapt. Many governance frameworks remain anchored in reactive crisis management, addressing each disruption as a separate event rather than recognising the broader structural vulnerabilities that allow crises to proliferate. As a result, decision-making processes often prioritise short-term containment over long-term resilience, leading to repeated cycles of emergency measures, institutional strain, and diminished public trust. Experts have a solid understanding of individual systemic risks – such as financial crashes or pandemics – but the interactions between these risks remain partially understood.[17] For instance, while epidemiologists long warned of the likelihood of a global pandemic, few anticipated how governmental responses to Covid-19 would interact with misinformation, political polarisation, and economic dislocation to create a wider social and governance crisis.

Wodak, 'Legitimizing Immigration Control: A Discourse-Historical Analysis' (1999) 1 Discourse Studies 83, 118. Global crises often exacerbate inequality and instability, leading to democratic backsliding. Prolonged emergency measures erode institutional checks, concentrate power, and suppress dissent. Moreover, crisis-driven policies disproportionately impact marginalised communities, deepening social inequalities and reinforcing cycles of exclusion, as seen in austerity measures and anti-terrorism laws; Stephen McBride, 'Can the Permacrisis Be Resolved?' (*Transforming Society Blog*, 25 January 2023) <www.transformingsociety.co.uk/2023/01/25/can-the-permacrisis-be-resolved/> accessed 12 December 2024.

[15] Goldin, 'Global Governance and Systemic Risk in the 21st Century' (n 13); Ian Goldin and Mike Mariathasan, *The Butterfly Defect: How Globalisation Creates Systemic Risks, and What to Do About It* (Princeton University Press 2014) <www.jstor.org/stable/j.ctt5hhqgq> accessed 10 February 2025; David Held and Anthony McGrew, *Globalisation/Anti-Globalisation: Beyond the Great Divide* (Polity Press 2007).

[16] Helbing (n 7). See also Peter Hoffman, 'Complex Global Shocks, Emergency Platforms, and United Nations Reform' (2024) International & Regional Organizations 4 <www.jstor.org/stable/resrep63228> accessed 5 February 2025: 'Three recent episodes were formative in defining "complex global shock": The Global Financial Crisis (2008–2009), COVID-19 pandemic (2020–2022), Food security from war against Ukraine (2022-). Aside from the enormous number of people harmed and at risk, all three of these crises possess two distinctive attributes: First, the extensive scope of their impacts is rooted in interdependence. Global connections enable a crisis in one country or region to metastasize, spreading first- and second-order harms far beyond the source. Second, the most vulnerable populations are hit hardest; those who have the fewest capacities to cope with a crisis bear the highest costs. This is particularly evident in setbacks of least developed countries to meeting the SDGs seen in the wake of the COVID-19 pandemic and the war in Ukraine'.

[17] See Jana Sillmann and others, 'ISC-UNDRR-RISK KAN Briefing Note on Systemic Risk' (International Science Council 2022) 8 <https://council.science/wp-content/uploads/2020/06/Systemic-risk-briefing-note_WEB.pdf> accessed 5 January 2025. See also Toby Ord, *The Precipice: Existential Risk and the Future of Humanity* (Hachette Books 2020).

In sum, as the 21st century progresses, the permacrisis compels a fundamental reconsideration of governance at all levels—national, regional, and global. Without a shift to more integrated and anticipatory governance models, legal and political institutions risk remaining trapped in a reactive loop, unable to build long-term stability. The challenge is not merely to respond to crises but to transform governance structures to navigate an era where disruption is the norm rather than the exception. This prompts a vital question: can global governance evolve to foster systemic resilience, or will democratic institutions buckle under relentless crises? As emergency responses become routine and crisis governance becomes a structural feature rather than an exception, policy fragmentation and institutional fatigue deepen. Legal frameworks, traditionally designed for predictability, must now contend with permanent uncertainty, continuously recalibrating to manage overlapping shocks.

C. Crisis as the New Status Quo? When the Exception Becomes the Rule: The Normalisation of Emergency Powers

In this paper, we examine emergency powers as the principal legal mechanism for responding to sustained, complex crises. This part explores the normalisation of emergency powers as a permanent governance feature. Traditionally, crises were understood as temporary and exceptional ruptures, demanding urgent intervention before a return to pre-crisis stability (*status quo ante*). The etymology of the word crisis – from the Greek *krisis* – evokes a decisive turning point that ultimately leads to resolution.[18] Historically, legal systems reflected this understanding: the Roman Republic's dictatorship model granted extraordinary powers for limited periods to address emergencies[19], and post-World War II rule-of-law paradigms insisted that emergency powers remain temporary, proportionate, and necessary to preserve democratic values.[20]

[18] Guillaume Mazeau and Jeanne Moisand, Interview with Yves Citton and Myriam Revault d'Allonnes, 'Revolution and the Crisis of Temporality' (La Vie des Idées, 2022) <https://laviedesidees.fr/Revolution-and-the-Crisis-of> accessed 9 January 2025.

[19] The Roman republican regime lasted from 509 to 31 BC. It was preceded by a period of monarchy, whereas the final political crisis of the Republic (in the 1st century BC) gave way to an imperial regime created by Augustus. The latter learned from these past experiences, especially the Syllian and Caesarian dictatorships that left an indelible mark on the function of a dictatorship. For more on this issue, see David Gwynn, *The Roman Republic: A Very Short Introduction* (Oxford University Press 2012) <https://global.oup.com/academic/product/the-roman-republic-9780199595112?cc=gb&lang=en&> accessed 5 January 2025.

[20] Anne Chemin, 'L'état d'urgence permanent subvertit en profondeur l'État de droit' *Le Monde* (Paris, 21 January 2022) <www.lemonde.fr/idees/article/2022/01/21/stephanie-hennette-vauchez-l-etat-d-urgence-permanent-subvertit-en-profondeur-l-etat-de-droit_6110344_3232.html> accessed 15 January 2025.

However, in the current era of permacrisis, this view has eroded. States routinely justify exceptional powers by invoking the ongoing nature of global threats – like terrorism, pandemics or climate change – under the rationale that "exceptional threats call for exceptional measures".[21] Crises are no longer isolated and short-lived events; instead, they persist, evolve and interact, becoming complex challenges "that can only be managed, not resolved",[22] rendering a return to normalcy increasingly elusive. Hennette-Vauchez's "dimmer-switch"[23] analogy captures this shift: emergency governance no longer toggles between binary states – "on" or "off" – but rather fluctuates in intensity, embedding itself within legal orders.[24] Similarly, Edgar Morin's notion of "polycrisis"[25] underscores how interconnected crises amplify one another.[26]

As emergency powers migrate from the margins into the core of legal frameworks, emergency governance gradually becomes the new *status quo*,[27] blurring the distinction between normalcy and exception. To illustrate this shift, this part focuses on three emblematic cases – Ireland, Egypt and Israel – that, despite differing historical and political contexts, offer useful comparative insight into the long-term entrenchment of emergency powers. These cases

---

[21] Danielle Lochak, 'Synthèse' (2008) 6 Cahiers de la recherche sur les droits fondamentaux 127 <http://journals.openedition.org/crdf/6872> accessed 21 January 2025. See also Ben Bernanke, 'Federal Reserve Policies to Ease Credit and Their Implications for the Fed's Balance Sheet' (Speech, National Press Club, Washington DC, 18 February 2009) <www.federalreserve.gov/newsevents/speech/bernanke20090218a.htm> accessed 21 January 2025 (where Ben Bernanke, American Economist and Former Chair of the Federal Reserve, stated: "Extraordinary times call for extraordinary measures").

[22] Neil Turnbull, 'Permacrisis: What It Means and Why It's Word of the Year for 2022' (*The Conversation*, 11 November 2022) <https://theconversation.com/permacrisis-what-it-means-and-why-its-word-of-the-year-for-2022-194306> accessed 18 January 2025.

[23] Stéphanie Hennette-Vauchez, *La Démocratie en état d'urgence* (Seuil 2017) 41-2.

[24] On this issue, see Guillaume Paugam, 'L'état d'exception: Sur un paradoxe d'Agamben' (2004) 19(3) Labyrinthe 43, 53 <https://journals.openedition.org/labyrinthe/237> accessed 3 January 2025; Hennette-Vauchez, *La Démocratie* (n 23).

[25] For instance, the public health issues arising from the Covid-19 pandemic intersected with economic instability, political polarisation, environmental disasters, and geopolitical tensions. This created a web of systemic challenges, defying linear solutions and requiring adaptive strategies to balance competing priorities. On this issue, see Adam Tooze, 'Welcome to the World of the Polycrisis' (*Financial Times*, 28 October 2022) <www.ft.com/content/498398e7-11b1-494b-9cd3-6d669dc3de33> accessed 3 January 2025; Simon Tormey, 'The Contemporary Crisis of Representative Democracy' (2014) 1(2) Democratic Theory 104 < https://www.berghahnjournals.com/view/journals/democratic-theory/1/2/dt010211.pdf> accessed 9 October 2025; Brian Walker and others, 'Navigating the Chaos of an Unfolding Global Cycle' (2020) 25(4) Ecology and Society 23 <https://www.ecologyandsociety.org/vol25/iss4/art23/> accessed 12 January 2025; Brian Walker and David Salt, *Resilience Thinking: Sustaining Ecosystems and People in a Changing World* (Island Press 2006).

[26] Edgar Morin, 'Pour une crisologie' (1976) 25 Communications 149 <www.persee.fr/doc/comm_0588-8018_1976_num_25_1_1388> accessed 8 January 2025; Edgar Morin, *The Challenge of Complexity: Essays by Edgar Morin* (Amy Heath-Carpentier ed, Liverpool University Press 2023) <www.jstor.org/stable/j.ctv3029jw9> accessed 12 January 2025; Keith Moser, 'The Challenge of Complexity: Essays by Edgar Morin', Morin E. (A. Heath-Carpentier ed.) *The Challenge of Complexity: Essays by Edgar Morin* (2024) 80 (3) World Futures 269 <www.tandfonline.com/doi/full/10.1080/02604027.2024.2340775> accessed 8 January 2025.

[27] On this issue, see Hennette-Vauchez, *La Démocratie* (n 23) 14; Giorgio Agamben, *State of Exception* (University of Chicago Press 2005).

were selected for their temporal scope, regime diversity, and their ability to reflect broader structural dynamics in the normalisation of emergency governance across different legal systems. Ireland's prolonged state of emergency from 1939 to 1995, which originally responded to the exigencies of World War II, was retained through constitutional mechanisms that made its removal politically and legally complicated.[28] While some restrictions eventually faded, the general legal and political environment for maintaining these emergency powers persisted for decades. In contrast, Egypt's 1958 Emergency Law (Law No 162/1958) conferred sweeping powers on the executive and remained in force even through the 2011 uprising, only formally lifted on 31 May 2012.[29] It became a tool for systematic repression, including warrantless detention, special security courts, censorship and mass surveillance.[30] Israel's continuous state of emergency since its creation in 1948[31] presents yet another variation: emergency governance has been continually extended through routine Knesset renewals under

[28] Ireland's prolonged state of emergency was constitutionally entrenched through Article 28.3.3 of the Irish Constitution and sustained by parliamentary renewals, while judiciary deference, notably in *State (Walsh) c Lennon*, further entrenched the emergency regime. This illustrates how constitutional emergency clauses effectively entrenched exceptional governance for decades. For more on this issue, see Fergal F Davis and Christopher Thornhill, 'Article 28.3.3º: Terrorism, Democracy, Supra-Legality and the "State of Emergency" in the Irish Constitution' in Eoin Carolan (ed), *The Constitution of Ireland: Perspectives and Prospects* (Bloomsbury Professional 2012) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2092294> accessed 23 April 2025; Department of Justice, *Report of the Committee to Review the Offences against the State Acts 1939–1998 and Related Matters* (the Hederman Report, 7 October 2002) <www.gov.ie/en/department-of-justice/publications/report-of-the-committee-to-review-the-offences-against-the-state-acts-19301998-the-hederman-report/> accessed 23 April 2025; European Commission for Democracy through Law (Venice Commission), *Emergency Powers, Science and Technique of Democracy No 12* (Council of Europe, Strasbourg 1995) CDL-STD(1995)012, 10 <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1995)012-e> accessed 23 April 2025; 'Emergencies' (*Irish Legal Blog Post*) <https://legalblog.ie/emergencies/> accessed 23 April 2025.

[29] This Emergency Law was continually amended and renewed from President Sadat's declaration in 1981 through President Mubarak's last renewal by Decree No 126/2010. Under this regime, emergency courts tried civilians without appeal, and the President could censor any kind of message and all forms of expression. Human-rights organisations documented that, over those three decades, arbitrary detention, torture and trials in unfair courts became systematic. Additionally, Egypt's Supreme Constitutional Court declined to strike down core emergency provisions (such as warrantless detention powers) until 2013, decades after they were enacted, illustrating the profound weakness of both legislative and judicial oversight during prolonged emergency. For more on this issue, see Yussef Auf, 'The State of Emergency in Egypt: An Exception or Rule?' (*Atlantic Council*, 2 February 2018) <www.atlanticcouncil.org/blogs/menasource/the-state-of-emergency-in-egypt-an-exception-or-rule/> accessed 20 April 2025; Sadiq Reza, 'Endless Emergency: The Case of Egypt' (2007) 10(4) New Criminal Law Review 532 <https://online.ucpress.edu/nclr/article/10/4/532/68595/Endless-Emergency-The-Case-of-Egypt> accessed 20 April 2025; International Commission of Jurists, *Submission to the Universal Periodic Review of Egypt, United Nations Human Rights Council, 7th Session of the Working Group* (August 2009) <www.icj.org/wp-content/uploads/2009/09/Egypt-ICJ-submission-UPR-non-judicial-submission-2009.pdf> accessed 20 April 2025.

[30] Human Rights Watch, 'Tahrir Square Voices Will Never Be Silenced' (*Human Rights Watch*, 11 February 2011) <www.hrw.org/news/2011/02/11/tahrir-square-voices-will-never-be-silenced> accessed 20 April 2025.

[31] Adam Mizock, 'The Legality of the Fifty-Two Year State of Emergency in Israel' (2001) 7(2) U.C. Davis Journal of International Law & Policy 223 <https://heinonline.org/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/ucdl7&men_hide=false&men_tab=toc&kind=&page=223> accessed 10 January 2025.

Section 38 of the Basic Law[32], which requires annual parliamentary approval to sustain the state of emergency.[33] Judicially, the Supreme Court repeatedly upheld the validity of emergency regulations, thereby normalising their application.[34] Over time, the interaction between legislative renewal and judicial validation transformed temporary crisis measures into enduring features of Israel's ordinary constitutional legal order.[35]

Although these cases differ in historical, legal, and political context, they reveal a striking convergence around four structural patterns of normalised emergency governance. First, the absence of effective sunset clauses or automatic termination mechanisms enabled emergency powers to be renewed indefinitely, facilitating their gradual incorporation into ordinary law. Without clear endpoints, these temporary powers were re-legislated, interpreted, and layered into legal systems through repeated use, leading to their formal embedding and normalisation. The result is a hyper-legalised emergency regime,[36] where extraordinary powers are continuously redefined, expanded, and prolonged. Second, the systems of parliamentary and judicial oversight that should have provided checks and balances often proved weak, delayed, or merely reactive. Rather than serving as proactive restraints on executive authority, legislatures and courts largely adapted to the emergency *status quo*, further legitimising expansive government action instead of contesting it. Third, the scope of emergency powers expanded incrementally far beyond their original justifications. Initially focused on immediate threats to national security or public order, these powers expanded to include surveillance, media regulation, public health management, and ordinary criminal justice, reshaping governance structures in fundamental ways. Finally, in all cases, governments justified the ongoing use of emergency frameworks by invoking the indeterminate and evolving nature of modern threats. This rhetoric of perpetual insecurity – whether framed around terrorism, war, internal unrest, or other systemic risks – allowed emergency powers to persist even as the initial causes for their enactment diminished or changed.

---

[32] Basic Law: The Government [2001] S.H. 165 (Isr) s 38.

[33] John Reynolds, 'Intent to Regularise: The Israeli Supreme Court and the Normalisation of Emergency' (2013) 104 Adalah Review 2 <https://ssrn.com/abstract=2272771> accessed 15 January 2025.

[34] See for example *Poraz v Government of Israel* [1992] Isr HCJ (affirming the executive's broad discretion to maintain emergency regulations with parliamentary approval) and *Streit v Chief of Staff* [1964] Isr HCJ (confirming administrative detention as lawful under emergency law).

[35] On this issue, see Federica D'Alessandra, 'Israel's Associated Regime: Exceptionalism, Human Rights and Alternative Legality' (2014) 30(7) Utrecht Journal of International and European Law 30 <https://ssrn.com/abstract=2511202> accessed 12 January 2025; Suzie Navot, 'Emergency As a State of Mind – The Case of Israel' in Pierre Auriel, Olivier Beaud and Carl Wellman (eds), *The Rule of Crisis: Terrorism, Emergency Legislation and the Rule of Law* (Springer 2018) <https://ssrn.com/abstract=3247520> accessed 13 January 2025; Reynolds (n 33).

[36] On this topic, see Mathieu Carpentier, *Norme et Exception: Essai sur la défaisabilité en droit* (Institut universitaire Varenne 2014) 8.

This trend is not confined to these three jurisdictions. In France, the 2020 law establishing a "transitional exit regime"[37] for Covid-19 repackaged health emergency powers into ordinary legislation, institutionalising measures – such as lockdowns, travel restrictions, and digital surveillance – long after the immediate public health threat had subsided.[38] Similarly, the French anti-terrorist state of emergency following the 2015 Paris attacks[39] incorporated permanent changes to the Penal Code and Code of Internal Security. These included the legalisation of continuous video surveillance for individuals in custody for terrorist offenses, restrictions on sentence reductions, and the criminalisation of travel to terrorist-controlled areas. Likewise, in the United States, the Patriot Act of the 26th of October 2001[40] (Patriot Act), enacted after 9/11, institutionalised mass surveillance and security protocols that remain in place over two decades later, despite significant changes in the threat landscape.[41]

The differences in the cases mentioned may suggest that not all democracies are equally vulnerable to the risks of permanent exceptionalism. Nevertheless, the overall trend across these systems highlights a profound shift: from viewing emergencies as discrete ruptures to perceiving them as enduring, ambient conditions that alter governance frameworks. Rather than simply ending emergency measures, these legal adaptations created a hybrid state – neither full emergency nor full normalcy – where exceptional governance mechanisms persist

[37] Law No 2020-856 of 9 July 2020 (organising the end of the state of health emergency), Official Journal of the French Republic (*JORF*) No 0169 of 10 July 2020. During the Covid-19 crisis, the health state of emergency law of March 23, 2020, initially enacted as a temporary response, was repeatedly extended. The law of May 11, 2020, prolonged the emergency until July 10 and amended key provisions of the Public Health Code. This expansion enabled the government to impose restrictive health measures beyond the immediate crisis period. The July 9, 2020, law, paradoxically titled "organizing the end of the state of emergency", preserved many emergency powers, effectively prolonging the exceptional governance regime. Additionally, new surveillance tools such as the SI-DEP and Contact Covid databases were introduced to track infections and contacts, with data collection persisting beyond the state of emergency.

[38] For instance, during the Covid-19 pandemic, France introduced a health pass on July 21, 2021, before legislative approval, while Germany considered restrictions on unvaccinated citizens. On this issue, see Arié Alimi, *Le Coup d'état d'urgence: Surveillance, repression et libertés* (Seuil 2021). See also Hennette-Vauchez, *La Démocratie* (n 23) 34-41.

[39] Law No 2016-987 of 21 July 2016.

[40] On this issue, see Sharon Rackow, 'How the USA Patriot Act Will Permit Governmental Infringement upon the Privacy of Americans in the Name of "Intelligence" Investigations' (2002) 150(5) University of Pennsylvania Law Review 1651 <www.jstor.org/stable/i273549> accessed 7 January 2025; Jennifer C Evans, 'Hijacking Civil Liberties: The USA Patriot Act of 2001' (2002) 33(4) Chicago Law Journal 933 <https://lawecommons.luc.edu/luclj/vol33/iss4/13/> accessed 8 January 2025; Susan N Herman, 'The USA Patriot Act and the Submajoritarian Fourth Amendment' (2006) 41 Harvard Civil Rights-Civil Liberties Law Review 67 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=715221> accessed 7 January 2025.

[41] David Cole and Jules Lobel, *Less Safe, Less Free: Why America Is Losing the War on Terror* (New Press 2009).

indefinitely.[42] Once crises are framed as open-ended or existential, emergency powers tend to become the "true 'state' of the law".[43]

D. Crisis Dynamics and Legal Transformations: A CAS Approach

The legal and institutional responses mobilised to address crises often operate within a narrow framework that fails to account for the complexity and evolving nature of contemporary emergencies. This rigidity can lead to long-term disruptions in democratic governance, as temporary crisis measures gradually become embedded within legal systems. To better understand these transformations, a comparative legal approach informed by CAS theory provides valuable insights. CAS theory studies how interacting, diverse components give rise to unpredictable, system-wide behaviours via non-linear dynamics, feedback loops, and adaptive learning, making it a useful framework for analysing how legal systems evolve and embed emergency measures under sustained stress. This allows for a more nuanced analysis of how they respond to prolonged crises, adapt over time,[44] and sometimes fail to revert to prior democratic standards. Key concepts such as nonlinearity, trigger mechanisms, emergent properties, feedback loops, bifurcation, and hysteresis help illustrate the profound ways in which crises reshape governance.

One of the defining characteristics of CAS theory is *nonlinearity*, meaning that small legal and institutional shifts can lead to disproportionately large and unintended

[42] For more on this topic, see Daniel Weinstock, 'A Harm Reduction Approach to the Ethical Management of the COVID-19 Pandemic' (2020) 13(2) Public Health Ethics 166 <https://academic.oup.com/phe/article/13/2/166/5899250> accessed 12 January 2025 (where the author argues that while confinement and quarantine measures during the early phase of the COVID-19 pandemic were justified by the exigencies of the situation, they came at significant costs. Identifying these costs helps to weigh principles for managing future risks, echoing harm reduction practices and guiding post-confinement policy).

[43] Giorgio Agamben, *État d'exception. Homo sacer II* (Éditions du Seuil 2003) 47; Richard Jackson, 'The Epistemological Crisis of Counterterrorism' (2015) 8(1) Critical Studies on Terrorism 33 <www.tandfonline.com/doi/abs/10.1080/17539153.2015.1009762> accessed 10 January 2025; Marine Guéguin, 'The Normalisation of Exceptional Counterterrorism Powers: The Case of France' (DPhil thesis, University of Leeds 2022) 40–1 <https://etheses.whiterose.ac.uk/32113/1/Guéguin_MG_POLIS_PhD_2023.pdf> accessed 10 January 2025.

[44] For more information on CAS, see John H Holland, 'Complex Adaptive Systems' (1992) 121(1) Daedalus 17 <www.jstor.org/stable/20025416> accessed 10 January 2025; J Stephen Lansing, 'Complex Adaptive Systems' (2003) 32 Annual Review of Anthropology 183 <www.jstor.org/stable/25064826> accessed 10 January 2025. See also Didier Wernli and others, 'A Complexity Lens on the COVID-19 Pandemic' (2022) 11(11) International Journal of Health Policy and Management 2769 <https://www.ijhpm.com/article_4360.html> accessed 11 January 2025; Tom Pegram and Julia Kreienkamp, 'Governing Complexity: Design Principles for Improving the Governance of Global Catastrophic Risks' (*UCL Global Governance Institute Policy Brief Series*, November 2019) <www.ucl.ac.uk/global-governance/sites/global-governance/files/governing_complex_global_catastrophic_risks_ggi_policy_brief_nov2019.pdf> accessed 15 January 2025 (discussing the limitations of traditional governance structures in addressing the complex nature of global catastrophic risks It advocates for governance models that recognise systemic interconnections and complexity and proposes using complexity theory to improve governance frameworks.

consequences.[45] This is particularly evident in crisis governance, where temporary emergency measures—such as heightened surveillance or restrictions on free movement—often escalate into broader transformations of legal norms. The Covid-19 pandemic exemplifies this dynamic: lockdowns, contact tracing, and emergency powers initially framed as temporary public health measures blurred the distinction between exception and rule, entrenching crisis governance as an enduring feature of legal systems. [46]

The concept of *trigger mechanisms* further highlights how crises accelerate systemic change. These mechanisms emerge from acute stressors—such as terrorist attacks, pandemics, or financial collapses—that demand immediate responses, often leading to an incremental expansion of executive authority. This can erode institutional checks and balances, shifting the governance framework in ways that persist long after the initial emergency has passed. The Patriot Act and emergency laws enacted during the Covid-19 pandemic discussed above exemplify this phenomenon. While both were justified as urgent crisis responses, they set legal precedents that facilitated the long-term entrenchment of extraordinary powers, reshaping the balance between security and civil liberties.

In addition, CAS theory introduces the idea of *emergent properties*, describing how legal and institutional transformations arise from the interaction of multiple factors rather than from singular policy choices.[47] For example, the 2008 financial crisis and the Covid-19 pandemic[48] fuelled widespread distrust in financial institutions and governments, accelerating the rise of anti-system and populist movements. These reactions were not merely the result of

[45] In a nonlinear system, the outcome isn't directly proportional to the input, making the system's behaviour unpredictable. On the notions of complexity and nonlinearity, see Marie I Kaiser, 'Complexity', *Encyclopedia of Systems Biology* (Springer 2013), 456-60 <https://link.springer.com/referenceworkentry/10.1007/978-1-4419-9863-7_55> accessed 15 January.

[46] For more on this issue, see Adam Tooze, *Shutdown: How Covid Shook the World's Economy* (Penguin UK 2021)/ Tooze underscores the enduring impact of the Covid-19 pandemic on global governance, highlighting it as a precursor to even more severe crises in the future. This crisis also demonstrated how governments can mobilise extensive emergency powers, but also how these powers tend to persist, reshaping governance structures under the guise of necessity. Tooze's analysis reveals that the pandemic not only disrupted economic and social orders but also perpetuated the cycle of permacrisis governance, making the state of exception a recurring feature rather than a temporary deviation.

[47] On this issue, see Oran R Young**,** *Governing Complex Systems: Social Capital for the Anthropocene* (MIT Press 2017) <https://direct.mit.edu/books/monograph/3567/Governing-Complex-SystemsSocial-Capital-for-the> accessed 11 January 2025; see Holland (n 44).

[48] On this issue, see Sandra Bertezene and Jacques Martin, 'Fighting Covid-19 as an army would fight its enemy?' (23rd Excellence in Services International Conference, Online, France, September 2020) 1-3 https://hal.science/hal-03283384/document accessed 12 January 2025 (where it is argued that the Covid-19 pandemic exemplifies a VUCA (volatility, uncertainty, complexity, ambiguity) world, where rapid, unpredictable changes and systemic interdependencies hinder clear decision-making). Contradictory policies, distrust in authorities, and the failure of conventional crisis protocols have fuelled public scepticism, reinforcing political instability and anti-establishment sentiment. See also Greco (n 13).

individual crises but rather the compound effect of repeated systemic shocks, highlighting how crises shape public perception and institutional behaviour in unpredictable ways.

Another central element of CAS theory is *feedback loops*, which play a crucial role in the normalisation of crisis governance. *Positive* feedback loops occur when crisis responses reinforce the very conditions that sustain them. For instance, prolonged public fear during a crisis can increase support for restrictive measures, such as mass surveillance or emergency executive powers.[49] Over time, this cycle legitimises the gradual expansion of state authority, making exceptional governance the norm rather than the exception. Conversely, *negative* feedback loops, which could serve as stabilisers by restoring legal and democratic norms,[50] are often too weak or delayed in reversing systemic shifts in an era of permacrisis.

Finally, two particularly important concepts for understanding democratic erosion in the age of permacrisis are *bifurcation* and *hysteresis*. Bifurcation points represent moments when governance structures split into competing trajectories, potentially leading to irreversible transformations. At such junctures, legal systems face a fundamental question: can they restore pre-crisis norms, or do they become permanently altered by the crisis response? The post-9/11 security framework serves as a clear example: rather than scaling back emergency measures once the immediate terrorist threat had subsided, many states codified them into permanent legal structures.[51]

Closely related is *hysteresis*, which describes the difficulty legal systems face in returning to prior democratic conditions after prolonged crises. Once emergency measures become institutionalised, they are rarely repealed in full. For instance, France's 2020 law on the "transitional exit regime" introduced a legal framework that, instead of lifting emergency measures, effectively repackaged them into ordinary governance. Such developments reveal how emergency powers, once justified as temporary, reshape legal frameworks in ways that

[49] For more on this issue, see Cole (n 41).

[50] See Adam Tooze, 'Defining Polycrisis – From Crisis Pictures to the Crisis Matrix' (*Chartbook*, 24 June 2022) <https://adamtooze.substack.com/p/chartbook-130-defining-polycrisis> accessed 8 February 2025. Tooze highlights how crises like food insecurity, energy market disruptions, inflation, and geopolitical tensions interact through complex feedback loops, where one crisis exacerbates another. His matrix of global risks illustrates that certain crises, such as inflation, can amplify others, while events like recessions can have both stabilising and destabilising effects, emphasising the systemic interconnections characteristic of polycrisis.

[51] Michael Cox, 'Paradigm Shifts and 9/11: International Relations After the Twin Towers' (2002) 33(2) Security Dialogue 247 <www.prio.org/publications/2780> accessed 10 February 2025; Jessica Wolfendale, 'Terrorism, Security, and the Threat of Counterterrorism' (2007) 47 International Studies Quarterly 511 <www.ojp.gov/ncjrs/virtual-library/abstracts/terrorism-security-and-threat-counterterrorism> accessed 11 February 2025; Jessica Wolfendale, 'The Narrative of Terrorism as an Existential Threat' in Richard Jackson (ed), *Routledge Handbook of Critical Terrorism Studies* (Routledge 2016) 114-24; Richard Jackson, *Writing the War on Terrorism: Language, Politics and Counter-terrorism* (Manchester University Press 2005).

outlive the crises they were meant to address,[52] with the risk of vacillating towards authoritarianism by normalising exceptional powers.[53]

To sum up, the entrenchment of emergency governance does not occur in a vacuum. These transformations unfold gradually, reinforced by political, economic, and social factors that make reversibility increasingly difficult. The challenge for legal systems is to develop adaptive governance models that enhance resilience without succumbing to the normalisation of authoritarian-like measures. By integrating insights from CAS theory, policymakers can better understand the different stages that democratic systems may go through during prolonged crises. In turn, this can inform them to better design resilient legal frameworks that balance adaptability with the preservation of democratic values. This requires reforms in governance structures that prevent the normalisation of emergency rule, ensure constitutional protections remain intact, and foster multilateral cooperation to address complex global challenges.[54] If left unchecked, the entanglement of crises may destabilise democratic legal systems, leading to further regression rather than resilience. [55]

E. Rethinking Legal Resilience in the Age of Ongoing Uncertainty

When the logic of the emergency becomes permanent, it ceases to be a contingent legal anomaly to become a normalised mode of governance. Rather than purely exceptional responses, emergency powers increasingly form part of resilience – or, conversely, regressive – constitutional architectures. It's crucial to understand how legal systems can develop mechanisms to enhance flexibility while safeguarding democratic principles. On one hand, advocates of a more flexible emergency framework argue that adaptability is necessary in times of crisis, since rigid legal structures may not be able to keep pace with rapidly evolving

[52] Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (CUP 2006).

[53] Liberal democracies are more vulnerable during prolonged or permanent emergencies due to their foundational principles of transparency, accountability, and individual liberties. In times of crisis, the urgency for decisive action can conflict with these principles, often leading to the expansion of executive powers and the erosion of civil liberties. Moreover, liberal democracies typically face greater scrutiny and resistance from both the public and political actors when emergency measures are implemented. In contrast, authoritarian regimes, with their centralised power structures and limited political freedoms, can more easily suppress opposition and impose restrictive measures without facing the same degree of resistance.

[54] For more on this issue, see Thomas G Weiss and Rorden Wilkinson, 'Rethinking Global Governance? Complexity, Authority, Power, Change' (2014) 58 International Studies Quarterly 207 <www.jstor.org/stable/24017859> accessed 12 February 2025. See also the debate on the scale of reform required: Dan Plesch and Thomas G Weiss, '1945's Lesson: "Good Enough" Global Governance Ain't Good Enough' (2015) 21 Global Governance, 197, 197; cf Stewart Patrick, 'The Unruled World: The Case for Good Enough Global Governance' (2014) 93 Foreign Affairs 58, 58.

[55] On this issue, see Anthony Giddens, *Politics of Climate Change* (Polity 2009).

threats.[56] On the other hand, critics of expansive executive power warn that continual reliance on emergency measures risks an irreversible slide toward authoritarianism, as crisis-driven governance increasingly erodes checks and balances, concentrates power, and restricts civil liberties.[57] Ultimately, the future of democratic governance will depend on whether legal frameworks can reconcile adaptability with the enduring protection of fundamental rights.

In the era of permacrisis, globalisation not only amplifies systemic disruptions but also underscores the urgent need for more effective governance at both national and international levels. The increasing complexity of global crises has created an interdependent system highly vulnerable to shocks. However, existing governance mechanisms often fail to provide coherent and effective responses. As Hale, Held, and Young argue, global governance remains gridlocked due to institutional inertia, conflicting national interests, and the complexity of transnational challenges.[58] This is particularly evident in issues like climate change, where international cooperation is hindered by diverging economic priorities between developed and developing nations,[59] despite the rhetoric of global solidarity.[60]

---

[56] On this issue see David R Godschalk, 'Urban Hazard Mitigation: Creating Resilient Cities' (2003) 4(3) Natural Hazards Review 136, 137 <https://research-legacy.arch.tamu.edu/epsru/Course_Readings/Ldev671MARS689/LDEV671_Readings/Godschalk_urbanhazard mitigation.pdf> accessed 23 April 2025. Godschalk argues that resilient cities are those that can absorb shocks without descending into chaos or suffering permanent damage. He describes them as systems that "might bend from hazard forces, [but do] not break", becoming stronger by adapting and learning from past disasters. See also Todd Miller, Loi De Lé, Katherine Hore, 'The adaptive shift: Embracing complexity in disaster and emergency management' (2025) 119 International Journal of Disaster Risk Reduction 105323 <www.sciencedirect.com/science/article/pii/S2212420925001475?via=ihub> accessed 22 April 2025; Michael J Bolton, Gregory B Stolcis, 'Overcoming Failure of Imagination in Crisis Management: The Complex Adaptive System' (2008) 13(3) The Innovation Journal: The Public Sector Innovation Journal 1 <https://innovation.cc/wp-content/uploads/2008_13_3_4_bolton-stolcis_crisis-mgmt.pdf> accessed 22 April 2025; Alex Burns and Ben Eltham, 'Catastrophic Failure" Theories and Disaster Journalism: Evaluating Media Explanations of the Black Saturday Bushfires' (2010) 137(1) Media International Australia 90 <https://journals.sagepub.com/doi/10.1177/1329878X1013700111> accessed 22 April 2025; Tim Prior and Florian Roth, 'Disaster, Resilience and Security in Global Cities' (2013) 6(2) Journal of Strategic Security 59 <www.jstor.org/stable/26466761> accessed 22 April 2025; Yacov Y Haimes, Kenneth Crowther and Barry M Horowitz, 'Homeland security preparedness: Balancing protection with resilience in emergent systems' (2008) 11(4) Systems Engineering 287 <https://incose.onlinelibrary.wiley.com/doi/10.1002/sys.20101> accessed 22 April 2025.

[57] On this issue, see Hennette Vauchez, *La Démocratie,* (n 23); Michel J Crozier, Samuel P Huntington, Jōji Watanuki, *The Crisis of Democracy: Report on the Governability of Democracies to the Trilateral Commission* (New York University Press 1975) 8 <https://ia801308.us.archive.org/23/items/TheCrisisOfDemocracy-TrilateralCommission-1975/crisis_of_democracy_text.pdf> accessed 10 February 2025.

[58] Thomas Hale, David Held and Kevin Young, *Gridlock: Why Global Cooperation Is Failing When We Need It Most* (Polity 2013).

[59] On this issue, see Irene Paviotti, 'Covid-19 and the International Liberal Order: Goodbye "Global", Hello "Regional"?' (22 October 2021) <www.iai.it/en/pubblicazioni/covid-19-and-international-liberal-order-goodbye-global-hello-regional> accessed 16 January 2025.

[60] On the issue of global health solidarity, see Mina Hosseini, 'Building Global Health Solidarity in a Permacrisis: Legal Impacts of a Pandemic Treaty' (UCD Working Papers in Law, Criminology & Socio-Legal Studies, Research Paper 14/2023, 2023) <https://ssrn.com/abstract=4659766> accessed 2 February 2025.

Furthermore, crises are increasingly becoming synchronised, occurring "everywhere all at once". [61] As Tooze observes, the accumulation of global challenges creates a precarious reality where interconnected systems, through rapid positive feedback loops, can escalate localised issues into widespread crises where "the whole is even more dangerous than the sum of the parts".[62] The persistence of crisis-driven governance highlights the limitations of current legal frameworks in addressing the complexities of permacrisis.[63] Failing to account for the interactions between different crises has become a critical risk in itself. This persistent state of flux further erodes the distinction between normalcy and exception, reinforcing a state of perpetual crisis[64] and compounding governance challenges. To navigate this new reality, legal systems must shift their focus from reactive crisis management to long-term adaptability.

The concept of resilience has emerged as a valuable framework for understanding these legal transformations.[65] In contrast to traditional legal approaches that aim to restore pre-crisis conditions, resilience emphasises the ability of legal systems to absorb shocks, adapt, and not only maintain but potentially enhance their core functions in the face of evolving stressors.

---

[61] Stephen Walt, 'How many shocks can the world take?' (*Foreign Policy*, 24 October 2022) <https://foreignpolicy.com/2022/10/24/how-many-shocks-can-the-world-take/> accessed 19 January 2025.

[62] Tooze, 'Defining Polycrisis' (n 50). See also Dimitris Katsikas, Maria Antonieta Del Tedesco Lins and Andrea Ribeiro Hoffmann, 'Introduction: A New Era? Permacrisis and the Challenges to Financial Stability, Economic Growth, and Democracy' in Dimitris Katsikas, Maria Antonieta Del Tedesco Lins and Andrea Ribeiro Hoffmann (eds), *Finance, Growth and Democracy: Connections and Challenges in Europe and Latin America in the Era of Permacrisis* (United Nations University Series on Regionalism vol 33, Springer 2025) <https://link.springer.com/chapter/10.1007/978-3-031-68475-3_1#citeas> accessed 19 January 2025.

[63] For more on how global health crises such as the Covid-19 pandemic expose weaknesses in compliance with international health regulations, highlighting the tension between emergency powers and human rights obligations, see Yusha Araf and others, 'Marburg Virus Outbreak in 2022: A Public Health Concern' (2023) 4(1) The Lancet Microbe e9 <https://pubmed.ncbi.nlm.nih.gov/36209757/> accessed 8 January 2025; Katherine F Smith and others, 'Global Rise in Human Infectious Disease Outbreaks' (2014) 11(101) Journal of the Royal Society Interface 20140950 <https://pubmed.ncbi.nlm.nih.gov/25401184/> accessed 11 February 2025. Similarly, the intersection of environmental crises such as climate change with other global risks stretches existing legal frameworks on state responsibility and environmental protection, as states struggle to reconcile urgent action with long-term obligations. On this issue, see Hoffman (n 16); Argyrios Altiparmakis and others, 'Pandemic Politics: Policy Evaluations of Government Responses to COVID-19' (2021) 44(5-6) West European Politics 1159 <www.tandfonline.com/doi/full/10.1080/01402382.2021.1930754> accessed 13 February 2025.

[64] Bonnie Honig, *Emergency Politics: Paradox, Law, Democracy* (Princeton University Press 2009) <www.jstor.org/stable/j.ctt7strv> accessed 20 January 2025.

[65] On this issue, see Wolfgang Merkel and Anna Lührmann, 'Resilience of democracies: responses to illiberal and authoritarian challenges' (2021) 28(5) Democratization 869 <www.tandfonline.com/doi/full/10.1080/13510347.2021.1928081> accessed 15 February 2025; Jon-Paul Faulkner, Enda Murphy and Mark Scott, 'Developing a holistic 'vulnerability-resilience' model for local and regional development' (2020) 28(12) European Planning Studies 2330 <www.tandfonline.com/doi/abs/10.1080/09654313.2020.1720612> accessed 15 February 2025; Eric Stollenwerk, Tanja A. Börzel and Thomas Risse, 'Theorizing Resilience-Building in the EU's Neighbourhood: Introduction to the Special Issue' (2021) 28(7) Democratization 1219–38 <www.tandfonline.com/doi/full/10.1080/13510347.2021.1957839> accessed 16 January 2025; Josh Holloway and Rob Manwaring, 'How well does 'resilience' apply to democracy? A systematic review' (2023) 29(1) Contemporary Politics 68 <www.tandfonline.com/doi/abs/10.1080/13569775.2022.2069312> accessed 16 January 2025.

Drawing from a broad literature, resilience can be understood as a dual concept. On the one hand, it can be seen in terms of *performance*, referring to how resilient the democratic system actually is – whether it continues on the same or an equivalent level during a period of crisis as before or after the crisis and is able to resist degradation and adjust to a changed environment.[66] On the other hand, it reflects an underlying *capacity* of resilience, referring to the set of conditions and mechanisms that enable a system to absorb risks and allow it to "bounce back" and recover post-crisis.[67] This perspective acknowledges that modern crises do not simply end, but instead require legal systems to stabilise at new equilibrium points. Additionally, this approach aligns with the interconnected nature of current polycrises and permacrises, recognising that effective responses require coordination across sectors and scales.[68]

In this context, the Covid-19 pandemic serves as a case study of legal adaptation under prolonged crisis conditions, prompting a radical rethink of existing legal systems and their limitations.[69] Initially, some feared that the pandemic would mark the decline of globalisation[70] and multilateralism, while others saw it as an opportunity to rethink existing governance structures. Tooze warned that Covid-19 was only a preview of even greater crises to come, emphasising the need for legal frameworks that are not only responsive to immediate crises but also capable of anticipating future disruptions.[71] Without resilient governance models, the vulnerabilities exposed by permacrisis will only intensify.

While global interconnectedness has intensified the impact of crises, it also offers opportunities for collective solutions.[72] No single country can effectively address transnational

[66] Aurel Croissant and Lars Lott, 'Democratic Resilience in the Twenty-First Century' (V-Dem Working Paper 149/2024, 2024) 5-7 <https://v-dem.net/media/publications/WP_149.pdf> accessed 18 February 2025.

[67] Johannes Helgest and others, 'A new game in town: Democratic resilience and the added value of the concept in explaining democratic survival and decline' (Gutenberg School of Management and Economics Working Paper 2206, 2022) <https://ideas.repec.org/p/jgu/wpaper/2206.html> accessed 17 February 2025; Carl Folke and others, 'Regime Shifts, Resilience, and Biodiversity in Ecosystem Management' (2004) 35(1) Annual Review of Ecology, Evolution, and Systematics 557, 558 <https://www.annualreviews.org/content/journals/10.1146/annurev.ecolsys.35.021103.105711> accessed 17 February 2025.

[68] International IDEA, *The Global State of Democracy 2024: Strengthening the Legitimacy of Elections in a Time of Radical Uncertainty* (International IDEA 2024) <https://cdn.sanity.io/files/2e5hi812/production-2024/0134f4cc56156db21ee23cf1072ab6d71704cd51.pdf> accessed 10 January 2025.

[69] Paviotti (n 59).

[70] 'Has Covid-19 Killed Globalisation?' (*The Economist*, 14 May 2020) <www.economist.com/leaders/2020/05/14/has-covid-19-killed-globalisation> accessed 9 February 2025.

[71] Tooze, *Shutdown* (n 46).

[72] However, systemic risks are described by some as "endemic to globalisation". On this issue, see Goldin, *The Butterfly Defect* (n 15) xiii (where the authors argue that while reforms – such as adjustments to the neoliberal economic order –could potentially mitigate these risks, they cannot be fully eliminated). See also Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Vintage Canada 2009) for a critique on how neoliberalism, driven by market liberalisation, privatisation and deregulation, has eroded state power and deepened inequality.

challenges – whether climate change, global migration, or financial instability – in isolation.[73] Instead of focusing solely on crisis containment, legal systems must shift toward proactive adaptation. The concept of "building back better" encapsulates this, advocating for systemic reforms that move beyond short-term recovery toward long-term sustainability. In other words, legal resilience cannot be achieved without addressing systemic inequalities. For instance, in times of crisis, marginalised communities often bear the brunt of the impact. Hence, responses to crises must be inclusive, ensuring that they don't perpetuate existing power imbalances. Resilient legal systems must ensure that vulnerable populations are included in decision-making processes, with a focus on equity and justice.

In a nutshell, rather than restoring outdated legal frameworks, the objective must be to create forward-thinking legal structures capable of navigating uncertainty without compromising democratic values.[74] The well-known expression "never let a good crisis go to waste" encapsulates the paradox of crisis governance.[75] While crises often expose systemic weaknesses, they also present opportunities for transformation. Instead of viewing crises as periods of mere disruption, they should be understood as inflection points – moments when legal and institutional paradigms can be fundamentally reimagined to meet the demands of an increasingly unpredictable world. The challenge is not simply whether legal systems should change, but how they can evolve in ways that reinforce resilience. If democratic legal orders are to endure, they must develop mechanisms that balance flexibility with the protection of fundamental rights, ensuring that governance remains adaptive yet accountable, responsive yet rights-based in an era of sustained global uncertainty.

She argues that neoliberalism often advances through crises, exploiting "shock" moments – such as wars, natural disasters or financial collapses – to impose unpopular economic reforms that transfer wealth from the public to private elites. Klein emphasises that these policies undermine state sovereignty, weaken democratic institutions and leave societies more vulnerable to crises. See also Jason Tatum, 'The Shock Doctrine: The Rise of Disaster Capitalism by Naomi Klein' (2009) 41 Antipode 214 <https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1467-8330.2008.00666.x> accessed 12 January 2025: "The reason shocks have been essential for neoliberalisation is because neoliberal policies are unpopular and can only be forced through during a severe crisis". Within this context, scholars have advocated for a systemic change in the global system to address the root causes of the crises we face and create more equitable and resilient legal systems. For example, see Rodrik, 'Globalisation's Wrong Turn' (n 7).

[73] On this issue, see Altiparmakis (n 63).

[74] On this issue, see Hoffman (n 16).

[75] On this issue, see Yves Daudet, '"Never Let a Good Crisis Go to Waste": Can International Law Seize the Advantage?' (2021) 115 Proceedings of the ASIL Annual Meeting 129 <www.cambridge.org/core/journals/proceedings-of-the-asil-annual-meeting/article/never-let-a-good-crisis-go-to-waste-can-international-law-seize-the-advantage/F230DFCFDEBC653DC761208A03F9A13E> accessed 7 February 2025; Marie A Chisholm-Burns, 'A Crisis Is a Really Terrible Thing to Waste' (2010) 74(2) American Journal of Pharmaceutical Education 19 <https://pmc.ncbi.nlm.nih.gov/articles/PMC2856408/#B9> accessed 13 February 2025.

F. CONCLUSION

This paper has examined how permanent crises are reshaping democratic legal orders, creating a new equilibrium where resilience and adaptability become essential. First, it analysed how contemporary crises, characterised by their interconnected and complex nature, have heightened systemic risks and challenged governance structures. It then explored how globalisation has amplified these vulnerabilities, turning once-isolated disruptions into an ongoing crisis continuum. Furthermore, it demonstrated how the normalisation of emergency governance has blurred the boundaries between normalcy and exception. The hope of returning back to "normal" has long been disrupted by globalisation, which has introduced competing forces—security versus liberty, competition versus cooperation, innovation versus conservation.[76] Events such as the 9/11 attacks in New York, the 2008 global financial crisis, and the Covid-19 pandemic have accelerated this destabilisation, transforming emergency governance into an enduring global condition. The analysis of CAS concepts – particularly non-linear feedback loops and the hysteresis of embedded emergency measures – demonstrated how temporary emergency measures can solidify into permanent norms, weakening institutional checks and eroding human rights protections. Lastly, the study of resilience underscored the need to legal frameworks to "change the compass" [77] to navigate the "new normal" evolving world marked by crisis-driven governance.[78]

As crises unfold in rapid succession, the assumption of reversibility has eroded, requiring legal systems to stabilise at new equilibrium points that acknowledge the realities of an interconnected world. However, this does not mean passively surrendering to a state of permanent crisis; rather, it calls for reimagining legal structures that balance flexibility with the protection of fundamental rights. Law has always existed at the intersection of continuity and adaptation, requiring a delicate balance between preserving core legal principles and adjusting to new realities. As such, the question is not whether legal systems should change,

[76] Mireille Delmas-Marty, *Liberté et sûreté dans un monde dangereux* (Seuil 2009); Mireille Delmas-Marty, *Aux quatre vents du monde* (Seuil 2016).

[77] Mireille Delmas-Marty, 'Changer de Boussole' in Stéphanie Hennette Vauchez (ed), *La Démocratie en état d'urgence* (Seuil 2017) 181; Mireille Delmas-Marty, *Sortir du pot au noir: L'humanisme juridique comme boussole* (Buchet-Chastel 2019); Mireille Delmas-Marty, *Une boussole des possibles* (Collège de France Éditions 2020).

[78] David Henig and Daniel M. Knight, 'Polycrisis Prompts for an Emerging Worldview' (2023) 39(2) Anthropology Today 3 <https://research-repository.st-andrews.ac.uk/bitstream/handle/10023/27458/Henig_2023_AT_Polycrisis_CC.pdf;jsessionid=EB0272F0D61E12CA96D09B39822CEDE2?sequence=1> accessed 12 February 2025. See also Fabian Zuleeg, Janis A. Emmanouilidis and Ricardo Borges de Castro, 'Europe in the Age of Permacrisis' (*European Policy Centre*, 11 March 2021) <https://www.epc.eu/publication/Europe-in-the-age-of-permacrisis-3c8a0c/> accessed 13 February 2025.

but how they can do so in ways that reinforce democratic governance rather than undermine it. History has shown that crises, while destabilising, also present opportunities for transformation. They force societies to confront the inadequacies of existing governance models, sometimes accelerating necessary reforms that might have otherwise been unattainable. In fact, in Chinese language, "the word 'crisis' consists of two characters, one symbolising danger and the other opportunity".[79]

[79] Former President of the United States, John F Kennedy, employed this expression in presidential campaign speeches in 1959 and 1960: John F Kennedy, 'Remarks of Senator John F. Kennedy' (Conference on India and the United States, Washington DC, 4 May 1959) <www.jfklibrary.org/archives/other-resources/john-f-kennedy-speeches/india-and-the-us-conference-washington-dc-19590504> accessed 13 January 2025; John F Kennedy, 'Remarks of Senator John F. Kennedy' (University of New Hampshire, Durham, New Hampshire, 7 March 1960) <www.jfklibrary.org/archives/other-resources/john-f-kennedy-speeches/university-of-new-hampshire-19600307> accessed 13 January 2025. See also Lewis Mumford, *The Condition of Man* (Martin Secker & Warburg Ltd 1944) 394; Benjamin Zimmer, 'Crisis = Danger + Opportunity: The Plot Thickens' (*Language Log*, 27 March 2007) <https://itre.cis.upenn.edu/~myl/languagelog/archives/004343.html> accessed 13 January 2025.

DOI: 10.14324/111.444.2052-1871.1988

Authorised Push Payment Fraud: Theorising a Loss Allocation Model

Nat Shum[*]

Abstract: Authorised push payment fraud ('APP fraud') occurs when a bank customer authorises the transfer of funds from their accounts, under a false pretence set up by a fraudster. The UK mandatory reimbursement regime and the EU Proposal for the Payment Services Directive 3 present wholly different loss allocation models in response to APP fraud. This article explores the following question: *how should losses be allocated between the customer who authorises the transaction and their financial institution*? The classic experience in formulating loss-allocation rules for *unauthorised* fraud provides a case-in-point as to whether banks should bear the bulk of the losses for APP fraud. By examining the distinction between authorised and unauthorised fraud, this article presents a principled case of a loss-allocation model that reflects the concepts of fault and moral hazard. In summary, this article argues for a loss allocation model that considers customer fault, the absence of a fixed upper limit on customer liability, increased bank liability for banks that their duties, and the exclusion of exceptions for vulnerable customers. The proposed loss allocation model aims to strike a balance between customer protection and financial consequences for banks, advocating for a shared liability approach between customers and banks. Regarding the concepts of fault and moral hazard, this proposed model suggests specific duties for banks to prevent authorised fraud and addresses the issue of moral hazard by incentivizing customers to take reasonable care in identifying fraud patterns. This proposed model serves to provide a starting point for future research and policy development in this area.

Keywords: Authorised Push Payment (APP) fraud, mandatory reimbursement, Payment Services Directive (PSD 2 & PSD 3), loss allocation model, payments, financial regulation.

A. INTRODUCTION

Authorised push payment fraud ('APP fraud') has emerged as a new type of financial fraud, whereby the victim is induced by fraudulent means to authorise their bank to send a payment to a bank account, which is controlled by the fraudster. APP fraud is contrasted against pull payment fraud or unauthorised fraud, where payments are extracted from the victim's bank account or debited to a card by a criminal, without the victim's authority.[1] In 2020, €323 million is the estimated value of total APP fraud losses for all Single Euro Payments Area euro credit transfers in the EU.[2] In 2023, 252,626 APP fraud cases and £341 million in losses were

[*]The author holds an LL.B. degree from University College London and Hong Kong University and PCLL from Hong Kong University. E-mail: natshumyc@gmail.com.

[1] *Philipp v Barclays Bank UK plc* [2023] UKSC 25, [2023] 3 WLR 284, [8].

[2] European Commission, 'Commission Staff Working Document – Impact Assessment Report – Accompanying the documents Proposal for a Regulation of the European Parliament and of the Council on payment services in the internal market and amending Regulation (EU) No 1093/2010; Proposal for a Directive of the European Parliament and of the Council on payment services and electronic money services in the Internal Market amending Directive 98/26/EC; Directives 2015/2366/EU and 2009/110/EC' SWD/2023/231 final ('EU Impact Assessment Report for PSD 3'), 10.

reported in the UK.[3] The existence of APP fraud as a social problem has prompted a multitude of solutions by regulators, including the creation of fraud prevention entities, data sharing and collaboration, risk and security, resolution frameworks, and the allocation of liability.[4]

This article focuses on allocation of liability between the customer who authorises the transaction and their financial institution (rather than other stakeholders in fraud prevention policies), primarily because financial institutions play the chief role in safeguarding customers' funds. [5] Frameworks to allocate liability between the customer and their financial institution are proposed by the EU and UK, under the new mandatory reimbursement requirement[6] and Proposal for Payment Services Directive 3 ('PSD 3')[7] respectively. These proposed loss allocation frameworks alter the position that losses lie where they fall 'namely, with customers) for want of regulatory intervention.

The Part 1 shall explore is '*how should losses be allocated between the customer who authorises the transaction and their financial institution?*' The structure of this article is as follows. In Part 2, I present the existing framework and proposals of loss allocation regimes for authorised fraud and unauthorised fraud. I summarise the main legislations provided for loss allocation in unauthorised fraud, namely, the EU Payment Services Directive 2 ('PSD 2'),[8] US Electronic Funds Transfer Act (also known as Regulation E, hereinafter as 'Reg E'),[9] and

[3] Payment Systems Regulator, 'Authorised push payment (APP) scams performance report' (July 2024) <https://www.psr.org.uk/information-for-consumers/app-fraud-performance-data/> accessed 22 February 2025.
[4] Lipis Advisors, 'Fraud prevention and resolution in push payment systems – comparative analysis' (*Payment Systems Regulator,* 2017) <www.psr.org.uk/media/3dbln5tw/lipis-report-international-fraud-practices-msg_.pdf> accessed 22 February 2025, 13. For a list of industry responses in the UK, ibid 6-7.
[5] In addition to financial institutions, regulators have sought to impose duties on other stakeholders to prevent fraud, for instance, telecommunication companies that have the duty to implement a scam filter: Monetary Authority of Singapore, 'Guidelines on Shared Responsibility Framework' (24 October 2024) <https://www.mas.gov.sg/-/media/mas-media-library/regulation/guidelines/pso/guidelines-on-shared-responsibility-framework/guidelines-on-shared-responsibility-framework.pdf> ('Singapore Guidelines').
[6] Payment Systems Regulator, 'Policy Statement – Fighting authorised push payment fraud: a new reimbursement requirement – Response to September 2022 consultation (CP22/4)' PS23/3 (June 2023) <https://www.psr.org.uk/media/rxtlt2k4/ps23-3-app-fraud-reimbursement-policy-statement-june-2023.pdf> accessed 22 February 2025 ('UK Jun 2023 Policy Statement'); Payment Systems Regulator, 'Policy Statement – Fighting authorised push payment scams: final decision' PS23/4 (December 2023) <https://www.psr.org.uk/media/kwlgyzti/ps23-4-app-scams-policy-statement-dec-2023.pdf> accessed 22 February 2025 ('UK Dec 2023 Policy Statement').
[7] European Commission, 'Proposal for a Directive of the European Parliament and of the Council on payment services and electronic money services in the Internal Market amending Directive 98/26/EC and repealing Directives 2015/2366/EU and 2009/110/EC' COM/2023/366 final (EU Proposal for PSD 3); European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on payment services in the internal market and amending Regulation (EU) No 1093/2010' COM/2023/367 final ('EU Proposed Payment Services Regulation').
[8] Council Directive 2015/2366/EC of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L337/35 ('PSD 2').
[9] 15 U.S.C. 1693 (1978).

US Uniform Commercial Code ('UCC') Article 4A.[10] These loss allocation regimes prescribe duties borne by financial institutions and customers when dealing with unauthorised fraud, and provide the situations when (and the extent to which) they respectively bear fraud losses (Sections 2.1 and 2.2). I will then review the UK and EU proposals that mirror, to different extents, the legislation on unauthorised fraud which provides compensation to customers (Section 2.3).

In Part 3, I theorise a loss allocation model for authorised fraud that reflects its theoretical and policy considerations, by exploring (i) the comparative lens of the regulatory responses to unauthorised fraud, and (ii) the theoretical lens of customer protection and moral hazard. I shall make four conclusions on the loss allocation model: (i) the loss allocation model should reflect customer fault in authorised fraud (Section 3.1); (ii) there should not be a fixed upper limit of customer liability (Section 3.2); (iii) the extent of liability of banks should reflect whether the bank is at fault (Section 3.3); and (iv) vulnerable customers do not warrant a separate set of loss allocation rules (Section 3.4). The theorised model based on these four principles thus form an indirect critique of the UK and EU proposals.

B. Distinction Between Authorised and Unauthorised Fraud

1. Unauthorised fraud by design

As PSD 2, Reg E, and UCC Article 4A show, regulatory responses to fraud have historically focused on unauthorised fraud.

(i) EU PSD 2

PSD 2 Articles 66-77[11] govern unauthorised fraud and loss allocation. The key underpinning is that a payment transaction binds a payment service user ('user') only when he authorises the payment, namely, where the payer's consent to execute the payment transaction[12] in the form[13] and procedure[14] is agreed between the payer and the payment service provider ('PSP'). In the absence of such consent, a payment transaction is unauthorised.

[10] Uniform Commercial Code, Article 4A.
[11] For a general overview of these provisions, see Gabriella Gimigliano, 'Authorisation of Payment Transactions (Arts 64–77)' in Gabriella Gimigliano and others (eds), *The Payment Services Directive II - A Commentary* (Edward Elgar, 2021).
[12] Payment Services Directive 2, Art. 64.
[13] Payment Services Directive 2, Art. 64(2).
[14] Payment Services Directive 2, Art. 64(4). It follows that an agent with actual authority may fail to authorise if the user has not informed the PSP of the agent's status.

The verification of authorisation by means of a payment instrument – in other words, authentication – may be proof of authorisation.[15]

Where a transaction is unauthorised:

i. The starting point is that the PSP bears the loss of the fraud amount, only if the user notifies the PSP promptly of the loss.[16] In this case, the PSP must refund the user immediately for the amount of unauthorised transactions. If the user fails to fulfil the notification requirements, the user bears the loss.

ii. However, the user shall bear all losses if they act fraudulently, or fail to fulfil one or more of the obligations set out in Art. 69[17] with intent or gross negligence.[18] Gross negligence means "conduct exhibiting a significant degree of carelessness", and includes "keeping the credentials used to authorise a payment transaction beside the payment instrument in a format that is open and easily detectable by third parties".[19] Under Art. 69,[20] the duties of the user[21] include, *inter alia*, the duty to "take all reasonable steps to keep safe the personalised security payment instrument".[22]

iii. In other circumstances, such as when the user does not breach the duty under Art. 69,[23] or breaches the duty under Art. 69 but was neither intentional nor grossly negligent,[24] the user may be obliged to bear the losses relating to any unauthorised payment transactions, up to a maximum of EUR 50. This results from the use of a lost or stolen payment instrument or the misappropriation of a payment instrument.[25]

[15] Payment Services Directive 2, Art. 72.
[16] Without undue delay on becoming aware of any such transaction giving rise to a claim and no later than 13 months after the debit date: PSD 2, Art. 71(1).
[17] Payment Services Directive 2, Art. 69.
[18] Gross negligence may include cases that would have otherwise been treated as those of apparent authority, for example, cases of familiar fraud where the payment service user delivers the payment instrument to a person considered by the payment service user to be a trusted agent who nevertheless betrays them: Benjamin Geva, 'Electronic Payments: Guide on Legal and Regulatory Reforms and Best Practices for Developing Countries' [2020] SSRN Electronic Journal <https://www.ssrn.com/abstract=3631155> accessed 22 February 2025, 58.
[19] Payment Services Directive 2, Preamble (72).
[20] Payment Services Directive 2, Art. 69.
[21] Art. 69 imposes a broad duty to "use the payment instrument in accordance with the terms governing the issue and use of the payment instrument".
[22] Further, Payment Services Directive 2, Art. 74 expressly provides a number of situations where that the PSP shall bear the entire loss when the payer has not acted fraudulently, including where (i) the loss, theft or misappropriation of a payment instrument was not detectable to the payer prior to a payment, (ii) where the loss is caused by acts or omissions by the PSP, (iii) the payer's PSP does not require 'strong customer authentication', (iv) further theft or misappropriation of the payment instrument or its unauthorised use after prompt notification, and (v) where the PSP does not provide appropriate means for the notification.
[23] Payment Services Directive 2, Art. 69.
[24] Geva, 'Guide on Legal and Regulatory Reforms and Best Practices for Developing Countries' (n 16), 59.
[25] Payment Services Directive 2, Art. 74(1).

Authentication does not lead to a presumption, conclusive or otherwise, that the payment is authorised under Art. 64.[26] In other words, it remains open for the user to challenge the authorisation, notwithstanding compliance with the form and procedure of giving consent as agreed by the user and the PSP. Where the user denies having authorised a payment transaction as debited to their account, it remains with the PSP to furnish additional proof to show that the transaction was authorised. This rule, as newly introduced in PSD 2 in 2015, is explained by reference to the customer's limited opportunity to provide evidence in cases of online payment fraud.[27] By the' same token, the fact that there is proper authorisation means that the user is bound by the transaction. PSD 2 could thus be seen to protect the sanctity of authorisation, in light of how, under the irrevocability of a payment order, a user must not revoke a payment order once it has been received by the payer's PSP.[28] To that extent, it informs us how regulatory responses to authorised fraud shall have regard to the centrality of the authority concept.

(ii) US Regulation E

In the US, unauthorised consumer transfers and non-consumer transactions are governed separately. Reg E[29] governs unauthorised consumer transfers. The underlying principle is that a consumer is liable for authorised transfers,[30] until the time of notification to the bank.

The loss allocation rules under Reg E §205.6.73[31] for unauthorised consumer transfers are as follows[32]:

i. If the consumer notifies the financial institution within two business days, after learning of the loss or theft of the access device, the consumer's liability is at most $50.[33]

[26] This is because the use of a payment instrument recorded by the [PSP] shall in itself not necessarily be sufficient to prove either that the payment transaction was authorised by the payer or that the payer acted fraudulently or failed with intent or gross negligence to fulfil one or more of the obligations under Art. 69: Payment Services Directive 2, Art. 72.
[27] Payment Services Directive 2, Preamble (72); Marte Eidsand Kjørven, 'Who Pays When Things Go Wrong? Online Financial Fraud and Consumer Protection in Scandinavia and Europe' (2020) 31(1) EBLR 77-109, 89-90.
[28] Payment Services Directive 2, Art. 80.
[29] Reg E
[30] Namely, electronic fund transfers that fall outside of the definition of "unauthorised electronic fund transfers" under Reg E §205.2(m).
[31] Reg E §205.6.73.
[32] For a general overview of rules governing unauthorised *consumer* transfers under Reg E, see Benjamin Geva, *Bank Collections and Payment Transactions: A Comparative Legal Analysis* (OUP, 2001) 410-413.
[33] Reg E §205.6(b)(1).

ii. If the consumer fails to notify the financial institution, within two business days after learning of the loss or theft of the access device, the consumer's liability is at most $500.[34]

iii. A consumer must report an unauthorised electronic fund transfer that appears on a periodic statement within 60 days of the financial institution's transmittal of the statement to avoid liability for subsequent transfers. If the consumer fails to do so, the consumer may bear the loss for the entirety of the unauthorised transfers that occur after the close of the 60 days and before notice to the institution.[35]

These provisions provide the consumer with the duty to notify the financial institution of the loss or theft of the access device or of an unauthorised transfer that appears on a periodic statement. Crucially, only electronic fund transfers executed with fraudulent intent by the consumer (or any person acting in concert with the consumer) are deemed to be authorised by the consumer, and binds the consumer.[36]

(iii) UCC Article 4A

The rules under UCC Article 4A governing unauthorised non-consumer[37] transfers are as follows:[38]

i. The starting point is that the customer is liable for anything which binds them under agency,[39] be it express, implied or apparent authority.[40]

ii. Additionally, the customer bears the loss for *unauthorised* payment orders, accepted by the bank in good faith, whereby the authenticity was verified by the bank pursuant to a commercially reasonable security procedure which was agreed between the customer and bank.[41] Where payment transactions are not authenticated by the prescribed methods, the bank bears the loss and must refund the customer the amount of the unauthenticated payment order, even when the customer fails to notify the bank of the unauthorised payment within a reasonable time (not exceeding 90 days).[42]

[34] Reg E §205.6(b)(2).
[35] Reg E §205.6(b)(3).
[36] Reg E §205.2(m).
[37] UCC §4A-108.
[38] For a general overview of rules governing unauthorised *non-consumer* transfers under UCC Article 4A, see Geva (n 26) 405-410.
[39] UCC §4A-202(a).
[40] Geva, Bank Collections and Payment Transactions (n 26), 406 [16].
[41] UCC §4A-202(b).
[42] UCC §4A-204(a).

iii. However, for authenticated transactions, the bank bears the loss where the customer proves that the order was caused by an interloper, namely, an outsider to the customer's organisation.[43]

In the case of non-consumers, a payment instruction that is purportedly authorised by the customer binds the customer. It only matters that the payment instruction emanates from the customer, such as when an insider of the customer – without actual or apparent authority – successfully uses the agreed security procedure to execute the transaction, even where the insider is not proximate to the transmitting facilities and the access.[44] This may be justified on the basis that the bank should be allowed to assume that matters of the customer's internal management and procedure have duly been complied with.[45]

2. The Authorised-Unauthorised Distinction

(i) Typologies of authorised fraud under the three regimes

With reference to the common law concept of authority, conclusions can be drawn for a few categories of cases:

i. For transactions executed by a principal themselves, or an agent with actual authority to do so, they are treated as authorised under all three regimes.[46] This is consistent with common law agency principles, under which, an act binds a principal where it is done by (i) themselves or (ii) an agent with actual authority, someone to whom the principal, expressly or impliedly, directs to act on their behalf.[47]

ii. For transactions executed by an agent with apparent authority, they are treated as unauthorised under PSD 2[48] and Reg E[49] (subject to the situation of familiar fraud under the third conclusion below). For instance, under PSD 2, methods to issue a payment instruction must abide by the agreed-upon procedure to constitute proper authentication.[50] This prevents the PSP from claiming that the user has, by some means otherwise, represented that the agent is authorised. Thus, PSD 2 eliminates the

[43] UCC §4A-203(a)(2).
[44] Geva, Bank Collections and Payment Transactions (n 26), 408 [17].
[45] Resembling, but going even further than, the Turquand's rule or indoor management rule under common law: *Royal British Bank v Turquand* [1856] 6 E. & B. 327 (Court of Exchequer); *Mahony v East Holyford Mining Co* (1874-75) LR 7 HL 869, 894.
[46] See Payment Services Directive 2, Art. 64, Reg E §205.2(m), and UCC §4A-202(a). These three frameworks do not modify the common law position of actual authority.
[47] Peter George Watts and Francis Reynolds, *Bowstead & Reynolds on Agency* (23rd edn, Sweet and Maxwell 2023) 3-003.
[48] Payment Services Directive 2, Art. 64.
[49] Reg E, §205.2(m).
[50] Payment Services Directive 2, Art. 64.

possibility of apparent authority.[51] This is slightly different from the common law position, whereby a principal is bound against the third party to whom the agent acts with apparent authority, which arises when (i) the principal (or someone with actual authority on their behalf) represents to the third party that the agent has such authority, and (ii) the third party is induced by and relies on the representation.[52]

iii. For transactions executed by an agent to whom the customer gives the access device, they may be treated as authorised under Reg E[53] and PSD 2.[54] Under Reg E, transactions by an agent who was furnished the access device to the consumer's account by the consumer – with apparent authority since the consumer has once notified the financial institution that transfers by the agent are authorised – are expressly deemed to be authorised, and so binds the consumer.[55] This is so, notwithstanding the agent may have acted beyond the scope of their actual authority (e.g. stole funds from the principal). By contrast, the situation is less clear under PSD 2. The situation of an agent who has transgressed the scope of their actual authority – but with apparent authority – warrants more consideration as they may well have passed the proper authentication procedure. That said, the principal may have breached the obligation to "keep personalised security credentials safe" under Art. 69[56] with intent, thus, rendering the transaction binding on the principal.[57] Conversely, it may be that the principal could adduce evidence that the agent is not authorised to rebut the finding of authorisation under Art. 64 PSD 2,[58] such that the transaction does not bind them. Due to ambiguity under PSD 2, familiar fraud should generally be seen to be an instance of authorised fraud, which must be accounted for in the loss allocation model. However, this situation of familiar fraud falls within apparent authority under common law and binds the customer.

iv. Fourth, a transaction executed by a person with neither actual nor apparent authority is firmly unauthorised under all three regimes. This follows from the trite principle that an agent may not clothe themselves with actual or apparent authority

[51] Geva, Bank Collections and Payment Transactions (n 26), 55.
[52] ibid 3-004; *Freeman & Lockyer v Buckhurst Park Properties Ltd* [1964] 2 QB 480 (CA).
[53] Reg E §205.2(m).
[54] Payment Services Directive 2, Arts. 64 and 69.
[55] Unless the consumer has notified the financial institution that transfers by that person are no longer authorised: Reg E §205.2(m).
[56] Payment Services Directive 2, Art. 69.
[57] Marte Eidsand Kjørven (n 23), 88; Payment Services Directive 2, Art. 69(2).
[58] Payment Services Directive 2, Art. 64.

simply by saying so.[59] Under apparent authority, any representation must originate from the principal, and not the agent. As such, a rogue who has gained access to a security device is not authorised within category (3) above. This category may apply for phishing and spoofing fraud where the payer voluntarily sends their personal credentials/ verification code to others (and acts with pre-fraud fault), or for hacking, identity theft, or malware-enabled variants fraud[60] (where the payer is innocent).

(ii) What does 'authorised fraud' mean?

In all cases of authorised fraud, it is the customer, rather than the fraudster, [61] who executes the payment instructions. Authorised fraud includes two major categories of APP fraud: [62]

i. Malicious Redirection Fraud: This refers to a situation where the customer thinks, in good faith, that they are sending money to the payee, where they are sending money to a fraudster. This includes invoice fraud, CEO fraud, impersonation by police or bank staff and other forms of impersonation.

ii. Malicious Payee Fraud: This include investment scams, romance scams, purchase scams, and advance fee scams. It refers to the situation where the payer fully intends to send the payment to a fraudster and thus authorises the payment, but is defrauded under the pretence set up by the fraudster.

Two observations may be made concerning the nomenclature of authorised fraud. First, situations that straddle the fine line between unauthorised and authorised fraud exist. An example is familiar fraud following the analysis on principle (3) in Section 2.2.1. Another example could be a mixed social engineering and technical fraud, where the customer hands over personal security credentials to the fraudsters, and it is the fraudster who authenticates the

[59] *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1986] AC 717 (HL).
[60] Monetary Authority of Singapore, 'Consultation Paper on Proposed Shared Responsibility Framework' P016-2023 (October 2023) <www.mas.gov.sg/publications/consultations/2023/consultation-paper-on-proposed-shared-responsibility-framework> accessed 22 February 2025, [4.4].
[61] For instance, where the customer hands over their personal credentials/ SMS verification code to the fraudster, e.g. by clicking on a phishing link and entering their credentials on a fake digital platform, and the fraudster executes the payment instruction: Singapore Consultation Paper (n 48), [4.1]; or where the customer enrols the fraudster's devices as a factor of the strong customer authentication (***SCA***) system, allowing the fraudster to take over the payment account completely: European Banking Authority, 'Opinion on new types of payment fraud and possible mitigations' EBA-Op/2024/01 (29 April 2024) <www.eba.europa.eu/sites/default/files/2024-04/363649ff-27b4-4210-95a6-0a87c9e21272/Opinion%20on%20new%20types%20of%20payment%20fraud%20and%20possible%20mitigations.pdf> accessed 22 February 2025 (EBA Opinion), [23].
[62] UK Finance, 'Half Year Fraud Update 2023' (*UK Finance,* 24 October 2023) <www.ukfinance.org.uk/system/files/2023-10/Half%20year%20fraud%20update%202023.pdf> accessed 22 February 2025, 27.

payment. While such cases are technically unauthorised, the latest opinion of the European Banking Authority ('EBA') observed that PSPs often wrongly categorise such fraud as authorised.[63]

Regardless of the precise categorisation, since the UK and EU expressly only aim to tackle APP fraud rather than authorised fraud generally, [64] this article principally takes the same approach in devising the loss allocation model. Future proposals should clarify whether familiar fraud falls within the scope of either or neither of the regimes for unauthorised and authorised fraud.[65] Second, in any event, regulatory intervention must account for the ever-evolving typologies of authorised fraud, due to its broad catch of all types of payment frauds notwithstanding unauthorised fraud and changing fraud technologies. On one hand, the loss allocation rules must be flexible enough to meet the changing specific nature of each type of authorised fraud and account for specific and nuanced responses. On the other hand, since authority is the unifying factor, there must be clear principles unifying the allocation rules for different types of authorised fraud. As we shall see in Section 3.3, the duty-based view on banks resolves this apparent conflict.

3. Existing Proposals for Authorised Fraud

(i) The UK's mandatory reimbursement requirement

In June 2023, the UK's Payment Systems Regulator ('PSR') confirmed new mandatory reimbursement requirements (hereinafter, 'the UK regime') for APP fraud within the Faster Payments System.[66] It reforms the current Contingent Reimbursement Model Code[67] ('CRM Code') that came into effect in May 2019. In December 2023, the PSR introduced the final detailed parameters and legal instruments to implement the mandatory reimbursement requirement, including the maximum level of reimbursement, claim excess, and the applicable

[63] EBA Opinion (n 49), [23].
[64] See, for example, how the UK and EU policy papers proceed on the basis of APP fraud *alone*: Payment Systems Regulator, 'Report and Consultation – Authorised push payment scams: PSR-led work to mitigate the impact of scams, including a consultation on a contingent reimbursement model' CP17/2 (November 2017) <https://www.psr.org.uk/media/1scay2wu/psr-app-scams-report-consultation.pdf> accessed 22 February 2025; EU Proposal for PSD 3 (n 7), 5.
[65] Along these lines, the EBA has observed the need to clarify certain fraud typologies that are easily mistaken as authorised as unauthorised fraud. Crucially, the EBA's classification of authorised and unauthorised fraud also proceeds on the concept of authority as adopted in this article, to ask whether it is the *customer* who gives the payment order: EBA Opinion (n 49), [31(a)].
[66] UK Jun 2023 Policy Statement (n 6).
[67] Lending Services Board, 'Contingent Reimbursement Model Code for Authorised Push Payment Scams (17 October 2023)' <www.lendingstandardsboard.org.uk/wp-content/uploads/2023/10/LSB-CRM-Code-V5.0-17-October-2023.pdf> accessed 22 February 2025 (***CRM Code***).

consumer standard of caution.[68] The UK regime came into effect on 7 October 2024.[69] Under the UK regime, PSPs shall reimburse in-scope customers who fall victim to APP fraud in most cases fully for their loss unless customers act fraudulently or with gross negligence,[70] subject to the claim excess of up to £100 per claim from the customer. [71] The receiving PSP and the sending PSP shall apportion the loss on a 50:50 basis. [72] The maximum amount of reimbursement is fixed at £85,000,[73] and customers bear all losses above this level. Sending PSPs must reimburse customers who fall victim to APP fraud within five business days,[74] except where the clock is stopped temporarily to permit the sending to PSP to gather further information.[75] This time limit is shorter than 15 business days, under the CRM Code.[76] Sending PSPs will have the option to deny APP fraud claims which have been submitted more than 13 months after the final payment to the fraudster.

Additional protections are provided for vulnerable customers, [77] namely, that the customer standard of caution and claim excess must not be applied. [78] In other words, notwithstanding their gross negligence, vulnerable customers will be reimbursed in full regardless of the £100 limit.[79] PSPs must consider a range of factors in construing vulnerability and must ask the extent to which characteristics of vulnerability of the customer, whether temporary or enduring, led them to be defrauded.[80]

Customers bear loss when they act fraudulently or with gross negligence. Gross negligence is a "high bar", and the burden of proof is on the PSP.[81] Further, gross negligence is only limited to the failure to fulfil any of these four specific duties: (i) have regard to interventions by the PSP or the police; (ii) promptly notify the matter to their PSP and not more

[68] UK Dec 2023 Policy Statement (n 6).
[69] UK Dec 2023 Policy Statement (n 6), [1.5].
[70] UK Jun 2023 Policy Statement (n 6), p.6.
[71] UK Dec 2023 Policy Statement (n 6), [1.2].
[72] UK Jun 2023 Policy Statement (n 6), [1.3].
[73] Payment Systems Regulator, 'Policy Statement – Faster Payments APP scams reimbursement requirement: Confirming the maximum level of reimbursement' PS24/7 (October 2024) <https://www.psr.org.uk/media/e30pwlly/ps24-7-app-scams-maximum-level-of-reimbursement-policy-statement-oct-2024.pdf> accessed 22 February 2025.
[74] UK Jun 2023 Policy Statement (n 6), [5.18].
[75] ibid [5.22].
[76] R3(1) of the CRM Code (n 55). Note in exceptional cases, this period can be extended to a maximum of 35 business days, provided the firm informs the Customer of the delay and the reasons for it, and the date by which the decision will be made.
[77] A vulnerable customer is defined as "someone who, due to their personal circumstances, is especially susceptible to harm, particularly when a firm is not acting with appropriate levels of care": UK Jun 2023 Policy Statement (n 6), [2.12].
[78] UK Jun 2023 Policy Statement (n 6), [2.11].
[79] UK Jun 2023 Policy Statement (n 6), [1.3].
[80] UK Jun 2023 Policy Statement (n 6), [2.13].
[81] UK Jun 2023 Policy Statement (n 6), ft 8.

than 13 months after the last relevant payment was authorised; (iii) respond to their PSP's requests for information, and (iv) report the scam to the police.[82] As for duties on PSPs, PSPs shall communicate their assessment of the probability that an intended payment is an APP scam payment.[83] By contrast, gross negligence under R(2)(1)(e) of the CRM Code[84] is not defined. The UK regime thus modifies the scope of gross negligence under the CRM Code.[85]

(ii) EU Proposal for PSD 3

Compared to the UK regime, the EU has taken a much more restrained approach. In its Impact Assessment Report for PSD 3,[86] the Commission rejected the "full reversal of liability between users and PSPs" for authorised fraud.[87] The EU introduces refund rights for authorised fraud (conditional reversal of liability) by the payer's PSP in two narrow situations.[88] First, reimbursement is granted for users (not just consumers) who suffered damages caused by the failure of the International Bank Account Number ('IBAN') / name verification service to detect a mismatch between the name and IBAN of the payee.[89] PSPs must offer the IBAN/name verification service and inform the payer of the degree of match between the name and IBAN of the payee.[90] This allows the payer to decide whether to proceed with the transfer. The PSP(s) (payer and/or payee PSP) that failed to notify the payer of a detected discrepancy between the unique identifier and the name of the payee provided by the payer must refund the payer the full amount.[91] As a matter of authorised fraud, this specifically tackles invoice fraud where the payee's account number but not the name is substituted with the fraudster's, as well as erroneous payment transactions, which are authorised transactions but not fraud.

Second, reimbursement is granted for consumers who fall victim to a specific type of spoofing fraud, namely, where the fraudster impersonates an employee of the consumer's PSP using the bank's name, email address, or phone number.[92] Refund is subject to the consumer filing a police report and notifying their PSP without delay. Refund is not available where the

[82] UK Dec 2023 Policy Statement (n 6), [1.2].
[83] UK Dec 2023 Policy Statement (n 6), [5].
[84] R2(1)(e) of the CRM Code (n 55).
[85] Note that R2(1) of the CRM Code (n 55) provides additional grounds for user liability.
[86] EU Impact Assessment Report for PSD 3 (n 2).
[87] EU Impact Assessment Report for PSD 3 (n 2), [6.1.d].
[88] Note that technical service providers and operators of payment schemes could be liable for the failure to support the application of strong customer authentication: EU Proposed Payment Services Regulation (n 7), Art. 58.
[89] ibid Art. 57.
[90] EU Proposed Payment Services Regulation (n 7), Art. 50.
[91] EU Proposed Payment Services Regulation (n 7), Art. 57(2).
[92] EU Proposed Payment Services Regulation (n 7), Art. 59(1).

consumer acts with gross negligence or intent,[93] including where they fall victim to the same fraud more than once, or to fraud which is not convincing, such as other than the bank's advertised credentials.[94]

PSD 3 is a restrained response compared to a wholesale reform in the UK case, which tackles all types of APP fraud. Whilst the EU justifies the first situation based on the incentivising effect this has on PSPs to adopt IBAN/name verification service,[95] it offers no justification for the second situation. Whilst this may seem to incentivise PSPs to take measures in educating users on how communications from the PSP will be done (e.g. reminding customers that PSPs will not ask for personal credentials or passwords), it is unreasonable and impractical to expect PSPs to actively police impersonation acts to prevent fraudsters from impersonating them. On that basis, there is no principled distinction between the impersonation of the PSP and of other entities. This measure may even be liable to exploitation by fraudsters, who may shift their tactics to impersonating PSPs in hopes of shifting the cost of fraud entirely to PSPs and getting more proceeds.

C. A Principled Case for the Loss Allocation Model for Authorised Fraud

To summarise, the key points of my proposal may be summarised as follows:

i. First, the starting point for loss allocation should be a rule that 'apportions' liability between the customer and the customer's bank in respective proportions, for instance, a 50:50 split. The precise apportionment shall account for the intricate balancing of customer protection against the financial consequences on banks, which should lie within the discretion of regulators. This apportionment rule does not apply to first-party fraud. Three considerations underlie the apportionment approach. First, customers invariably act with pre-fraud fault, which simply follow from the fact that they have duly authorised the transaction. Therefore, the customer's share of loss should be significant to reflect such fault. To that end, no distinction should be made between different levels of customer fault, such as the gross negligence threshold in the UK regime. Second, the apportionment approach removes moral hazard, as the precautionary measures taken by customers and banks are commensurate with the size of payment transactions. Third, compared to erroneous payment transactions, there is a presumption that the lost funds are irrecoverable from the fraudster and have a lower

[93] EU Proposed Payment Services Regulation (n 7), Art. 59(3).
[94] EU Proposed Payment Services Regulation (n 7), Preamble (82).
[95] EU Impact Assessment Report for PSD 3 (n 2), [6.1.e].

likelihood of first-party fraud. On that basis, the apportionment approach ought to be used, and there should not be an upper limit on customer liability.

ii. Second, where customers, save for vulnerable customers, breach post-fraud duties, there is good reason to require them to bear the entire loss. This is so, because post-fraud duties, upon the customer's knowledge of their losses, are reasonable and not onerous.

iii. Third, where the customer's bank breaches the duties owed to its customer, it should be responsible for a larger proportion of the loss, compared to the proportion it bears where it satisfies all duties. This reflects the duties owed by banks under the common law, including the *Quincecare* duty (and the limits thereof). Regulators should set the level of increase in the proportion of liability by considering the extent of customer protection and the financial abilities of banks. For instance, a 70:30 split between banks and customers may be prescribed.

iv. Fourth, no special rules should apply with respect to vulnerable customers. If it is assumed that vulnerable customers are incapable of taking any precautionary measures, this provides more of a reason as to why customers should listen to the bank's assessment of the likelihood that they are defrauded. The failure to have regard to such interventions constituting pre-fraud fault in the sense described in Section 3.1 means that losses should lie on them rather than the banks. Further, imposing an additional proportion of liability or the entire liability under the UK regime fails to incentivise banks to protect such customers, resulting in a moral hazard in the sense described in Section 3.1.2. Such a robust policy of customer protection is unlikely to be feasible in most jurisdictions.

1. The model should reflect customer fault, which follows from their authority

(i) Victims of authorised fraud are invariably at fault

For authorised fraud, it can be questioned as to what the relation is between the customer duty to take reasonable care in precautionary measures and loss allocation. A comparison with the models for unauthorised fraud reveals that the UK regime is unprincipled.

Under the unauthorised fraud models, customers bear both (i) pre-fraud and (ii) post-fraud duties to take reasonable care to prevent losses.

For pre-fraud duties:

i. Under PSD 2, the user has the duty to take all reasonable steps to keep safe the personalised security payment instrument. The user bears the entire loss *only* where

duties under Art. 69 are breached with intent or gross negligence.[96] In all other situations, the user bears a maximum loss of EUR 50 (subject to fulfilment of post-fraud duties).[97]

ii. In contrast, Reg E disregards the consumer's possible contribution to the fraud as a reason to fasten liability on them. Regardless of pre-fault fault, the consumer may bear only a maximum loss of $50 where the notification requirement is fulfilled.[98]

iii. Under UCC Article 4A, a fault is not the overarching principle for fastening liability. The customer's liability is different depending on whether it is an insider or an interloper who issues the payment order.[99] The customer's fault may well be the same in both cases.

The pre-fraud duties so conceptualised under Art. 69 PSD 2[100] may be said to resemble a duty of reasonable care, which effectively allows PSPs to raise a defence to a claim for the execution of transactions for want of proper authority. Customer fault, on this basis, simply means a breach of the duty that passes a prescribed threshold which renders it just to impose loss on the customer.

Despite the differences among these three regimes on whether fault is the basis to pin liability on the customer, the situation is far more straightforward for authorised fraud. Strictly speaking, customers could not be said to breach a duty as they are entitled to authorise any transactions as they wish. On this basis, customer fault simply means authorising transactions that carry an outcome that they do not want to bear, even though they are, strictly under the authority and agency principles, bound by it and so bear all ensuing losses. This follows from the position under the common law: where the customer authorises the transaction, "[i]t is not for the bank to concern itself with the wisdom or risks of its customer's payment decisions".[101] To this end, there is no reason why customer fault so conceptualised does not apply to authorised fraud. Customer protection, even if accepted as a valid normative principle, should be restrictively applied.

Fault, so conceptualised is largely disregarded by the UK regime since the only type of pre-fraud fault which leads to customer bearing losses, is whether the customer had regard to proper interventions by PSPs and the police.[102] It follows that, whether the customer has

[96] Payment Services Directive 2, Art. 69.
[97] Payment Services Directive 2, Art. 74(1).
[98] Reg E §205.6(b)(1).
[99] UCC §4A-203(a)(2).
[100] Payment Services Directive 2, Art. 69.
[101] *Philipp v Barclays Bank UK plc* year/?(n 1), [3].
[102] UK Dec 2023 Policy Statement (n 6), [5].

contributed to the occurrence of fraud in the first place is irrelevant. The narrow conception of pre-fraud fault under the UK regime appears to be similar in scope to the duty to "take appropriate actions in response to effective warnings given by the firm" under R2(1)(a)(iii) of the CRM Code. This reveals that the additional grounds for pre-fraud fault under R2(1)(a) to (d) of the CRM Code are removed.

One could imagine that the narrow notion of pre-fraud fault under the UK regime is found only in the most extreme of situations, such as that in *Philipp v Barclays Bank,*[103] where the victims ignored repeated interventions by the bank staff and police and insisted upon authorising the payment instruction. This appears to be a rather low standard of customer care that comes close to Reg E's approach[104] to disregard the consumer's pre-fraud fault, namely, ignoring the consumer's possible contribution to the fraud as a reason to fasten liability on them. But the considerations for Reg E[105] should not apply, in any event. This is because, unlike authorised fraud where the customer may or may not have contributed to the fraud in the first place such that it may be just to disregard altogether the customer's negligence in contributing to the fraud as relevant, in virtually all cases of authorised fraud, the customer is at fault and contributes to it. Here, it must be emphasised that customer fault would arise simply by virtue of the customer authorising a transaction with an outcome that they do not desire, and is not fault in the sense of the breach of some duty owed to the bank. Such fault on the customer's part should well have been reflected in the model. Thus, limiting gross negligence to the failure to have regard to interventions under the UK regime is problematic.

This problem is even more starkly observed when we compare that with gross negligence under PSD 2.[106] As gross negligence is not further defined under PSD 2,[107] such ambiguity may be said to give more room for the PSPs to interpret gross negligence broadly to reject compensation. It should not be the case that authorised fraud victims, who are always at fault, are more readily compensated for their losses. For unauthorised fraud, it could well be that the customer has done all that he can to prevent losses. Thus, by asking if negligence is gross, it may be distinguished between whether the customer bears all losses, or only up to the prescribed upper limit of customer liability. For authorised fraud, there is little room for the level of fault in this sense to supply a sound basis for just compensation, as customer fault invariably contributes to the fraud. Nor is it easy to discern a principle for just compensation

[103] *Philipp v Barclays Bank UK plc* (n 1).
[104] Reg E §205.6(b)(1).
[105] Reg E §205.6(b)(1).
[106] Payment Services Directive 2, Art. 69.
[107] Payment Services Directive 2, Art. 69.

based on the typologies of authorised fraud (as explained in Section 2.2.2) and their respective victim profiles.

(ii) Moral hazard should be avoided

It is central to the design of payment rules that both the bank and the customer have enough incentives to pass a certain threshold to take the requisite precautionary measures. Moral hazard are ensued when customers are not incentivised to take precautionary measures for authorised fraud and may take unnecessary risks in relation to payment transactions. More specifically, two types of moral hazard may emerge.

First, a customer who bears no losses has no incentive to take any precautionary measures to prevent fraud. This is the most straightforward conceptualisation of moral hazard. The EU Impact Assessment Report for PSD 3[108] appears to proceed on this view of moral hazard, given that it rejects a full reversal of liability between users and PSPs on the basis that it "only [serves] to reattribute the social cost of fraud *without* incentivising payers to avoid taking unnecessary risks". As considered by Douglass,[109] the zero-liability policy by Visa and Mastercard[110] – where cardholders do not have to bear *any* losses for unauthorised transactions given that they give prompt notification of the loss of the payment card – creates a moral hazard in this sense.[111] In the context of unauthorised fraud, Levitin also considered that this view of moral hazard may go further to allow instances of first-party fraud,[112] namely, that the customer shall falsely allege that a transaction is unauthorised to seek compensation from the bank. Under the UK regime, since a claim excess of £100 may be applied by the PSPs, this view of moral hazard does not arise.

The second type of moral hazard is that a customer who bears *some* losses shall take precautionary measures to prevent fraud, only if the loss that they may bear is greater than the cost of taking additional precautionary measures and/or the benefits received with expediting payment transactions. Where the risk of loss is insufficient to motivate the party to undertake precautionary measures to prevent fraud, the customer would rather bear the loss since it is cheaper to do so. In this light, for the threat of the $50 or $500 loss under Reg E[113] to be

[108] EU Impact Assessment Report for PSD 3 (n 2), [6.1.d].
[109] Duncan B. Douglass, 'An Examination of the Fraud Liability Shift in Consumer Card-Based Payment Systems' (2009) Economic Perspectives Vol. 33, No. 1 <https://ssrn.com/abstract=1341696> accessed 22 February 2025.
[110] See, for example, Visa USA, 'Visa's Zero Liability Policy' <https://usa.visa.com/pay-with-visa/visa-chip-technology-consumers/zero-liability-policy.html> accessed 22 February 2025.
[111] Douglass (n 89), 46.
[112] Adam J. Levitin, 'Private Disordering - Payment Card Fraud Liability Rules' (2010) 5 Brook J Corp Fin & Com L 1, 39.
[113] Reg E §205.6(b).

effective in incentivising customers to take reasonable care, this threshold must be greater than the cost of precautionary measures and the benefits from *not* taking reasonable care. Similarly, this should also be the case under the UK regime, where customers bear at most £100 liability[114] and are shielded from most of the liability (subject to post-fraud duties).

A few points emerge from this. First, under both Reg E[115] and the UK regime, the threat of customers bearing the entire loss is limited, which may contribute to the rise of moral hazard. This is so since pre-fraud fault is wholly disregarded under Reg E[116] and narrowly construed as only the failure to have regard to interventions under the UK regime,[117] under which, no pre-fraud customer fault can be found if the PSP does not detect the fraud. Contrast this against PSD 2[118] and PSD 3,[119] a threat of fault constituting gross negligence – a concept which is liable to be broadly defined by PSPs under PSD 2[120] and confirmed to be easily found under PSD 3[121] – has a much better bite to incentivise customers to take reasonable care. This reveals how the narrow concept of fault under the UK regime is problematic, and there is good reason for a much broader concept of fault to apply. On the other hand, interpreting the moral hazard problem too literally fails to produce any useful change to the default position of customers bearing the loss. What this foregoing analysis therefore shows, is that customer liability should not be capped as the UK regime does. Rather, customers should bear a significant proportion of their losses.

Second, if this view of moral hazard were tolerated in the eventual loss allocation regime, it could well be that the overall social cost of fraud may increase. A customer may expedite authorisation processes for instructions below a certain amount since the potential loss it bears in relation to fraud is smaller than the costs associated with assuring all transactions are based on a legitimate premise. This concept of moral hazard equally applies to banks, where they may not set up transaction monitoring devices for transactions below a certain amount, since it may be cheaper to compensate the payer than to monitor every payment instruction. Whilst there is nothing that strictly prevents either the party or the bank from preferring to bear

[114] UK Dec 2023 Policy Statement (n 6), [1.2].
[115] Reg E §205.2(m).
[116] Under Reg E §205.2(m), fault on the consumer is relevant only to the extent that electronic fund transfers with "fraudulent intent by the consumer or any person acting in concert with the consumer" are deemed to be authorised.
[117] UK Dec 2023 Policy Statement (n 6), [1.2].
[118] Following how 'gross negligence' is not further defined under PSD 2.
[119] EU Proposed Payment Services Regulation (n 7), Preamble (82).
[120] Following how 'gross negligence' is not further defined under PSD 2.
[121] EU Proposed Payment Services Regulation (n 7), Preamble (82).

the loss as a matter of *their own* commercial interests, the fact that the rest of the loss is incurred by the other party calls for the need to resolve this aspect of moral hazard.

Third, the query persists as to whether empirical evidence exists to inform the applicable threshold to remove such moral hazard since it requires an express weighing of the costs and benefits of fraud for each party. Particularly, the financial capabilities of individual customers to bear loss differ from customer to customer, and richer customers are more likely to prefer bearing the loss. In these circumstances, no uniform threshold of loss constituting sufficient incentives could be set in principle. As further elaborated in Section 3.2, the difficulty of fixing a standard monetary amount also informs how we should allocate losses based on fixing the *proportion* of the losses instead, e.g. a 50:50 split.

(iii) Post-fraud duties should not be less onerous than unauthorised fraud

As for post-fraud duties, the UK regime provides requirements to notify the PSP and file a police report, where the failure to notify the PSP of the unauthorised transaction within the prescribed time limit of knowing the same results in the customer bearing the entirety of the loss.[122] These duties are reasonable to impose upon the customer's knowledge of their losses, and similar to those under PSD 2[123] and Reg E, [124] where the breach of notification duty within the prescribed time limit results in the customer bearing the *entirety* of the loss. By the same token, for authorised fraud, it is not unreasonable to pin the entire loss on the customer if they fail to satisfy these post-fraud duties.

(iv) The existing models for erroneous transactions provide a case for comparison

The UK regime also departs from the principle taken for erroneous payment instructions – a type of authorised transaction – that losses are shifted to the PSP only if there is fault on the PSP's part. The starting point for these transactions is that the customer bears the loss.[125] For erroneous payment instructions, fault found liability on the bank. Under PSD 3, the PSPs must notify the user of the degree of discrepancy between the name and the bank account number by way of a name-checking service.[126] If the name-checking service fails to

[122] Under the UK regime, the post-fraud duties are the prompt notification, responding to requests for information, and police reporting requirements: UK Dec 2023 Policy Statement (n 6), [5]; cf the post-fraud customer duty not to act "dishonestly or obstructively in a material respect" under R2(2)(b) of the CRM Code (n 55).
As for PSD 3, refund for impersonation fraud is subject to the consumer filing a police report and notifying their PSP without delay: EU Proposed Payment Services Regulation (n 7), Art. 59(1).
[123] Without undue delay on becoming aware of any such transaction giving rise to a claim and no later than 13 months after the debit date: Payment Services Directive 2, Art. 71(1).
[124] Within 60 days of the financial institution's transmittal of the statement: Reg E §205.6(b)(3).
[125] Payment Services Directive 2, Art. 88(1) and (2), UCC §§4A-205 and 206.
[126] EU Impact Assessment Report for PSD 3 (n 2), [6.1.c].

detect a mismatch, the PSP bears the loss.[127] Under UCC §§4A-205 and 206, a sender can shift the loss to their bank, only when the receiving bank [128] has failed to comply with an agreed-upon security procedure which would have detected the error.[129] As such, UCC Article 4A[130] and PSD 3[131] provide only limited circumstances where losses for an authorised transaction are recoverable from the bank. As such, they reflect the centrality of the concept of authority – risk for a payment order duly authorised by a payer lies with the payer and is consistent with this concept.

The framework for erroneous payment instructions is a useful comparator for what regulatory responses for authorised fraud should be. As with authorised fraud, the customer is the one at fault – authorising transactions that carry an undesirable outcome. Given that erroneous payment instructions and authorised fraud are, by their very nature, authorised transactions duly executed by the payer on their own volition, the bank – save for their limited duties – has no duty and business to advise the customer on transactions stemming from their proper authority. Here, the fact that the banks can better absorb losses does not provide a reason for adopting an expansive approach imposing bank liability as a starting point.

However, the case of erroneous payment instructions also supplies arguments on why changes should be made to a fault-based approach to reflect the differences between erroneous payment instructions and authorised fraud. First, the framework of rules for authorised fraud should proceed on the basis that the fraudster has absconded with the funds, which may lend some support to the deep pockets argument for banks to bear losses. This is different from erroneous payment instructions, where *realistically*, losses are much more likely to be recoverable from the erroneous payee under restitution and mistake.

Second, authorised fraud sees a much lesser risk of first-party fraud. For erroneous payment instructions, instances of first-party fraud may arise. Customers may abuse the compensation regime by falsely claiming that their transaction is an erroneous one, notwithstanding that they have only later come to regret a payment order and claim that the payment is of a larger sum, or wrongly sent to a payee other than what they truly intended. In such cases, there is a real risk of first-party fraud as the bank has virtually no contrary proof to defeat the customer's factual allegations. However, for authorised fraud, proper rules can

[127] Cf Payment Services Directive 2, Art. 88(5).
[128] UCC §4A-103.
[129] Except when the customer fails to report the error "within a reasonable time, not exceeding 90 days" of being advised of the unauthorised contents: UCC §4A-205(b).
[130] UCC §§4A-205 and 206.
[131] EU Impact Assessment Report for PSD 3 (n 2), [6.1.c].

prevent first-party fraud, where the customer so falsely claims authorised fraud in hopes of recouping losses owing to their erroneous instruction. For instance, under the UK regime, the PSP is entitled to request further information from the customer and require the customer to report the matter to the police pursuant to the requirements for a claim for reimbursement.[132] As most instances of first-party fraud may be removed, it is not unfair for banks to bear the loss for authorised fraud.

2. The model should not apply a fixed upper limit of customer liability

(i) The flat excess approach results in the bank bearing the bulk of the losses

Contrasted against the 'all or nothing' approach that imposes the entire loss on one party, in some situations, PSD 2[133] and Reg E[134] adopt the 'flat excess' approach. These provisions provide, subject to a fixed upper limit for customer liability, the PSP or financial institution bears the rest of the losses. Since the prescribed upper limits are not high, one can assume that the PSP or financial institution bears the bulk of the losses. By contrast, the approach under UCC Article 4A is strictly all-or-nothing, where in *all* circumstances, *either* the bank *or* the customer bears the entire loss.[135] The lack of loss-sharing provisions under UCC Article 4A reflects authority as a central construct of the model, under which, the transaction either binds the customer or it does not.

The upper limits under PSD 2[136] and Reg E[137] appear to be arbitrarily determined as the legislators have proffered no empirical evidence on how the figures came to be. The fact that this customer liability – however small in sum – may apply in both cases where the customer has *no* fault at all further speaks volumes to how the flat-excess is not based on sound principle. Rather, it is a symbolic exercise that *formally* shares losses between the customer and the bank. The UK regime, not inconsistent with these observations, entitles the PSP to apply for a claim excess of up to £100 from the customer (except for vulnerable customers).[138]

But even if we accept the arbitrariness of the figure of the flat excess, the justifications for the flat-excess approach under PSD 2[139] and Reg E[140] simply do not apply for authorised fraud since, as argued in Section 3.1, the customer fault level is much higher than that under

[132] UK Dec 2023 Policy Statement (n 6), [5].
[133] Payment Services Directive 2, Art. 74(1).
[134] Reg E §205.6(b).
[135] Section 2.1.3.
[136] Payment Services Directive 2, Art. 74(1).
[137] Reg E §205.6(b).
[138] UK Dec 2023 Policy Statement (n 6), [1.2].
[139] Payment Services Directive 2, Art. 74(1).
[140] Reg E §205.6(b).

unauthorised fraud. Particularly, for authorised fraud, it is difficult to merely consider the victims' compliance with the reporting duty without having regard to pre-fraud fault (Reg E) or to speak of their fault level as falling below gross negligence (PSD 2).

(ii) The flat excess approach leads to moral hazard

More fundamentally, the flat excess approach reveals a third aspect of moral hazard (in addition to the two aspects in Section 3.1.2). It applies to a customer who bears *some* losses and is incentivised to take precautionary measures (i.e. the cost of taking additional precautionary measures and/or the benefits received with expediting payment transactions is cheaper than the loss that they may bear). For these customers, as described by Cooter and Rubin, [141] if such incentive is not commensurate with the level of risk of the payment instruction, there is "a point at which liability ceases to produce major increases in loss avoidance behaviour",[142] and liability is not an effective incentive because behaviour no longer responds to it. In other words, even if the $50 or $500 loss (Reg E) borne by the customer is a valid incentive, the customer will only do the minimum level of precautionary measures necessary. The precautionary measures undertaken do not increase, notwithstanding that the amount lost in the unauthorised payment transaction does. Cooter and Rubin expressly disregard this aspect of moral hazard and argue that it is for this reason that consumers cease to be responsive and that banks should absorb the rest of the losses. They argue since "precaution increases at a decreasing rate" [143] in response to the risk of the transaction, increasing liability becomes oppressive to consumers", and as such, they go on to defend Reg E as it imposes strict liability on the consumer's part at a "significant but not excessive amount".[144]

For unauthorised fraud, there is arguably good reason to adopt this approach and tolerate moral hazard in this sense, for the simple reason that the amount of unauthorised transaction is simply not known to the customers until the customer becomes aware of it, and there is no expectation that customers should increase their precautionary measures in response to unauthorised transactions, the amount of which is wholly out of their control. To that extent, it may well be justified to require banks to bear all losses above a certain threshold. In relation to authorised fraud, however, there is no good reason to accept this sense of moral hazard. This

[141] Robert D. Cooter and Edward L. Rubin, 'Theory of Loss Allocation for Consumer Payments' (1987) 66 Tex L Rev 63.
[142] ibid 90.
[143] ibid 92.
[144] ibid.

is because customers clearly understand that the default rule is that they have to bear liability on authority terms, and it is common sense that a larger sum of payment instructions naturally comes with a higher risk, and thus, the higher need to take precautions. The flat excess approach under the UK regime effectively removes this inherent sense of precaution in customers and its potential applicability to prevent authorised fraud, especially those involving large sums of payment instructions. Therefore, customer protection – in its broad and blanket terms under the UK regime – does not supply a convincing reason to override the unfairness caused by pinning the bulk of the losses on banks even when they comply with all their duties. Transposing the model for unauthorised fraud for authorised fraud – as the UK regime does – places undue emphasis on the expediency of the loss allocation process (i.e. the loss imposition principle under Cooter and Rubin's framework[145]), and is doctrinally unsound based on this third aspect of moral hazard so conceptualised.

What, then, should be the principle that grounds a loss-sharing approach between customers and banks? The simplest way to preserve the thrust of the factor that 'a larger transaction comes with higher risk' is to share losses on an apportionment basis, e.g. 50:50 split between the customer and the bank as a starting point. That way, the loss allocated to customers and banks will be commensurate with the loss resulting from authorised fraud.

3. The model should allocate more loss to banks when they breach their duties

To the extent reflected in PSD 2 and Reg E,[146] it is central to customer protection that losses for unauthorised fraud may fall on the PSP or financial institution even if it has no fault. This position may be sharply contrasted against the common law position, which provides loss falls upon the customer since there is no claim for breach of duty to fasten liability on the bank,[147] and there is nothing in the contract between a bank and its customer which could require a banker to consider the commercial wisdom of the particular transaction.[148]

Should authorised fraud apply this view of customer protection so enshrined under PSD 2 and Reg E, to override the position under contract or agency law and impose liability on banks even for unauthorised transactions that banks cannot reasonably prevent? The reimbursement duty under the UK regime certainly adopts this view, where PSPs may bear

[145] ibid, 78-84.
[146] See Sections 2.1.1 and 2.1.2.
[147] The position at common law is that, where an unauthorised payment order has been properly authenticated, in the absence of fault by the bank, there may be no common law grounds to fasten liability on the bank, and the customer becomes bound by the properly authenticated payment order regardless of whether or not he has been negligent: Geva, Bank Collections and Payment Transactions (n 26), 397 [7].
[148] *Philipp v Barclays Bank UK plc* (n 1), [3]; *Lipkin Gorman v Karpnale Ltd* [1989] 1 WLR 1340 (CA), 1356.

most of the loss subject to the claim excess, even where it has fulfilled its duty to "clearly communicate the PSP's … assessment of the probability that an intended payment is an APP scam payment".[149] But this should not be the case, since customers are *invariably* at fault for authorised fraud. Allocating the bulk of the loss to banks even if they do not breach any duty risks expanding the idea of customer protection too widely.

The better approach is to introduce a cap on the proportion of loss banks have to bear to reflect customer culpability. Following this, if banks are at fault, this is all the more reason why banks should bear *more* loss. This is so, because a breach of duty is significant in theoretical terms, given the trite position under common law that banks have the duty of "reasonable care and diligence in the discharge of user instructions and the performance of all banking functions",[150] or other duties on banks, including the *Quincecare* [151] duty which provides that "a bank has a duty not to execute a payment instruction given by an agent of its customer without making inquiries if the bank has reasonable grounds for believing that the agent is attempting to defraud the customer".[152] This proposal reflects the trite position that banks should compensate for losses naturally arising from their breach of duty. Further, it reflects the advantages of the traditional duty-based view of liability that banks would be incentivised to take measures to prevent authorised fraud and solve moral hazard. Further, the assignment of (more) liability of banks is consistent with Cooter and Rubin's theoretical framework, that liability should be assigned to banks since they can reduce losses at the lowest cost as they can easily innovate by developing technology to reduce fraud losses, respond to legal incentives, and learn the legal rules.[153] At the same time, this proposal partially[154] obviates the direct conflict of the reimbursement duty with the bank's "basic" duty to make payments from the accounts promptly in compliance with the customer's instructions where the customer has so authorised and instructed.[155]

What, then, are the duties of banks that attract increased liability if they are breached? A robust view is that a transaction monitoring duty should be imposed on banks, coupled with the duty (and power) to stop high-risk transactions. The EBA's latest opinion proposed this

[149] UK Dec 2023 Policy Statement (n 6), [5].
[150] Geva, Bank Collections and Payment Transactions (n 26), 397 [7].
[151] *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363.
[152] *Philipp v Barclays Bank UK plc* (n 1), [5].
[153] Cooter and Rubin (n 107), 77.
[154] I say partially, because the very design of the loss allocation model for authorised fraud could be said to contravene the *basic* duty of banks to execute payment transactions.
[155] *Philipp v Barclays Bank UK plc* (n 1), [3].

duty.[156] However, the EBA's latest opinion does not suggest that a breach of the transaction monitoring duty would result in PSPs bearing most or all of the losses. Nor does it differentiate between the types of authorised fraud that could be stopped by transaction monitoring and those which could not. As such, penalising banks for their inability to stop fraud by transaction monitoring, which they are incapable of doing so, owing to technological limitations or the very nature of certain types of authorised fraud, is hugely unfair for banks.

In stark contrast to a broad, blanket duty of transaction monitoring, a milder and more nuanced approach could be adopted. Given the ever-evolving typologies of authorised fraud (as elaborated in Section 2.2.2 above), the list of duties of banks should very well be *specific* responses to specific types of authorised fraud. The duty to provide the IBAN/name verification service under PSD 3 to specifically tackle invoice fraud is a good example of this. Regulators may, along similar lines, prescribe a duty on banks to ensure that discrepancies are revealed and that a breach of this duty attracts increased liability. Along these lines, for other types of authorised fraud, duties should be imposed on banks based on what they can (or cannot) do to prevent authorised fraud, in response to the latest state of technological innovations in the payment industry. This allows regulators to tailor nuanced and specific duties to better leverage the role of banks in fighting authorised fraud. Such flexibility is very much in line with the principle – trite and firmly rooted in the bank-customer relationship – that a breach of duty attracts compensation.

4. The model should not provide exceptions for vulnerable customers

The UK regime includes separate provisions for vulnerable customers, based on a presumption that certain customers cannot take reasonable care of authorising transactions. Under the UK regime, vulnerable customers – which is loosely defined as "someone who, due to their personal circumstances, is especially susceptible to harm"[157] – will be compensated even if they are grossly negligent, meaning the *only* pre-fraud duty to have regard to interventions by the PSP and police is waived. In addition, the claim excess is disapplied, meaning that they will be compensated in the entire amount. [158] In effect, even if PSPs succeed in notifying vulnerable customers about the likelihood of the fraud and the vulnerable customer ignores the fraud, PSPs still bear the entire loss. This is problematic since the loss allocation

[156] Under this proposal, if a PSP determines an instant payment is high risk, it can refuse to execute the transaction with proper notification to the PSU, including the reason of the refusal, and the indication of the options available to re-issue the payment order: EBA Opinion (n 49), [29(b)(v)].
[157] Someone who, due to their personal circumstances, is especially susceptible to harm: UK Jun 2023 Policy Statement (n 6), [2.12].
[158] UK Jun 2023 Policy Statement (n 6), [2.11].

regime does not penalise the PSP's failure to do all that it can to prevent losses, but rather, imposes liability on the PSP regardless of it.

Such a loose and customer-friendly approach appears to be rather unprincipled and infeasible for wider adoption in other jurisdictions. The definition of vulnerability is arbitrary and unhelpful, coupled with how banks will be reluctant to classify someone as vulnerable due to their limited incentives in doing so.[159] The assumption that vulnerable customers are incapable of taking reasonable care is all the more reason why customers shall listen to the bank's assessment of the likelihood that they are defrauded. Further, it does not appear banks could take any precautionary measures to limit their extent of liability given that it is virtually impossible for banks to ascertain each customer's individual circumstances and determine whether a customer is vulnerable on a case-by-case basis.[160]

Therefore, the model should not provide exceptions for vulnerable customers given that it will likely cause significant confusion.

D. Conclusion and Way Forward

The lack of incentives for the payment industry to take upon the challenge of solving authorised fraud calls for regulators to introduce regulations. I have observed that limits ought to be placed on the loss allocation model to reflect customer fault in authorised fraud. The level of customer liability should be set at a level that sufficiently incentivises customers to take reasonable care in identifying authorised fraud patterns. Further, customers should bear a significant portion of the total loss, and the amount should represent a proportion of the overall loss rather than an upper limit on consumer liability. A breach of duty by banks should continue to inform loss allocation since it incentivises banks to undertake precautionary measures. On that basis, where banks are found to breach their duties, the proportion of loss borne by banks should increase. The precise scope of duty of banks should be tailored to fit the applicable methods to fight specific kinds of authorised fraud, thus, reflecting how banks are best placed to respond to the latest authorised fraud trends and adopt technological innovations to prevent the same. Vulnerable customers ought to be more protected, but in a way that does not remove

[159] As evidenced by how, under the CRM Code, staff of PSPs misses obvious triggers or signs that the customer was vulnerable to the scam, and do not probe further when customers declared a clear vulnerability to the scam which resulted in the scam succeeding: Lending Standards Board, '2022 Review of adherence to Contingent Reimbursement Model Code for Authorised Push Payment Scams – Summary Report' (September 2022) <www.lendingstandardsboard.org.uk/wp-content/uploads/2022/09/CRM-22-Summary-report-Final-0922.pdf> accessed 22 February 2025, 21.

[160] On a related note, it is doubted whether and how a similar measure in the UK regime in relation to the banks' duties after the fraud can work in practice: UK Jun 2023 Policy Statement (n 6), [5.28].

the simple, yet effective means to prevent authorised fraud, namely, the duty to respond to interventions.

Given the dynamic interplay and apparent conflict between policy considerations and theoretical objections, it is not difficult to see why the loss allocation framework for authorised fraud is still in its infancy. Existing proposals tilt the balance in favour of some considerations at the expense of others. Whilst the UK regime weighs overwhelmingly in favour of customer protection, PSD 3 is equally unsatisfactory as it espouses tackling only limited types of authorised fraud. On the other hand, some jurisdictions have decided against any form of loss allocation framework for authorised fraud. One such example is Singapore, which vehemently rejected compensation for authorised fraud as they "do not fundamentally affect confidence in digital payments or digital banking, as they can equally happen in the non-digital world".[161] Other jurisdictions may object to compensation for authorised fraud based on how authority is entrenched as the theoretical foundation. This article proffers a model that solves these problems. It is a principled model that achieves an intricate balance between all considerations presented in this article, which can be a starting point for future empirical and policy research.

It is hoped that authorised fraud shall become a policy priority for regulators. As the UK case shows, customer protection alone can drive regulatory intervention. With reference to broad policy concerns, the model proposed in this article allows regulators to adopt loss allocation rules as they see fit. Regulators may alter the starting point of a 50:50 split and subsequent alteration to a 70:30 split where banks breach their duties, whilst still preventing moral hazard and considering the overarching policy to reduce the social cost of fraud.

[161] Singapore Consultation Paper (n 48), [4.4(a)].

DOI: 10.14324/111.444.2052-1871.1989

Articulating the Theory of Right-Holding and the Rights of Nature under Earth Jurisprudence

Kaden Pradhan[*]

Abstract: One of the core tenets of Earth Jurisprudence is the facilitation of legal rights for natural entities, known collectively as the 'rights of nature'. A major defect in the theory is that neither the optimal substantive content of these rights, nor the conception of right-holding upon which they rely, has been rigorously and coherently expounded in the existing literature. This article investigates the philosophical basis for an expanded theory of right-holding which permits certain ecological subjects, interrogating competing approaches in light of Earth Jurisprudence principles, and determines the entities to which the rights of nature can accrue. It also elaborates the ideal substance of these rights, analysing a range of candidate schemes with reference to the literature and to legal systems in which the rights of nature have already been implemented.

Keywords: rights of nature, Earth Jurisprudence, right-holding, Kramerian theory, environmental rights, environmental philosophy, environmental law

A. INTRODUCTION

The continued exploitation of the natural world by human agents has precipitated an environmental crisis of stunning proportions.[1] Acts of exploitation are almost invariably performed within a system of legal governance that may, at times, prohibit or condition them, but generally grants them express endorsement.[2] In this context, the relationship between law and the natural realm has been considered from numerous angles.[3] One of the many products of this extended discourse is a novel legal philosophy known as Earth Jurisprudence, which challenges classical Western legal theories in several radical ways. Earth Jurisprudence makes claims concerning general jurisprudence—offering a novel answer to what the concept of law is—and also to specific aspects of legal theory. One of the most significant components of Earth Jurisprudence is its facilitation of the 'rights of nature', a bundle of moral and legal claim-rights that certain natural entities enjoy. These rights, proponents argue, follow logically from, and are justified by, the premises of the philosophy, the most foundational of which operate to remove unjustified, embedded anthropocentrism in our understanding of law.

However, the treatment of the rights of nature by Earth Jurisprudence scholars is currently defective in two main respects. Firstly, no scholar has expounded, with sufficient analytic rigour, an account of a compatible theory of right-holding. It therefore remains unclear

[*] The author is a law student at Gonville & Caius College, University of Cambridge, UK. E-mail: kadenpradhanmyp@gmail.com.

[1] Julian Saurin, 'Global Environmental Crisis as the 'Disaster Triumphant': The Private Capture of Public Goods' (2001) 10(4) Environmental Politics 63.

[2] Eva Johnson, *Mineral Rights: Legal Systems Governing Exploration and Exploitation* (KTH Sweden 2010).

[3] Richard Brooks and Ross Jones, *Law and Ecology: The Rise of the Ecosystem Regime* (1st edn, Routledge 2002).

which natural entities, or categories thereof, are capable of holding claim-rights in the first instance, and why they do or do not have this capability. Secondly, different writers and jurisdictions have offered different accounts of the substantive content of the rights of nature. These accounts are not all properly justified; some elements do not follow from Earth Jurisprudence principles, and others appear redundant. In this article, I aim to cure both defects. Following a brief exposition of the history and main ideas of Earth Jurisprudence in Part B, I will examine the most common theories of right-holding in Sections C.I and C.II, and, in Section C.III, construct the theory of right-holding that, in my view, derives from and coheres with the principles of Earth Jurisprudence. Subsequently, in Part D, I will chart the substance of the rights of nature across the literature and as they have been implemented in practice, before offering an ideal model of these rights and their accompanying obligations and entitlements. The final section concludes.

It is worth reflecting upon the scope and nature of the project undertaken in this article before embarking upon any substantive analysis. In essence, I argue that it can be viewed in one of two ways. First, the project could be approached from the perspective of someone who is already convinced by the normative strength of Earth Jurisprudence. In this case, the theory of right-holding and doctrine of rights presented in this article would stand in a normatively superior position as compared to accounts which are incompatible with Earth Jurisprudence, which includes those discussed in Sections C.I, C.II, and D.I. From this viewpoint, the consequence of my argument is that incompatible accounts should be rejected in favour of the account outlined in Sections C.III and D.II. In other words, if one accepts that Earth Jurisprudence is correct as a matter of ethics, it follows that right-holding and rights should be reconceptualised according to the account offered. Alternatively, the project could be approached from a position that is neutral on whether Earth Jurisprudence is normatively superior. In that case, the theory of right-holding and doctrine of rights presented in this article is on an equal normative footing with the main accounts explored. What it is, however, is the best account that is compatible with Earth Jurisprudence. Within the four corners of Earth Jurisprudence, it is analytically superior to other possible theories—including that provided by Thomas Berry. In other words, the project is concerned with adopting the claims of Earth Jurisprudence as a series of premises, examining which conclusions emerge as possible accounts of rights, and determining which of these is the best.

Under the first approach, this article presents an account which is normatively justified. Under the second, the account is not justified in this way, but is merely the optimum account of rights that is available under Earth Jurisprudence. The reason that both approaches can be

taken is that nowhere in this article will I attempt to offer a foundational justification of Earth Jurisprudence. That is a question of ethics which is quite beyond the scope of the article. Nevertheless, under either approach, I suggest that there are times within this article where it has exerted revelatory force. In particular, when interrogating the Kramerian approach to right-holding, reasoning empowered by Earth Jurisprudence has revealed the profound anthropocentrism that underlies many of the ethical convictions that guide and inform the theory. Whether such anthropocentrism is justified is a separate question, but Earth-centric thinking sheds light on its existence and provokes thought on the legitimacy of its foundation. This is a valuable part of the dialogue that allows for novel ways of thinking in this field.

B. EARTH JURISPRUDENCE: A BRIEF SKETCH

Whilst Earth Jurisprudence is generally thought to have emerged as a philosophy in its own right in 1999, with the publication of Thomas Berry's seminal text, *The Great Work*,[4] many of its core ideas have a long and developed pedigree. The earliest direct call for rights for natural entities beyond sentient non-human animals appears to have been made in 1867,[5] and was developed in several works penned throughout the latter half of the twentieth century.[6] Concurrently, in environmental ethics, the theory of deep ecology, which in many ways prefigures the more metaphysical elements of Earth Jurisprudence, began to gain prominence.[7] Nevertheless, *The Great Work* represents the starting point for Earth Jurisprudence as a philosophy of law. In this book, Berry noted that relations between human agents do not compose the cosmos; humanity exists as an element of the Earth community, which itself is just one part of the universe. He then expressly denounced the reflexive nature of human institutions, arguing that the ethical and legal theories which underlie them are effective in evaluating human actions involving other human beings—suicide, murder, torture, slavery, silencing, incarceration, and so on—but fail to rigorously prevent the destruction of large ecological units or the Earth system itself.[8] He averred that human agents have clear moral responsibilities towards the natural world, and that these responsibilities require systems of legal governance to reject anthropocentrism and extend protection to nature. For Berry, this moral obligation arises from the fact that, just like other species, humanity is interconnected with, and dependent upon, other functioning components of the Earth community.[9] As a result,

[4] Thomas Berry, *The Great Work: Our Way into the Future* (Harmony / Bell Tower 1999).
[5] John Muir, *A Thousand-Mile Walk to the Gulf* (Houghton Mifflin Co 1917 [1867]).
[6] Discussed in Alessandro Pelizzon, *Ecological Jurisprudence* (Springer 2025) 173-176.
[7] For an overview of the theory, see Bill Devall and George Sessions, *Deep Ecology* (Gibbs Smith 2007).
[8] Berry (n 4) 104.
[9] ibid 77.

the denial of the rights of natural beings is an unsustainable manifestation of the fallacious view that nature exists primarily for human use and exploitation.[10]

Berry proposed that natural entities enjoy "the right to be, the right to habitat, and the right to fulfill [their] role in the great community of existence" and, additionally, "the right not to be abused by humans, a right not to be despoiled of [their] primary dignity whereby it gives some manner of expression to the great mystery of existence, and a right not to be used for trivial purposes."[11] In addition, in a separate text, Berry made a number of brief comments justifying these rights.[12] He asserted that the ultimate source of rights is existence itself, and the universe, 'self-referent' in being and 'self-normative' in action, is the 'primary referent' for all derivative entities. Since the universe is composed of a communion of subjects, and not a collection of objects, the components of the universe are the subjects of the rights that he articulates.[13]

Whilst I will reserve my evaluative comments on Berry's version of Earth Jurisprudence for a later juncture, it is worth noting at this stage that such a view constitutes an extraordinarily radical reimagining of the nature and function of rights. Rather than serving a salutary role in regulating interactions and relations between human agents, which is the principal purpose envisioned by the conception of rights that dominates orthodox Western theories, rights are thought to follow from the constitutive structure of the cosmos itself, which is the final source of moral norms.

Earth Jurisprudence was developed significantly by Cormac Cullinan in his text Wild Law,[14] and by the contributors to Exploring Wild Law, a later volume edited by Peter Burdon.[15] Cullinan developed the concept of the Great Jurisprudence, which describes the principles by which the universe itself operates—in particular, how various natural entities interact in trophic and symbiotic relationship, flourish, and evolve. He argued that human institutions and systems of governance ought to align with the Great Jurisprudence. Indeed, the concept of law itself, when constructed from an Earth-centric perspective, is quite different.[16] These propositions, which represent the position of Earth Jurisprudence on matters of general jurisprudence, are somewhat beyond the scope of this article, except to the extent that it is vital to recognise that

[10] ibid 133.
[11] ibid.
[12] Thomas Berry, 'The Origin, Differentiation, and Role of Rights' (1 November 2001) <https://www.ties-edu.org/wp-content/uploads/2018/09/Thomas-Berry-rights.pdf> accessed 9 October 2025.
[13] ibid paras 1-3.
[14] Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice* (2nd edn, Bloomsbury 2011).
[15] Peter Burdon, *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press 2011).
[16] Cullinan (n 14) 29-31.

the orthodox understanding of law, and the jural conceptions which flow from it, are marred by a pervasive—and, under Earth Jurisprudence, unjustified—anthropocentrism. The other aspect of the Great Jurisprudence is the principle of integrity, a paramount ethical consideration under Earth Jurisprudence which is discussed further throughout Parts C and D.

I have elsewhere outlined seven 'central theses' which, I suggest, emerge from a careful reading of all the Earth Jurisprudence literature.[17] The first three of these mirror Cullinan's propositions as to the Great Jurisprudence and the Earth-centric concept of law, and are largely irrelevant to the present exercise. The second set of three relates to the rights of nature: that all members of the Earth community must be the subjects of legal rights; that some of these rights are fundamental and therefore absolute; and that the remaining qualified rights must be balanced according to the terms of the Great Jurisprudence. The latter two of these, the last of which I have already criticised,[18] are the subject of Part D of this article, whilst the first is covered in Part C. The final thesis is that legal concepts must be understood and interpreted with reference to the Great Jurisprudence. This, in particular, requires a paradigm shift in legal reasoning. Essentially, it invites us to reconsider the nature of legal concepts in light of how they fit with the workings of the Earth community as a whole, not merely the socioeconomic considerations that usually inform them. In other words, it alludes to the point made above—that orthodox legal reasoning is underpinned by an anthropocentric worldview. As such, it operates as an undercurrent in much of the ensuing discussion.

Two further clarifications are in order. First, Earth Jurisprudence is best seen as a member of a family of legal philosophies, each of which is a form of 'ecological jurisprudence'. An important recent work by Alessandro Pelizzon traces the history of some of these sister theories.[19] None of them is coextensive, and indeed each possesses distinguishing features—Klaus Bosselmann's, for instance, is centred on human duties towards the environment, rather than the rights of nature.[20] What they all have in common, however, is an aspiration to bring law in harmony with ecological principles,[21] even if the level of abstraction at which this project is undertaken differs for each philosophy. However, this article is only concerned with Earth Jurisprudence itself. Second, although the rights of nature have been recognised in many jurisdictions, as I will explore in Section D.I, only a handful of these amount to a holistic

[17] Kaden Pradhan, 'Earth Jurisprudence and Land Law: A Critique of the Philosophical and Economic Foundations of the Modern Law of Real Property' (2025) 10 LSE Law Review 295, 312ff.
[18] ibid 319.
[19] Pelizzon (n 6) 182-191.
[20] ibid 187.
[21] ibid 188.

adoption of Earth Jurisprudence principles. Although I will strive to develop an ideal model for the rights of nature, such a model will naturally be enriched by comparisons and contrasts with these jurisdictions. It remains the case, however, that I will not be directly evaluating them as self-contained units.

C. RIGHT-HOLDING UNDER EARTH JURISPRUDENCE

1. The Main Approaches to Right-holding

A theory of right-holding is required because the theory of rights itself places no inherent limits on the class of potential right-holders. According to the classic Hohfeldian framework,[22] A holds a claim-right vis-à-vis B when that right is deontically protected; i.e., when any interference or non-cooperation that either fails to fulfil the terms of the right, or worsens A's position with respect to its content of the right, is prohibited. The existence of such a claim-right entails the existence of a correlative duty incumbent upon B, which renders such interference or non-cooperation impermissible. The content of the claim-right can either be moral or legal. In the former case, A might have a moral claim-right vis-à-vis all other human agents, for instance, not to be subject to physical abuse. This means that all human agents are under an ethical duty not to interfere with that right—not to subject A to physical abuse. In the latter case, a statute or contract might confer a legal claim-right upon A vis-à-vis B to, for instance, demand £500 in costs from B. It follows that B is under a legal duty to pay the £500. Non-cooperation is particularly important here, as it is not permissible for B to refuse to pay the £500 in a way which contravenes the terms of the claim-right, and B's legal duty is therefore one of positive action.

Whilst the Hohfeldian analysis demarcates the form of the relationship, A and B must be a part for either of them to hold a claim-right, it sets no limits to either the content of the right or the set of agents between which such a relationship can obtain. As regards moral claim-rights, the content limits are, of course, set by the particulars of whatever ethical philosophy underlies the assertion of those rights. Hence, certain utilitarians would deny that A always has a moral claim-right against torture vis-à-vis by the State if, for instance, the exercise of that torture would increase aggregate or average utility across society.[23] Conversely, certain deontologists would hold that such a moral claim-right always exists.[24] As regards legal claim-rights, the limits to content are set by the legal norms of the system in question, some of which

[22] Leif Wenar, 'Rights', *The Stanford Encyclopedia of Philosophy* (Spring edn 2023) para 2.1.
[23] Fritz Allhoff, 'Terrorism and Torture' (2003) 17(1) International Journal of Applied Philosophy 105.
[24] Bob Brecher, *Torture and the Ticking Bomb* (Blackwell 2007).

also bear upon certain parties' legal powers to make contracts of certain kinds and thereby generate new claim-rights.

As for the set of agents who can hold a claim-right in the first instance, a separate theory is needed to define what does and does not fall within that set. The same is true for other Hohfeldian entitlements—liberties, powers, and immunities—although it is with claim-rights that I am principally concerned. At least two major camps have emerged from the extensive debate on this issue, two of which are particularly dominant—the will and interest theories—and it is on these two strains which I will focus.

Will theorists essentially maintain that for a right to accrue to any agent, that agent must acquire 'control' of the correlative duty.[25] In order to make such an acquisition, they must be able to do so, in terms of capacity. Control consists in a series of accompanying legal powers: a type of Hohfeldian entitlement which enables one party to change another's legal position; that is, generate new claim-rights and duties. According to HLA Hart's classic account, before a duty is violated, a right-holder must have the powers to maintain or extinguish the correlative duty; after it is violated, to demand enforcement of or waive the duty; and, after judgment is issued in their favour, to demand enforcement of or waive the ensuing remedy.[26] The existence of all of these powers at each relevant stage, alongside capacity, is individually necessary and jointly sufficient to render the agent a right-holder.

The powerful attraction to the will theory is that it coheres with a commonly held conception of the function of rights. For most people, right-holding entails a particular kind of authority or 'sovereignty' over another person's actions. Someone who holds a right would expect it to be accompanied by many of the powers that Hart specifies, and might be dismayed to find any of the powers lacking—indeed, they may view it as a failure of the legal system in question. However, the will theory also seems over-exclusive. In the first instance, consider the requirement of capacity inherent in acquisition. This can be read factually, in terms of an agent's actual capabilities to declare a waiver or pursuit of enforcement; morally, in terms of the presence of an underlying moral entitlement to do so; or legally, in terms of whether such a declaration, if made, would be effective at law.[27] In any of the three cases, however, a number of parties—such as individuals with psychiatric disorders, certain children, comatose and deceased people, non-human animals, future generations, and so on—are immediately excluded from the class of potential right-holders. Since the members of each of these groups

[25] Classically, HLA Hart, *Essays on Bentham* (Clarendon 1982) 183-184.
[26] ibid.
[27] This tripartite reading comes from Neil MacCormick, *Legal Right and Social Democracy* (OUP 1984) 156.

does not have capacity, they cannot acquire control, and, therefore, cannot hold rights. This seems problematic. Moreover, a number of other objections could be made, including that many of the most important claim-rights that people hold, the right not to be tortured, for instance, are unwaivable in law, which would mean that those rights cannot be genuinely held. As Matthew Kramer has observed, many of these objections are, in effect, question-begging. There is a presumption that children, animals, and so on ought to be right-holders, and the right against torture ought to be genuinely held, and the objections therefore arise from preconceptions rather than raw analysis.[28] He has shown, however, that the will theory is also impugnable on its own terms—most private-law rights do not actually include a power to maintain the existence of the duty, per se, before the violation; the duty merely remains in existence by the operation of the general law—such that the vast majority of private-law rights are rendered unsusceptible to holding, a conclusion most will theorists would be anxious to avoid.[29]

Aside from the objections already raised, a separate question is whether the will theory can be sustained under Earth Jurisprudence principles. The short answer is no. Under Earth Jurisprudence, legal concepts must be evaluated in light of their place in the schema of the natural world as a whole. If the capacity requirement is read as legal, the vast majority of the members of the Earth community are denied the capacity to hold rights at all; if it read as factual, then the same majority will be unable to communicate a waiver or pursuit of enforcement, even if they can form and deliberate upon those decisions in the first place. The moral reading is the most forgiving to Earth Jurisprudence, but even then, if a form of moral capacity is admitted to natural entities, and they can therefore acquire the accompanying powers doctrinally, they are completely unable to exercise them on their behalf. The capacity requirement expressly restricts right-holding to human agents, and to a particular subset of human agents at that; in this way, it betrays its intrinsic anthropocentrism. The core notion that a right is held when the right-holder can independently exert authority or sovereignty concerning the correlative duty also rests on an anthropocentric worldview. This results from the fact that the legal powers that Hart postulates themselves presuppose capacity, in both a factual and legal sense. The exercise of 'will' in this regard is an exercise of a distinctly human will.

[28] Matthew Kramer, *Legal Rights and Moral Rights* (CUP 2025) 17-18.
[29] ibid 19-21.

On the other hand, interest theorists, who occupy the second dominant camp, essentially argue that for a right to accrue, it must operate to further the right-holder's interests. The classic formulation by Joseph Raz provides that an agent holds a right if they "can have rights" and if "other things being equal, an aspect of [their] well-being (… interest) is a sufficient reason" for holding someone else under a duty.[30] The first of these limbs constructs a class of potential right-holders but does not specify its limits; the second requires that the exercise of the right must be underpinned by a sufficient furtherance of their interests. Kramer's more rigorous formulation is stated as follows:

> Individually necessary and jointly sufficient for the holding of a claim-right by X are (1) the fact that the duty correlative to the claim-right deontically and inherently protects some aspect of X's situation that on balance is typically beneficial for a being like X, and (2) the fact that X is a member of the class of potential holders of claim-rights.[31]

In *Rights and Right-Holding*, from which the above definition is taken, Kramer presents his model as a non-justificatory account: unlike that of Raz, it demarcates the conditions of right-holding without broaching the question of whether the rights themselves are morally justified.[32] He also defends the interest theory from many criticisms; his ripostes to Sreenivasan, Kurki, Wenar, and others are comprehensive and convincing.[33] It remains, then, to assess the two conditions of his formulation from an Earth Jurisprudence perspective.

The application of the first condition rests on an evaluative premise which Kramer draws from his own version of the Rawlsian thin theory of the good. He acknowledges that certain primary goods, social and natural, are "conducive to anyone's pursuit of his or her objectives" regardless of the content of those objectives.[34] Primary social goods include basic civil rights, entitlements to wealth and income, and opportunities to obtain a position of power. Primary natural goods include health, intelligence, and warranted self-respect. The former can be distributed by human institutions of governance, whilst the latter cannot. His argument is that in applying the first condition, regard must necessarily be had to exactly what, on balance, is typically beneficial for the right-holder. This involves some basic evaluative judgment. Fortunately, Kramer does not specify that the domain of protected interests is restricted to what falls under the Rawlsian thin theory. This relieves an Earth Jurisprudence scholar from the burden of showing that the benefits which natural entities would putatively enjoy as right-

[30] Joseph Raz, *The Morality of Freedom* (OUP 1986) 166.
[31] Matthew Kramer, *Rights and Right-Holding: A Philosophical Investigation* (OUP 2024) 179.
[32] ibid 214 et seq.
[33] ibid 178-255.
[34] ibid 181; this page also covers what follows.

holders must be Rawlsian goods. Indeed, since the entire Rawlsian project is one of social justice—justice in human governance—most of his goods are clearly directed at humans. Kramer, however, construes interest at a level of generality high enough to include many other kinds of benefit. This prefigures his application of the theory to certain non-human animals—who, notably, cannot enjoy most of the Rawlsian goods.

The first condition, then, seems concomitant with Earth Jurisprudence. Provided that one can show that the correlative duty would deontically and inherently protect some aspect of a natural entity's situation that on balance is typically beneficial to an entity of their type, the first condition is met on its own terms. It would seem that this can, in many cases, be demonstrated with ease. Indeed, all of the rights that I will present in Part D of this article do meet this criterion.

The second condition, unfortunately, is not as easily compatible, at least according to Kramer's account of it. As he notes, on its terms, the class of potential right-holders—that is, the set of entities capable of holding rights at all—can be defined broadly or narrowly.[35] He maintains that the exercise of defining the scope of the class is still non-justificatory, despite being informed by 'deep matters of ethics'.[36] In his view, not every definable entity can be a member of this class, because some entities are precluded from right-holding as a result of these ethical considerations. At the outset, he gives the examples of grass, paintings, and buildings as entities that may satisfy the first condition, but whose inclusion under the second would be problematic.[37] He then constructs his theory as to the scope of the class, guided by the 'deep matters of ethics' to which he alludes, which essentially consists of four aspects. The first is that the limits on the class must be determined with reference to what promotes each member of a community to enjoy a strong and warranted sense of self-respect.[38] Second, it relies on a paradigmatic category of community members who are morally obligated to recognize one another as right-holders.[39] The third is that any extension of right-holding capabilities to entities beyond the paradigmatic category is underpinned by the self-respect requirement, and this involves consideration of the effect of such an extension on both the paradigmatic category and the entities to which the capability might be extended.[40] The fourth is that a conception of 'ultimate' value which involves the quality of être pour soi, "a level of

[35] ibid 291-297.
[36] ibid 293.
[37] ibid 295-296.
[38] ibid 329.
[39] ibid 330.
[40] ibid 334.

self-reflective attunement that is characteristic of conscious engagement with oneself and with the world", and intrinsic value to the furtherance of the entity's interests, is the 'hallmark' or key control which determines the entities that are and are not admitted to the class.[41] Each of these four aspects is open to challenge on the basis of Earth Jurisprudence principles, and I will now consider each in turn.

2. Interrogating the Kramerian Interest Theory

First, Kramer contends that the scope of the class of potential right-holders is "connected to the paramount moral responsibility borne by every system of governance and by each individual" which is to establish and sustain "the conditions under which everyone in a society can be warranted in harboring a strong sense of self-respect".[42] The notion of warranted self-respect is Rawlsian in origin, but has been significantly developed by Kramer in his earlier writings.[43] It rests on considerations of political morality—what the State is morally obligated to do with respect to its citizens—and therefore, as is immediately clear, emerges from a fundamentally anthropocentric worldview. Only a human can enjoy self-respect in the Kramerian sense. Human institutions of governance, when obligated to secure warranted self-respect amongst their human members, often produce satisfactory conclusions result with respect to human problems such as capital punishment and torture.[44] Framing it as 'paramount' moral responsibility of both individuals and officials, however, reflects Kramer's focus on developing an ethical philosophy that is able to yield satisfactory answers to distinctly human problems. As Berry pointed out, such philosophies are incapable of preventing significant harm to the Earth system.[45] Admittedly, some environmental harms might be so great as to impinge upon a human's sense of self-respect. The reason why this would engage an alternative moral responsibility, however, is because of the human's perception of their surroundings. In other words, what is determinative of whether an individual or an official is obligated to mitigate the destruction of the natural world is, under this 'paramount' responsibility, its effect on the humans who are members of the society proximate to that destruction. This is profoundly anthropocentric.

Earth Jurisprudence places emphasis on the moral responsibility of human agents, as constitutive members not only of a political system but also of the wider Earth community, to

[41] ibid 317-329.
[42] ibid 329.
[43] For instance, Matthew Kramer, 'On Political Morality and the Conditions for Warranted Self-Respect' (2017) 21(4) Journal of Ethics 335.
[44] ibid 340-34.
[45] Berry (n 4) 77.

promote and sustain the well-being of the Earth system as a whole. It is this responsibility which is paramount, and where it conflicts with other moral obligations—including that which relates to securing the conditions for warranted self-respect amongst human societies—it triumphs. The paramount responsibility that humans owe to the Earth community will rarely be engaged in ethical quandaries that arise in practice, most of which concern human agents only. However, the moment that a proposed action or omission bears upon other members of the natural world, considerations of political morality, such as Kramerian self-respect, are overridden by the true paramount responsibility. This paramountcy arises from the most foundational of Earth Jurisprudence principles: that it is the Earth system, not human society, which is the primary normative referent, and conclusions of permissibility arising from calculations undertaken under an ethical theories like Kramer's political morality cannot be decisive as to the permissibility of the action or omission if its effects escape the domain of human relations and affect natural entities.

What Earth Jurisprudence reveals, then, is that Kramer's selection of a rule of political morality to inform the limits of the class of potential right-holders is anthropocentric and therefore somewhat arbitrarily stipulative. If, in the Rawlsian vision, a group of parties in an original position, which was abstracted from a planetary community containing only the (human) people to whom those parties connect, were to decide the limits of the class, they would of course be guided by an ethical philosophy that regulates their relations only. Human society is only one element of the Earth community, however. Once our responsibility to the Earth system is understood as paramount, it becomes clear that the ethical considerations which underlie the limits of the class must include this responsibility, which is superior when engaged.

Second, Kramer argues that the paramount moral responsibility of the members of the community of potential right-holders obligate certain amongst them, those within a paradigmatic category, to acknowledge the right-holding capabilities of all others within that category; otherwise, the paramount responsibility cannot be fulfilled.[46] The paradigmatic category, he argues, is made up of those entities which are "straightforward[ly] and uncontroversial[ly]" members of the community and which play a 'pivotal' role in discharging the obligation of recognising the capabilities of the others.[47] He concludes that the paradigm right-holders are sane human adults.

[46] Kramer (n 31) 330.
[47] ibid 330-331.

A preliminary point to note here is that, as noted above, although the responsibility to secure self-respect is of course important, it is superseded, according to Earth Jurisprudence, by the responsibility that humans owe towards the Earth system. Hence, the question upon which the exercise turns becomes: "would certain entities recognising the capability of certain other entities to hold rights fulfil the responsibility owed by humanity to the Earth system?". As regards the first limb of paradigmaticity, it is clear that the conclusions Kramer reaches are underpinned by an anthropocentric worldview. Indeed, the idea that only human beings are "straightforward[ly] and uncontroversial[ly]" right-holders is charged with some very powerful assumptions. To whom is it straightforward and uncontroversial that humans are the paradigmatic right-holders? To other legal philosophers? Perhaps to other humans? Not all human societies would agree with such a simplistic account—much has been written on how certain Indigenous ontologies reject such a premise.[48] The assumptions are not only anthropocentric, but Western-centric in substance. A potential riposte is that humans are straightforwardly and uncontroversially right-holders to the other members of the community, but this would only hold true for the other *Western human* members of the community. If the assumption is enthymematical informed by a view that the community in question comprises only human societies, then it is unclear when or why such a restriction has been introduced. Otherwise, the notion that only sane human adults belong to the paradigmatic category requires a much stronger justification. As regards the second limb, it is clear that only human agents can be subject to moral obligations, and therefore, it is only human agents who can be obliged to make the necessary acknowledgements as to other entities' right-holding capabilities. Why this itself demarcates the scope of the class of potential right-holders, however, is far from apparent.

Third, Kramer proposes that the extension of right-holding capabilities to those beyond the paradigmatic category must operate to fulfil the paramount responsibility, accounting for the effects on the paradigmatic members and the entities under consideration.[49] The application of Earth Jurisprudence principles is very clear here. Given that the paramount responsibility is that owed by human agents to the Earth system, it is evident that including certain natural entities in the class of potential right-holders would have a major salutary effect in fulfilling this responsibility. As for the effects on both paradigmatic right-holders and the entities under consideration, it is useful to consider at this stage Kramer's treatment of "inanimate and

[48] See, for instance, Jacinta Ruru, 'Listening to Papatūānuku: a Call to Reform Water Law' (2018) 48 Journal of the Royal Society of New Zealand 215.
[49] Kramer (n 31) 334.

insentient entities".[50] He argues first that because such entities "are wholly without any awareness of their situations" and therefore cannot experience pleasure or pain, they are not the beings "for whom any legal duties are imposed"; they are, rather, beings "in regard to which many such duties are established".[51] He then avers that an affirmation that such entities are excluded from the class by the paradigmatic right-holders does not "bespeak high-handedness or effrontery or insecurity" but simply "evince[s] their recognition that … [such beings] never have been able and never will be able to participate as subjects" in the community of potential right-holders.[52] The former proposition relates to his conception of 'ultimate' value, which I will turn to shortly. The latter is dubious, I suggest, for a number of reasons. First, the exclusion of all non-sentient natural entities does in fact 'bespeak high-handedness' insofar as it rests on an underlying anthropocentric conviction that merit is determinable by reference to human parameters; a criticism I shall develop subsequently. Second, the argument that the decision to exclude merely "evince[s] … recognition" that such entities are excludable is unsustainable. The position which I interpret Kramer to be taking is that the decision to exclude non-sentient entities is not itself morally pregnant, because it takes effect as mere 'recognition' that such entities cannot form part of the community of right-holders, which itself holds no moral content. Such a decision does hold moral content, however. Even though it may appear as mere 'recognition' in form, in substance, it must carry a justification with moral value. Perhaps the unspoken justification is, in this case, the 'paramount' responsibility to secure self-respect, to which it refers immediately afterwards.[53] As I have argued, however, such a responsibility is not absolutely superior. Rather, by excluding certain non-sentient natural entities, the paradigmatic members—even assuming, arguendo, that the paradigmatic category consisted solely of sane human adults—would be directly working against their true paramount responsibility towards the Earth system.

Finally, Kramer presents a notion of 'ultimate' value which, in his view, is the 'hallmark' of entities within the class. This is composed of (i) the être pour soi property described above and (ii) intrinsic value to the furtherance of the entity's interests.[54] In arriving at this conception, he considers and rejects, in turn, instrumental, constitutive, and intrinsic conceptions of value as sufficient to mark an entity as includable in the class. The sorts of natural entities with which Earth Jurisprudence is concerned possess great intrinsic value.

[50] ibid 334-338.
[51] ibid 334.
[52] ibid 336.
[53] ibid 337.
[54] ibid 317.

Given this, Kramer's dismissal of intrinsic value as a sufficient condition appears in tension with the moral commitments of Earth Jurisprudence. On what basis, then, is such a dismissal justified?

> … in itself [intrinsic value] is manifestly insufficient to serve as the point d'appui for the delimitation. None of the things just mentioned as possessed of intrinsic value is included in the class of potential holders of claim-rights. Great paintings and symphonies and poetry and rivers and trees and stone formations are all valuable in themselves independently of any other good things to which they can contribute causally or constitutively, but those inanimate entities are not capable of holding any claim-rights. Hence, like instrumental value and constitutive value, intrinsic value as consequence-independence is not suitable by itself as a cornerstone for this chapter's ruminations on the class of potential holders of claim-rights.[55]

This is unsatisfactory. Merely stating that entities with intrinsic but not ultimate value are "not capable of holding any claim-rights", when the entire project of formulating a satisfactory conception of value is for it to form part of a constructed theory of right-holding which will then demarcate what can and cannot hold rights, is akin to saying that *The Alchemist* is not substantial enough to be a novel whilst arriving at a conception of substantiality which will then inform the test developed for deciding what is and is not a novel. Kramer can avoid an allegation of circularity only by responding that when he here states that such entities are not capable of holding claim-rights, he is simply referring to the fact that they are not generally viewed as such by theorists or by the general populace. If that is the case, however, his entire discourse on value, and the conception which he does finally develop, are both impugnable on the basis that they arise from preconceptions as to what does and does not hold claim-rights. Neither of them is an analytic product. The 'hallmark' which he develops is no more than a signifier of what is commonly thought of as included within the class of right-holders. Kramer does attempt to justify his conception of ultimate value, however. Indeed, it claims "follow[s] from some deep ethical considerations":[56] that is, the first three aspects discussed above. At no point, however, does he explicitly demonstrate how the 'paramount' responsibility and the considerations of paradigmaticity and extension follow give rise to the notion of ultimate value which he presents. Rather, ultimate value seems to play a crucial role in defining the paradigmatic category and the modality of the exercise of extension: it is one factor which militates in favour of including sentient animals and excluding non-sentient ones, for instance.[57] Hence, the justificatory force flows in the opposite direction.

[55] ibid 316.
[56] ibid 321.
[57] ibid 339.

The principles of Earth Jurisprudence reveal the profound anthropocentrism upon which this conception of ultimate value is built. First, it is undeniable that all entities that possess ultimate value also possess intrinsic value. Moreover, since both limbs of the conception rely on properties which inhere in the entity itself, ultimate value is just a form of enhanced intrinsic value; or, more accurately, a conception of intrinsic value which specifically amplifies certain intrinsic elements: être pour soi and the derivative value of furthering the entity's interests. The crucial question is why these two intrinsic elements are selected for special emphasis when a range of other elements could instead be chosen. The natural answer is that it flows from an anthropocentric conviction. Even though Kramer admirably includes non-human sentient animals in the class, because they are êtres pour eux-mêmes, a human being is the central case—the paradigmatic right-holder—and these animals are includable because they are similar enough to humans in possessing alert sentience. If we range outwards from the central case, from mammals to fish and lizards to insects, we soon hit a barrier at which those beings lose right-holding capabilities: hence, cockroaches are not included.[58] Indeed, Kramer expressly places importance on "the remoteness or proximity between the traits of human beings and the traits of other animals".[59] Moreover, even creatures which are êtres pour eux-mêmes can fail at the hurdle of possessing intrinsic value in the furtherance of their interests if such furtherance would be injurious to human interests, because the 'paramount' responsibility to secure self-respect obligates that such 'vermin' be excluded from the class.[60] Even the second limb of the conception—is the furtherance of the entity's interests intrinsically valuable?—is determined according to human parameters.

The choice of the two intrinsic elements to amplify in the given conception of ultimate value is, then, anthropocentric through and through. It cannot be sustained under the principles of Earth Jurisprudence, nor can any of the ethical considerations that underlie the choice of what entities are and are not capable of holding rights according to Kramer's account. The reality is that the entirety of Kramer's view of where the limits should be placed on the class rests on the neo-Rawlsian conviction that the principal responsibility of human individuals and officials is to secure robust self-respect across human society. This works excellently as an obligation with respect to social justice, but fails to account for the superior responsibility of humanity to maintain the well-being of the Earth community. Therefore, despite Kramer's insistence that his view of the limits of the class is 'more or less' the only sustainable one—

[58] ibid 345.
[59] ibid.
[60] ibid 346.

with some leeway at the edges—and hence legislatures which purport to grant rights to non-sentient natural entities do not, as a matter of deep theory, actually succeed in doing so,[61] it is clear that a robust alternative theory can nevertheless be constructed from egocentric norms.

D. AN EXPANDED THEORY OF RIGHT-HOLDING

The first step in developing a theory of right-holding fully concomitant with Earth Jurisprudence is to define the principal ethical considerations that will guide the project. For this, it is useful to return to Berry's notion of the universe as the "primary [normative] referent" and Cullinan's notion of the Great Jurisprudence.[62]

Philosophers tend to frame normativity as a quality which can be obtained, and is therefore assessable, only from the perspective of a human agent. Hence, relations between humans have the ability to be laden with moral weight: if one human is exploiting, torturing, or abusing the other—or, conversely, acting for their benefit—a normative assessment can be made as to the content of that relation. Similarly, if a human agent abuses an armadillo, the human side of that relation is normatively evaluable, but the armadillo side is not, as saying that the animal 'ought' or 'ought not' to do something is meaningless. The result of applied philosophy is that in undertaking the many normative calculations that are required to build a conception of, for instance, law or justice, relations with at least one human agent remain the primary referents. When jurisprudents debate legal positivism and natural law, and when political theorists debate Rawlsian and libertarian ideals of justice, they are debating conceptions that apply primarily, if not always, to human relations; hence, the conceptions that result are conceptions of human law and social justice.

Under Earth Jurisprudence, however, normativity is delocalised and is recognised as appurtenant to the Earth system.[63] The primary referent is how the Earth community, and not merely human society, self-regulates. Normative calculation is reframed with an acknowledgement that humanity is only one component of a complex whole. The conceptions which consequently emerge are free of the anthropocentrism which would otherwise restrict their effectiveness in processing of non-human problems.

The Great Jurisprudence is one such conception. The essential feature of the Great Jurisprudence is that relations between entities are ordered in such a way that the integrity of the communities to which these entities belong is maintained.[64] Integrity is to be understood as

[61] ibid 338.
[62] Berry (n 12); Cullinan (n 14) 82 et seq.
[63] On this issue, see Pelizzon (n 6) 346-352.
[64] Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice* (1st edn, Green Books 2003) 87-89.

comprising both survival and gradual progressive evolution. Only a rudimentary understanding of ecology is required to grasp the fact that most natural communities are structured in such a way that both of these that aspects are facilitated. Trophic and symbiotic interdependencies, whereby certain natural entities rely on others from other species either for sustenance or for mutual benefit, create self-regulating feedback loops whereby the populations of each species within that community are kept at roughly the same (or constantly growing) levels in the long-term, whilst also enabling evolutionary processes to take effect. The natural world regulates itself to preserve the integrity—survival and flourishing—of the communities that comprise it.

Once the fulcrum of normative reference is extended beyond human society to the Earth system as a whole, this integrity becomes the paramount ethical consideration. How human societies should order themselves to promote social justice remains a question of great relevance when considering human relations, but whenever such relations also exert an effect on any non-human natural community, the integrity of that community acquires a lexically prior, and places limits—which may or may not be absolute—on the morality of any human actions contemplated. In other words, the paramount ethical consideration begets a paramount moral responsibility on the part of human agents to ensure that such integrity is maintained.

When constructing a theory of right-holding, this consideration must be borne in mind. Evidently, the will theory, even if cured of eliminativism,[65] is entirely inapposite: in assuming that the essential criterion to possess right-holding capability is the exercise of a uniquely human sovereignty, the will theory brushes away all natural entities. As for the Kramerian interest theory, it has already been demonstrated that the first condition, that the right must protect some aspect of the entity's situation that is of benefit, will be easily met. The exercise of defining the scope of the class of potential right-holders, however, must be undertaken anew.

As Kramer does, the first step is to consider the group of all possible right-holders and define the paradigmatic category. Given that the integrity of the Earth system is now the paramount ethical consideration, the paradigmatic right-holders are those entities which are central to that integrity. I reject the idea that the paradigm is defined according to what beings are "straightforward[ly] and uncontroversial[ly]" right-holders because, once the primary normative reference is removed from humanity, the entire basis for deciding to whom and according to what standards such non-controversy must present becomes manifestly difficult. Rather, the paradigmatic category consists of those entities to which rights must necessarily accrue in order for the paramount ethical consideration to be vindicated.

[65] The critique given in Kramer (n 28) 19-21.

I suggest that these entities are themselves the communities whose integrity is of significance under the Great Jurisprudence. In other words, ecosystems, and all self-regulating communities larger than ecosystems, are the paradigmatic right-holders. This might appear extremely radical. Perhaps it is, from an anthropocentric worldview under which rights are thought of as uniquely human constructs; in some ways, they are. Legal rights are artefacts of human systems of governance which demarcate human responsibilities. The power of treating the Earth system as the primary normative referent, however, reveals itself here. The whole project of defining what beings can and cannot hold rights ceases to be guided by what would be beneficial for human society, and instead is oriented around what would be beneficial for the Earth community. Ecosystems and such are the paradigmatic right-holders precisely because their right-holding capacities are pivotal in the fulfilment of the paramount ethical consideration. It is irrelevant that they are non-sentient; indeed, the importance of sentience for paradigmaticity only results from an anthropocentric starting-point. The Kramerian conception of 'ultimate' value rests on an application of human qualities—whether an entity is actually of ultimate value depends upon its position in the complex, self-regulating Earth system.

It follows that the extension of right-holding capabilities to human beings, certain sentient animals, and so forth becomes of relevance in the exercise of extension rather than as a matter of paradigmaticity. It is at this stage when so-called 'ultimate' value and alert sentience are engaged, as it is necessary to extend right-holding capabilities to all of these entities to secure the fulfilment of the central principles of political morality—the need to secure self-respect, for instance—which are non-paramount but remain vital in ordering human societies and relations. Hence, right-holding capability is extended by the paradigmatic beings, for whom right-holding secures the integrity of the Earth system, to creatures of 'ultimate' value, for whom right-holding is necessary for robust social justice and political morality within human society.

It is worth noting that the exercise also works in the converse. Hence, even if, arguendo, sane human adults are still regarded as paradigmatic right-holders, then the extension of right-holding capabilities to ecosystems and such becomes of overriding importance because of the necessity of such an extension to secure the effective exercise of the paramount ethical consideration and the derivative paramount moral responsibility on all human agents. In any

case, the community of potential right-holders we arrive at includes creatures of 'ultimate' value and ecosystems, and such.[66] It is of little practical relevance which group is paradigmatic.

The language of 'holon' is occasionally used in the Earth Jurisprudence literature.[67] A holon is essentially any self-regulating entity. Berry clearly expresses the view that holons of all scale are capable of holding rights. Hence, in his view: "Birds have bird rights. Insects have insect rights. Humans have human rights. Difference in rights is qualitative, not quantitative. The rights of an insect would be of no value to a tree or a fish."[68]

I am not convinced that all holons can be capable right-holders under Earth Jurisprudence. To be sure, the mass destruction of a population of wild insects would likely have a deleterious effect on the ecosystem those insects belong to, and therefore impinge upon the paramount ethical consideration of integrity. However, the destruction of a single insect, or even a dozen, does not have the same consequences. The fulfilment of the paramount consideration can be achieved by acknowledging that only holons above a certain minimum scale, which I contend to be that of an ecosystem, are capable of holding rights. It can also be achieved by saying that individual insects are right-holders but that, for instance, they only have very minimal rights. Those rights, however, must surely make reference to the destruction of populations of insects rather than individual ones: hence, a cockroach would have the right to be a member of a stable population of cockroaches within an ecosystem. This adds nothing at all to the minimum-scale approach, however, and would simply burden systems of legal governance in applying those rights. The application of Occam's Razor leads us towards a class of potential right-holders which include holons at the scale of ecosystem and above.[69] This is the most practically effective way of fulfilling the paramount ethical consideration, and no sacrifices are made in terms of outcomes.

It can be difficult in practice to define the extent of a holon, in terms of, for instance, which populations of which creatures belong to a single definable ecosystem. This does not detract from the fact that if such an ecosystem does exist, it benefits from right-holding capabilities as a result of the paramount consideration. It may be burdensome, therefore, to demonstrate an ecosystem, but this is an issue for the courtroom and does not bear upon the

[66] Including the other non-paradigmatic members that Kramer lists: deceased and comatose humans, future generations, foetuses, human collectives, and so on, all of which must be included because of the application of considerations of political morality: Kramer (n 31) 350-387.
[67] Ian Mason, 'One in All: Principles and Characteristics of Earth Jurisprudence' in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press 2011) 36-37.
[68] Berry (n 12) para 6.
[69] As I have also suggested, see Pradhan (n 17) 319.

underlying ethical theory. The same argument applies to larger holons, such as networks of interdependent ecosystems and the global macroclimate.

The final question is whether any modification to the Kramerian conception of 'ultimate' value must be made under Earth Jurisprudence principles. The extension of right-holding capability to creatures of 'ultimate' value follows from an application of considerations of political morality, rather than the paramount consideration. Hence, it is legitimate to use alert sentience—être pour soi—as a controlling factor. However, if a creature does meet the requisite threshold of alert sentience, Earth Jurisprudence demands an adjustment to the second limb of 'ultimate' value: the intrinsic value of the furtherance of the creature's interests. The effect of the primary normative reference being removed from humanity is that such value cannot be assessed according to human parameters. As such, it is invalid to exclude alert sentient creatures which are 'vermin'—in the sense of being injurious to humans in large numbers—from the class of potential right-holders merely because the furtherance of their interests would be damaging to human interests. The value of the furtherance must be evaluated with regard to the paramount consideration: to what extent does it promote or damage the integrity of communities constitutive of the Earth system? These reframing changes the category of alert sentient animals who are not capable of holding rights from 'vermin', a definitionally anthropocentric concept, to 'invasive creatures': those for whom there may be no value to the furtherance of their interests because of the damaging effect such a furtherance would have on ecosystems and other communities in the vicinity. It might be that some vermin are invasive creatures and vice-versa, but this will not hold true in all cases.

In sum, the theory of right-holding concomitant with Earth Jurisprudence is a form of the Kramerian interest theory where the class of potential right-holders includes creatures of 'ultimate' value as well as ecosystems and all holons of larger scale. It is the latter which, I suggest, are paradigmatic right-holders, because their right-holding capability is pivotal to secure the integrity of the Earth system, which is the paramount ethical consideration. The former benefit from right-holding capability as it is necessary to fulfil other vital considerations of political morality to secure the effective ordering of human society.

E. Articulating the Rights of Nature

1. The Rights of Nature in the Literature and in Practice

In this Section, I seek to resolve the flaws and inconsistencies in and across the Earth Jurisprudence literature and practice as regards the substantive content of the rights of nature. This requires a brief survey of the accounts offered.

As noted above, Berry wrote that natural entities had a right to be, a right to habitat, a right to fulfil their role in the Earth community, a right against abuse, a right to dignity, and a right against trivial use; for Berry, this included all living creatures.[70] This presents a number of difficulties. First, the scope of these rights is not clearly defined. It is clear that a fish would be deprived of their right to habitat if the river which they inhabit ceased to flow. However, if a hyena had their regular ranging grounds restricted from 75 km^2 to 10 km^2, would that infringe their right to habitat? What if the restriction was as severe as 1 km^2? Or the hyena was prevented from accessing only 25 km^2, but the barred area contained most of their prey at most times? Second, it is unclear why rights against abuse and trivial use need separate definition: all instances of such use would infringe a right to primary dignity. Moreover, none of these latter three rights is justifiable on the basis of the paramount ethical consideration of community integrity. Rather, they speak to the ethical position of an individual creature and the morality of acts of abuse by human agents against it. Finally, there is no justification schema for infringements of the rights. In other words, there is no way of balancing the rights enumerated against conflicting human public or private rights. They present themselves as absolute.

Cullinan adopts a similar approach, but adds that the rights of nature can be balanced against other rights—but the outcome "depend[s] on the circumstances" and the culture in question.[71] Hence, the killing of a zebra may be justified if undertaken for the purposes of individual nourishment, but may not be if performed to acquire a pelt of a certain kind for its commercial value.[72] He places great emphasis on the 'essential nature' of a natural entity and whether that nature is affected: hence the canalisation of a flooding river is contrary to its nature as a flooding river.[73] This improves upon Berry's account by providing a justification schema, but produces great uncertainty. First, why must the scope of the right depend on the culture of the human agent who allegedly infringes it? Allowing the permissibility of destroying a natural entity to hinge solely on the political customs of the acting human agent appears problematic, at least without those customs giving rise to a human right which can hold a place in the justification matrix. Second, the concept of 'essential nature' is very loose. Does the essence of a flooding river arise from the mere fact that it floods, or from the fact that a network of ecosystems relies on its regular flooding? The latter is more easily derivable from the paramount ethical consideration, but the former is arbitrarily stipulative.

[70] Berry (n 4) 133.
[71] Cullinan (n 64) 119.
[72] ibid 119-120.
[73] ibid 121.

In practice, the rights of nature have been holistically implemented in Bolivia; in Uganda; in various Mexican subregions, including Colima, Oaxaca, Guererro, and Mexico City and State; and in Ecuador—although such rights have been recognised in a wealth of jurisdictions, these other instances relate only to specific entities.[74] Bolivia passed Law 071 in 2010,[75] and Law 300 in 2012,[76] the combined effect of which is to grant 'Mother Earth' a series of rights—to life, to diversity, to water, to clean air, to balance, to restoration, against contamination (Art. 7 of 071)—and define a series of correlative duties on the State and on ordinary citizens (Art. 8-9 of 071; Art. 10-11 of 300). For these purposes, Mother Earth is defined as a dynamic system composed of an indivisible community of all living beings and communities (Art. 3 of 071). However, the rights of nature under these laws have not yet been invoked in court.[77] In Ecuador, the rights of nature find expression in Title II, Chapter VII of the Constitution, which grants nature the right "to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes" (Art. 71) as well as a right to restoration (Art. 72) and confers correlative duties upon the State and accompanying powers upon all people.[78] Unlike in Bolivia, the Ecuadorian courts have dealt with these provision actively. In *Wheeler*'s case, an injunction was granted preventing a construction project that would harm a local river and ordering reparations.[79] In the *Los Cedros* case, a similar order was made in respect of mining activities in a protected forest.[80] These were both cases against provincial governments, notably, the rights of nature have also been raised by the State against a mining corporation proceeding without authorisation—although the determinative issue in that case was one of criminal law.[81] In *Reyes & Others*' case, the Chapter VII rights were recognised as applicable to coastal marine ecosystems.[82] In Uganda and in the Mexican subregions, the rights of nature are given effect

[74] See the overview in Pradhan (n 17) 336ff.
[75] *Law on the Rights of Mother Earth*, Law 071 of the Plurinational State of Bolivia, 21 December 2010.
[76] *Framework Law of Mother Earth and Integral Development to Live Well*, Law 300 of the Plurinational State of Bolivia, 15 October 2012.
[77] María Valeria Berros, 'Challenges for the Implementation of the Rights of Nature: Ecuador and Bolivia as the First Instances of an Expanding Movement' (2021) 48(3) Latin American Perspectives 192, 197.
[78] Constitution of the Republic of Ecuador. The Constitution is available in English at Georgetown University Center for Latin American Studies, 'Political Database of the Americas' <https://pdba.georgetown.edu/> accessed 9 October 2025.
[79] Case 11121-2011-0010, *Wheeler v Director of the Procurator General of the State of Loja* (Provincial Court of Justice of Loja, Ecuador, 2011).
[80] Case 1149-19-JP/20, *Los Cedros* (Constitutional Court of Ecuador, 2021).
[81] Act of Session 66, *National Assembly of the Republic of Ecuador, Commission for Biodiversity and Natural Resources* (Second Court of Criminal Guarantees of Pichincha, Ecuador, 2011); Erin Daly, 'The Ecuadorian Exemplar: The First Ever Vindications of Constitutional Rights of Nature' (2012) 21(1) Review of European Community & International Environmental Law 63, 65.
[82] Case 95-20-IN/24, *Reyes & Ors* (Constitutional Court of Ecuador, 2024).

in almost precisely the same terms as the Ecuadorian Constitution. The Ugandan legislation limits them to conservation areas designated by the government,[83] whilst the relevant parts of the Coliman, Guerreran, Mexican and Oaxacan State and Mexico City Constitutions apply to all ecosystems within their respective jurisdictions.[84] No cases have yet emerged from Uganda applying their provisions, but the Human Rights Commission in Guerrero has declared that it has jurisdiction to hear rights of nature complaints, and has found a violation in respect of the treatment of animals in the Zoochilpan Zoo.[85] Other cases on harm to the natural world in Mexico ordinarily focus on the human right to a healthy environment or on animal welfare laws.[86]

The Ecuadorian rights, which are substantially the same as those codified in Uganda and in Mexico, correspond closely to the three 'primary' rights in Berry's formulation; 'existence' maps to the right to be, whilst 'maintenance' and 'regeneration' map to the rights to habitat and flourishing. Similarly, the courts have accepted that these rights extend not only to ecosystems, but to individual wild animals, and potentially to population thereof, although the content of the right depends on context.[87] Conversely, the Bolivian rights are more expansive, including specific rights to diversity, water, and air, as well as protections against contamination. There is perhaps some practical value in recognising these—in the sense that it will be easier for litigants to present an arguable case for a violation—although interferences with any of these will almost inevitable also infringe the three primary rights, so it is questionable whether they add any substantive, extensional content to Art. 7.

In all the other jurisdictions where the rights of nature have been recognised, they have been limited to specific settings or entities. By far the most common of these are rivers and lakes. In Bangladesh, all rivers have been declared to be the subjects of rights of protection and

[83] National Environment Act 2019, s 4.
[84] Constitution of the State of Colima art 2(IX)(a); Constitution of the State of Guerrero art 2; Constitution of the State of Mexico art 5 and 18; Amendment to the Constitution of the State of Oaxaca DFDA/LXIV/OFIC068/2020; Constitution of the City of Mexico art 13(A)(3).
[85] Human Rights Commission of the State of Guerrero, Recommendation 063/2018, 2VG/AC/003/2018-III.
[86] Amparo 307/2016, *Laguna del Carpintero* (Supreme Court of Justice of Mexico, First Chamber, 2018), on the right to a healthy environment; Amparo 163/2018, *Constitutionality of the Prohibition on Cockfighting* (Supreme Court of Justice of Mexico, First Chamber, 2018), on animal welfare.
[87] Case 253-20-JH/22, *Estrellita Monkey* (Constitutional Court of Ecuador, 2022), paras 51-121.

conservation.[88] Other jurisdictions have made similar declarations for specific rivers, whilst in Spain, the Mar Menor lagoon has been granted these rights through legislation.[89]

2. A New Conception of the Rights of Nature

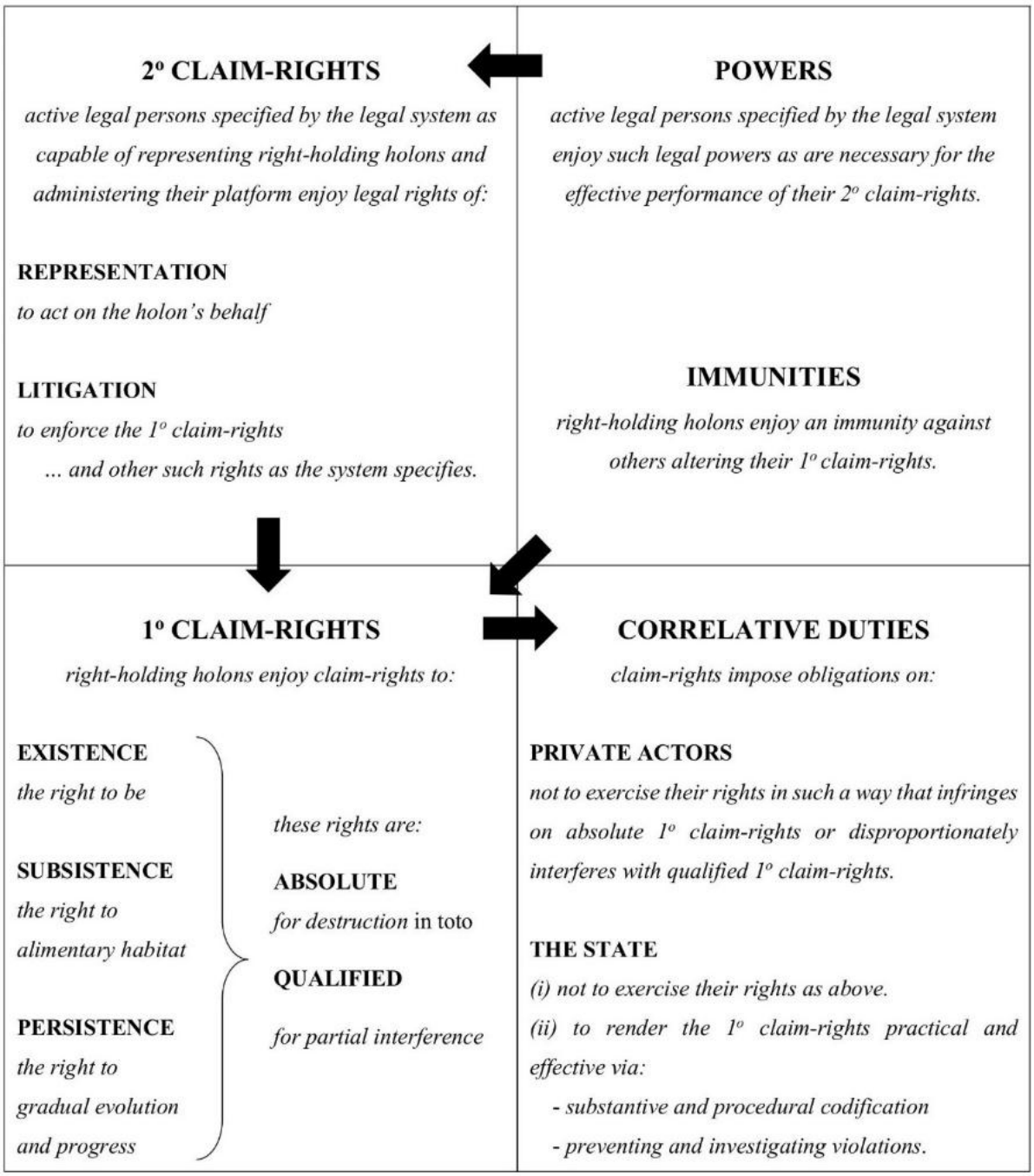

Figure 1: The Ideal Model for the Rights of Nature under Earth Jurisprudence.

[88] *Human Rights and Peace for Bangladesh & Ors v Secretary of the Ministry of Shipping & Ors*, Writ Petition No. 13989 of 2016 (Supreme Court of Bangladesh, High Court Division). Note the approach of the Appellate Division, which upheld these rights but modified some of the directions: *Nishat Jute Mills Ltd v Human Rights and Peace for Bangladesh*, Civil Petition for Leave to Appeal No. 3039 of 2019 (Supreme Court of Bangladesh, Appellate Division).
[89] Law 19/2022 of Spain, the Mar Menor Act.

The ideal model for the rights of nature which I propose is shown in diagrammatic form above (Figure 1). Each major element of the model will be derived and explored in the ensuing discussion, although certain minor elements are left for future work.

Under Earth Jurisprudence, the paramount consideration is the integrity of the Earth system and the communities which compose it. This follows from the delocalisation of normativity and the recognition that the Earth system self-regulates to promote both stability and gradual development as aspects of integrity. In constructing an ideal model of the rights of nature, integrity must be the central informing precept.

I have argued that only ecosystems and holons of larger scale—biotic areas and the macroclimate—are paradigmatic right-holders, because nothing is added to the fulfilment of integrity by including individual animals or populations thereof. Rather, the inclusion of animals (and humans) as right-holders is an exercise in extension, and follows from the moral value of those creatures as alert sentient beings. Although the innovation of the Ecuadorian courts and the Guerreran HRC in extending the rights of nature to animals is a noteworthy development, it is best dealt with under a different normative framework which is better capable of evaluating the moral content of a human-animal relation according to the ethical positions of each: sentience, dignity, and so on.[90] This framework is what is traditionally called 'animal rights' and its definition is marked by a debate between consequentialist and deontological theories.[91]

The prioritisation of community integrity and the recognition that 'animal rights' are best dealt with separately leads to the conclusion that, under Earth Jurisprudence, rights against abuse, to dignity, and against non-essential or frivolous use cannot form part of the rights of nature. These rights bear very little upon integrity, and indeed express ethical convictions which integrity cannot support.

As such, the rights of nature that flow from integrity are essentially Berry's three primary rights with adjustments, which I term 'existence', 'subsistence', and 'persistence'. The right of existence, the right to be, is a right against partial or complete destruction. The right of subsistence is a right to habitat and to supportive space, such that right-holding holons have a right against having their territory, and the nutritional and alimentary value thereof, reduced. The right of persistence protects the second aspect of integrity and shields holons against

[90] A suggestion I also make in Pradhan (n 17) 319.

[91] Peter Singer, *Animal Liberation Now* (HarperCollins 2023). Tom Regan, *The Case for Animal Rights* (University of California Press 1983). A new approach was recently suggested by Raffael Fasel, *More Equal than Others: Humans and the Rights of Other Animals* (OUP 2024).

activities which would prevent their restoration, gradual evolutionary progress, and development. These three rights, as moral rights, are, I argue, individually necessary and jointly sufficient to ensure that the integrity of the Earth system is maintained. As legal rights, they are similarly necessary and sufficient to ensure that human agents, individuals and officials, carry out their paramount moral responsibility not to damage holon integrity.

On their individual necessity, it is worth examining each of the rights separately, and considering a doctrine of rights which included two of these but excluded the third—and why such a doctrine would be unsatisfactory. First, take the right to exist. As a right against destruction, it is evaluable in quantitative terms. Populations of organisms within ecosystems fluctuate in size naturally,[92] but anthropogenic reductions in their sizes which go beyond the bounds of their ecological flux may threaten other populations in trophic or mutualistic relationships with them. Any such reduction may this constitute a threat to the integrity of the ecosystem as a whole, and interferes with its right to exist. Conversely, any diminution in the size of a constitutive population which keeps that size within the bounds of its ordinary ecological flux does not bear consequences for other populations within the ecosystem, and does not therefore infringe the right to exist. This means that culling and other conservation strategies which involve managed reductions in population are not capable of amounting to a rights of nature violation unless the ecosystem is under threat, and indeed would be lawful unless otherwise regulated—for instance, by administrative laws requiring licensing, or by criminal or animal rights laws against certain modes of killing.

Clearly, a doctrine that excluded a right to exist would be inadequate. Natural organisms can be destroyed directly, without affecting their habitat, such that the right of subsistence will not always be engaged by acts of destruction. Moreover, ecosystems which are partially, but not wholly, destroyed by a human act can sometimes return to the original status quo after a period of regeneration; this is known as ecological resistance.[93] It follows that some acts of destruction would not engage the right to persist. The right of existence is therefore necessary to ensure the present integrity of the ecosystem is maintained, even where the right of persistence safeguards its future integrity. Similar considerations apply to holons of larger scale. The destruction of a population of organisms which is significant enough to threaten the stability of organisms, such that it threatens the stability of a biome, should be construed as an

[92] Juli Pausus and William Bond, 'Feedbacks in Ecology and Evolution' (2022) 37(8) Trends in Ecology & Evolution 637.
[93] Anthony Ives and Stephen Carpenter, 'Stability and Diversity of Ecosystems' (2007) 317(5834) Science 58.

interference with that biome's right to exist as well as an interference with the relevant ecosystem.

Next, take the right of subsistence. This is similar to Berry's right to habitat, but in fact is slightly wider in scope—it protects the entire abiotic background which supports and sustains an ecosystem, including the spatial aspect of territory, and the nutritional value of the various abiotic components, including the cycles which provide and replenish this value, such as the hydrological, carbon, and numerous mineral cycles.[94] Any human activity which reduces the effective availability of this value interferes with the right of subsistence. Such interferences therefore require qualitative and quantitative evaluation; whether a given abiotic component supports the right-holding holon falls to be determined first, following which the reduction in value must be assessed with reference to the expected range of natural ecological variability. For the first question, it is clear that some abiotic elements, such as soil, air, and waterways, will almost always sustain the ecosystem in some way. Others, such as rock landforms, will need a case-by-case analysis. For the second question, much like population fluctuations for the right to exist, the scale of the value provided by the relevant abiotic component may fluctuate over time and according to natural conditions—the water cycle will be restricted, for instance, in periods of natural drought. However, any human act which causes a reduction in alimentary value beyond what is ordinarily experienced by the holon, either in the sense that the value has fallen below some threshold which normal natural flux would never breach, or in the sense that the value remains within ordinary bounds but is artificially withheld to an abnormally low level for a longer period than natural flux would permit, constitutes an interference with the right of subsistence.

Let's imagine a system that didn't recognize this right. One might assume that the right to food and basic environmental support simply depends on the more fundamental right to exist. After all, when essential natural resources are degraded, populations may no longer survive. In that case, there'd be no need for a separate right to subsistence—any threat to it would already be covered by the right to exist. But this isn't always the case. In particular, the spatial extent of territory is not connected with holon stability in that way. Territory is a complex concept, not least because it is not merely a block of defined space: avian and some marine populations can migrate vast distances, and this is part of their ranging territory, even if the other populations in an ecosystem occupy a much smaller area of land.[95] In any case,

[94] Melissa Ha and Rachel Schleiger, *Environmental Science* (ASCCC OERI 2022) 7.3.1.
[95] Peter Berthold, Eberhard Gwinner, and Edith Sonneschein (eds), *Avian Migration* (Springer 2013).

where the scale of territory, migratory or otherwise, is reduced by a human act to an extent greater than would be ordinarily expected under national conditions of flux, the right of subsistence is interfered with, as the right protects both the nutritional value of abiotic components and the intrinsic value in a right-holding holon occupying a space in which would otherwise naturally occupy. Both of these aspects inhere within the concept of integrity. Merely reducing the scale of territory, however, does not engage the right to exist, as it does not amount to the destruction of a constitutive living population, nor the right to persist, as the holon can still regenerate and evolve within the new spatial boundaries. This shows why a separate right to subsistence matters: it helps protect species from losing the space and resources they depend on, even if they aren't yet at risk of dying out. Even when the subsistence right overlaps with the right to exist—like when key natural cycles are disrupted—it still adds important legal protection. For instance, imagine a corporate actor who seeks to develop an industrial project that will prevent the local hydrological cycle from operating at natural levels for an extended period. Having identified an ecosystem that is at least in proximity to the project, a presumption arises that the right of subsistence enjoyed by that ecosystem would be interfered with if the project proceeded. The legal system might then choose to reverse the burden of proof in such cases, requiring the developer to demonstrate why their project would not reduce the alimentary value of the cycle to an extent sufficient to amount to an interference, before even proceeding to the conflicts of rights stage, discussed below. On the other hand, if only the right to exist were to be protected, the party evaluating whether the project would constitute a breach of the right would be compelled to amass a much greater amount of scientific and technical evidence demonstrating a connection between the hydrological cycle and the relevant population sizes, and, for an interference to arise, would have to show that the project would clearly threaten the stability of the ecosystem. Such evidence might be contested and controversial. A court might decline to prevent the development on this basis, and harm might result. Enshrining a separate right of subsistence, however, ensures that the integrity of the ecosystem is effectively protected in cases such as this.

Finally, take the right to persist. This protects the future integrity of the holon; its ability to regenerate following a destructive event, its evolutionary processes, and what Berry terms, a little whimsically, "the right to fulfill [its] role in the great community of existence".[96] It might be said that, whereas existence and subsistence allow a holon to survive, persistence allows it to thrive. The first aspect of persistence is regeneration or restoration. Again, as with

[96] Berry (n 4) 133.

the other rights, there is natural ecological fluctuation—or, more accurately in this case, natural ecological divergence. Hence, after a destructive event, some 'resistant' ecosystems restore themselves to the previous status quo, whilst other 'resilient' systems settle at a new equilibrium dictated, in part, by the consequences of the event.[97] A human act which prevented regeneration to the status quo would amount to an interference for a resistant ecosystem, but would not in all cases for a resilient one, because the ecosystem would not have regenerated in full in any case. Ordinarily, however, most activities which prevent regeneration to a lesser or greater extent will amount to interferences. Note that inherent in the concept of regeneration is an anterior destructive event, but strictly this need not be an anthropogenic one. Imagine a prolonged wildfire in a densely forested area which was not started by a deliberate human act. It might be that, applying attribution science, responsibility for the wildfire is partially allotted to anthropogenic climate change.[98] On the other hand, it might be that there is no human responsibility found for this particular fire. It is nonetheless true that, if an opportunistic real estate developer were to then purchase the land, clear the burnt areas, and begin construction of a housing complex, thus preventing the holons in the vicinity from regenerating effectively, the right of persistence would be impinged upon. The second aspect of persistence is evolution. The ability of a holon to evolve will naturally be affected by breaches of other rights, such as dramatic reductions in territory and reductions in population sizes. Evolution is uniquely relevant, however, to human acts of sterilisation of certain populations which prevent the holon to which they belong from evolving to the extent that such evolution could be expected under ordinary natural conditions.[99]

A doctrine which excluded the right to persist would protect the present survival of a given holon, but not its capacity to thrive. Integrity encompasses both of these aspects. It follows that such a right is indeed necessary. In many cases, the right of persistence will be breached in conjunction with an interference with the other two rights, but as shown above with the wildfire and sterilisation examples, this is not always true.

The three rights—existence, subsistence, and persistence—are each essential to protect the integrity of the Earth's community. But we still need to explain why, together, they are also enough. As mentioned earlier, integrity refers to the ongoing stability and health of the entire ecosystem, both now and in the future. The rights to exist and subsist mainly protect living

[97] Ives and Carpenter (n 93).
[98] Zhongwei Liu et al., 'A Global View of Observed Changes in Fire Weather Extremes: Uncertainties and Attribution to Climate Change' (2022) 173 Climatic Change 14.
[99] For an overview of some of the issues, see Jordan Hampton et al., 'Is Wildlife Fertility Control Always Humane?' (2015) 5(4) Animals 1047.

organisms, but also cover non-living elements like air, water, and nutrients—along with the physical space those ecosystems occupy. The right to persist ensures that ecosystems can recover and adapt over time So conceptually, these three rights seem to fully capture what ecosystem integrity means. So conceptually, these three rights seem to fully capture what ecosystem integrity means. However, in practice, it might be thought that certain duties would also need to be implemented. The Chapter VII rights enshrined in Ecuador are accompanied by a duty on the State to pursue restoration and mitigation: in cases "of severe or permanent environmental impact, including those caused by the exploitation of non-renewable natural resources, requiring the State to use the most effective ways to restore the environment and take steps to reduce long-term harm (Art. 72). So are the three rights enough to protect integrity, or is a legal duty like this still needed? I suggest that, since natural holons are capable of regenerating without human input, a right against activities which interfere with this self-restoration is all that is needed to secure integrity. A positive duty on the State may cause more uncertainty than it is worth. It's hard to say how a court would interpret a phrase like 'most effective mechanisms'—it sounds like a very heavy burden to meet, especially when compared to the weaker-sounding 'adequate measures'. Moreover, .a government might reasonably argue that the best way to restore nature is simply to leave it alone or apply minimal conservation. As such, a duty of the kind envisioned in Art. 72, although admirably framed, appears to add little extensional content to the three rights, and is uncertain in application. Nevertheless, it is crucial that the rights themselves are rendered practical and effective, and to this end the State is under ancillary obligations which I discuss below.

Having established the substance of the doctrine of rights under Earth Jurisprudence, a few questions remain as to their effective realisation. One key issue is how to balance these nature-based rights with competing human rights—whether public or private If an action completely destroys an ecosystem, its habitat, or its ability to evolve, then the right is absolute and cannot be overridden. If an action completely destroys an ecosystem, its habitat, or its ability to evolve, then the right is absolute and cannot be overridden. Hence, the complete elimination of an ecosystem, the complete annihilation of its habitat, or a complete restriction on its evolutionary capabilities are never justifiable. But if the impact is only partial, that right becomes 'qualified' and could potentially be outweighed by legitimate human interests. The approach used by the European Court of Human Rights can help guide us here.[100] A

[100] An overview is given in Kristina Trykhlib, 'The Principle of Proportionality in the Jurisprudence of the European Court of Human Rights' (2020) 4 EU and Comparative Law Issues and Challenges Series 128.

proportionality test can be used to weigh whether a human right is justified even if it limits nature's rights. I have outlined elsewhere what such a calculation might look like in detail.[101] In short, this means proving that the action serves a valid goal (like development), uses the least harmful method, and strikes a fair overall balance.

The second question is whether these rights apply only against the State—as in many European human rights cases—or whether they apply to all humans. In other words, who is under a correlative duty not to interfere with the rights of nature? Unlike in human rights cases, nature's rights are often violated by individuals or companies acting under private rights. This is especially clear with land ownership: a property owner might legally destroy a riverbank ecosystem on their land, for instance— and the same issue appears in maritime law, pollution rules, industrial activities, and more. Non-State actors in a range of domains are able to pursue otherwise lawful activities which interfere with the rights of nature. So, it makes sense that nature's rights should apply to everyone—not just governments. However, to ensure that the rights of nature are rendered 'practical and effective',[102] the State is also under a series of ancillary obligations which private actors are not subject to. I have discussed these elsewhere,[103] and they consist of: (i) a structural duty to codify the rights of nature in law and provide procedural rights for their vindication; (ii) an operational duty, engaged where the State knows or ought to know of an imminent rights of nature violation, to take reasonable measures to prevent it; and (iii) a procedural duty, engaged once a rights of nature violation is alleged to have occurred, to investigate, determine whether one has, and identify those responsible.

The third question is one of personhood and representation. Kurki rightly points out that having rights doesn't mean being a full legal person.[104] Rather, right-holding holons under Earth Jurisprudence are passive legal persons, enjoying claim-rights but bereft of the secondary rights that would enable the vindication of those claim-rights. That's why someone else must act on the ecosystem's behalf in legal matters.[105] Different approaches have been adopted in different jurisdictions, including the establishment of a guardianship body capable of acting and litigating on behalf of the right-holding entity.[106] In Ecuador, anyone with legal standing can bring a case to defend nature's rights. The merit of each approach depends on the

[101] Pradhan (n 17) 320ff.
[102] To borrow from *Artico v Italy* [1980] 3 EHRR 1, para 33.
[103] Pradhan (n 17) 324ff.
[104] Visa Kurki, 'Can Nature Hold Rights? It's Not as Easy as You Think' (2022) 11(3) Transnational Environmental Law 525, 542.
[105] ibid 545.
[106] Erin O'Donnell and Elizabeth Macpherson, 'Voice, Power and Legitimacy: The Role of the Legal Person in River Management in New Zealand, Chile and Australia' (2019) 23(1) Australian Journal of Water Resources 35, 38.

institutional circumstances of each jurisdiction. For instance, charging specific people with a duty to enforce the rights of nature may be more expensive but lead to better outcomes; it may not do so, however, if civil society is itself capable pursuing the same enforcement objectives. Earth Jurisprudence doesn't prescribe a fixed model for how nature's rights must be represented, providing the ancillary duty of the State to ensure that the rights of nature are rendered practical and effective is met.

The final issue is what happens when nature's rights are violated. Since nature's rights are legal rights, breaking them should carry legal consequences. However, the principles of punitive justice appear generally inapposite to rights of nature violations. This is because, although such violations are morally wrong, many of them will occur unknowingly, with the violating agent responsible only for a failure to properly investigate the surrounding natural situation, and therefore culpable to a lesser extent. Instead, the right approach is to make the violator help restore the environment to how it was before.[107] The specifics of this approach will depend on the jurisdiction. This could mean paying a conservation group or government agency to carry out the restoration.

F. Conclusion

The object of this article was, first, to interrogate theories of right-holding from an Earth-centric perspective and develop a theory of right-holding concomitant with Earth Jurisprudence principles, and, second, to outlinene an ideal model for the rights of nature. I have argued that ecosystems and all holons of larger scale—networks of interdependent ecosystems and the global macroclimate—are the paradigmatic right-holders under Earth Jurisprudence, and right-holding capabilities are extended to humans, certain animals, and other creatures possessed of alert sentience to secure the effective promotion of political morality. This modifies Kramer's 'interest theory' of rights to fit an Earth-centered approach.. I have also proposed a framework whereby right-holding holons enjoy rights of existence, subsistence, and persistence, which are individually necessary and jointly sufficient to fulfil the paramount ethical consideration of Earth community integrity. These rights have an absolute character where the contravention of their correlative duties would entail complete destruction of the core content of the right, and have a qualified character in instances of partial destruction, which allows interferences to be justified if proportionate. The rights of nature stand vis-à-vis all human agents, ut the State has added duties to make them real and

[107] On restorative justice in Earth Jurisprudence, see Mason (n 67).

enforceable, including assigning legal guardians or agencies to represent ecosystems when needed.

As noted earlier, this article doesn't try to prove Earth Jurisprudence from scratch. In other words, I have adopted the principles of Earth Jurisprudence as premises and attempted to reason towards the best compatible theory of right-holding and doctrine of rights, all within the four corners of the philosophy. If one is of the view the paramountcy of the consideration of Earth community integrity can be justified ab initio as a matter of ethics, then the account of rights presented in this article is superior to those which do not prioritise that consideration. If one is not of that view, then this article simply offers the best account, analytically speaking, that can be derived from Earth Jurisprudence principles.

Moreover, my proposed ideal model for the rights of nature is, essentially, an ideal model within Earth Jurisprudence only. I have not suggested that jurisdictions such as Ecuador and Bolivia adopt it in toto—again, that would require Earth Jurisprudence to be justified ab initio. However, given that Ecuador and Bolivia already come so close to a holistic adoption of Earth Jurisprudence, some of the ideas expressed and discussed in this article might be useful to adjudicators and legislators within these jurisdictions.

Finally, this article leaves some nuances unsettled. In particular, the specific nature of the proportionality calculation for conflicting rights requires further exposition, as does the content and extension of other accompanying entitlements—powers and immunities—that the model demands. Still, I hope this article has clarified the main rights ecosystems hold under Earth Jurisprudence.

DOI: 10.14324/111.444.2052-1871.1984

Complying with Legislative Procedural Rules: Why Legislatures Should Foster This Goal and How It Can Be Done

Luís Otávio Barroso da Graça[*]

Abstract: There are several reasons why lawmakers should adhere to procedural rules in the legislative process. First, doing so upholds the rule of law, ensuring that participants engage in lawmaking under established procedures. Second, following these rules protects participation and the expression of diverse viewpoints, thereby strengthening democratic representation. Third, respecting procedures promotes transparency by clarifying both the content and purpose of proposed legislation. Compliance depends on internal and external enforcement. Lawmakers may use points of order and internal remedies to uphold the rules. Additionally, legislatures should rely on impartial staff whose independent judgment helps deter violations. To resist political pressure, these officials must be protected by guarantees of free expression, both within and beyond the legislature. Finally, under appropriate constraints, courts should be open to reviewing procedural breaches—provided they act with deference, limit standing to qualified actors, and avoid overturning laws based solely on violations of infra-constitutional legislative rules.
Keywords: due process, fairness, legislative procedures, legislative process, participation, transparency

A. INTRODUCTION

In 1812, in his farewell speech, Joseph Story, then Speaker of the Massachusetts House of Representatives in the United States of America (US), urged his peers to stick to the rules that governed their legislative business. He did so in the following terms.[1]

> I have been able ... to appreciate the excellence of those established rules which invite liberal discussions, but define the boundary of right, and check the intemperance of debate. I have learned, that the rigid enforcement of these rules, while it enables the majority to mature their measures with wisdom and dignity, is the only barrier of the rights of the minority against the encroachments of power and ambition. If any

[*] The author is a lawyer and Senior Legislative Advisor and Drafter at the Federal Senate of Brazil. He holds a Doctor of the Science of Law (JSD) degree from the University of California, Berkeley, and a Master of Laws (LLM) degree from University College London. This paper is a version of a part of the author's JSD thesis, which was financed in part by the *Coordenação de Aperfeiçoamento de Pessoal de Nível Superior – Brasil* (CAPES) – Finance Code 001. In his JSD program, the author also counted on the support of Fulbright, Berkeley Law Robbins Fellowship, and the Federal Senate of Brazil. The author is grateful to Shaun Dowling (proofreader), to Berkeley Law Professors Jonathan Gould, David Grewal, Abhay Aneja, and Sean Farhang, as well as to the editorial and reviewing team of the UCL Journal of Law and Jurisprudence. The author is solely responsible for the opinions expressed in this article, and for any mistakes. E-mails: luisbg@senado.leg.br; luisbg@berkeley.edu.

[1] Joseph Story, 'Farewell Speech' (Massachusetts House of Representatives, 17 January 1812) <https://archives.lib.state.ma.us/bitstream/handle/2452/819790/ocm39986872-1812-HB-UN0002.pdf?sequence=1&isAllowed=y> accessed 4 October 2025.

> thing can restrain the impetuosity of triumph, or the vehemence of opposition ... it will be found in the protection with which these rules encircle and shield every member of the legislative body. Permit me, therefore, with the sincerity of a parting friend, earnestly to recommend to your attention a steady adherence to these venerable usages.

Joseph Story's words go to the heart of this article's concerns. A legislature brings together individuals with divergent views, reflecting the complexity of society within the boundaries defined by electoral laws. It also faces an ever-expanding range of issues, driven by the growing scope of governmental responsibilities. In this context, and to promote fairness, participation, and transparency, legislatures should function as structured institutions governed by binding rules. They should also rely on enforcement mechanisms—some administered by legislators themselves, others entrusted to third parties expected to remain neutral.

There are several reasons why lawmakers should comply with legislative procedural rules. First, this is a matter of the rule of law: participants in the lawmaking process have the right to carry out their legislative functions according to established procedures, much like the expectation of fairness in a well-regulated game.[2] Admittedly, legislative procedures allow for some flexibility, since negotiation and compromise are integral to politics.[3] In this context, enforcement may not appear as prominent as it does in judicial settings. Nonetheless, and second, adhering to procedural rules protects participation and ensures the flow of diverse opinions, thereby reinforcing democratic representation.[4] Third, compliance promotes transparency,[5] by shedding light on both the substance of a bill and its underlying motives.[6] It therefore follows that procedural violations in legislatures can undermine fairness, participation, and transparency.

These reasons are elaborated upon in the discussion in Part B of this article. It is important to note that these arguments support not only compliance with existing legislative procedural rules, but also the adoption of such rules in the first place. Accordingly, the analysis presumes a normative framework in which procedural provisions reflect principles akin to those articulated in

[2] Luís Otávio Barroso da Graça, 'Judicial Review of the Legislative Process in Brazil' (2018) 7 UCL Journal of Law and Jurisprudence 55, 58–61.
[3] William N Eskridge Jr, Abbe R Gluck, and Victoria F Nourse, *Statutes, Regulation, and Interpretation: Legislation and Administration in the Republic of Statutes* (West Academic Publishing 2014) 2, 11, 17; cf Susan Rose-Ackerman, Stefanie Egidy, and James Fowkes, *Due Process of Lawmaking: The United States, South Africa, Germany, and the European Union* (CUP 2015) 22.
[4] Graça (n 2) 61-64.
[5] ibid.
[6] see Luc J Wintgens, 'Legisprudence as a New Theory of Legislation' (2006) 19 Ratio Juris 1.

the Internal Rules of the Federal Senate of Brazil.[7] In summary, these principles are: a) equality among legislators; b) due process of lawmaking; c) respect for minority rights;[8] d) collective decision-making;[9] e) transparency;[10] and f) open and substantive deliberation. Provided that legislative procedures are grounded in such principles, adherence to them is expected to advance fairness, inclusive participation, and transparency, thereby strengthening the overall legitimacy of the legislative process.[11]

A case from Brazil illustrates the importance of these underlying principles.[12] In the late 1990s, the São Paulo City Council adopted a resolution allowing a majority of its members to designate certain bills for *en bloc* voting—without debate or the possibility of amendment—during floor proceedings.[13] At first glance, the resolution created an all-or-nothing mechanism: members who supported certain measures were compelled to accept others they might oppose. In practice, the situation was even more problematic. Since the majority had discretion to select which bills would be subject to this procedure, the outcome of the votes became a mere formality.[14] Predictably, minority councillors objected, arguing that the resolution infringed upon their rights to vote independently and to speak during deliberations.[15] Fortunately, the majority employed the mechanism only once, although they approved over twenty bills in a single session.[16] Recognizing the procedural unfairness it had introduced, the Council later repealed the resolution.[17]

These remarks are not intended to suggest that legislators may simply disregard procedural rules that fail to reflect the aforementioned principles. Even when faced with unreasonable or unfair rules, noncompliance should not become standard practice. This is because, firstly, the very reasonableness of a rule is often a matter of political and legal contention, and secondly, selective

---

[7] Regimento Interno do Senado Federal (RISF), art 412 <https://www25.senado.leg.br/documents/12427/45868/RISF+2018+Volume+1.pdf/cd5769c8-46c5-4c8a-9af7-99be436b89c4> accessed 4 October 2025.
[8] Walter J Oleszek and others, *Congressional Procedures and the Policy Process* (11th edn, CQ Press 2020) 10–11.
[9] ibid 12.
[10] ibid.
[11] ibid; Oleszek and others (n 8) 9; Ittai Bar-Siman-Tov, 'Lawmakers as Lawbreakers' (2010) 52 William and Mary Law Review 805, 814–815.
[12] Instituto do Legislativo Paulista, 'Direito do Parlamentar ao Devido Processo Legislativo' (2 September 2021) [00:22:42-00:31:33] <https://www.youtube.com/watch?v=CktLj3HBi5I> accessed 4 October 2025.
[13] ibid.
[14] ibid.
[15] ibid.
[16] ibid.
[17] ibid.

disobedience might open the door to arbitrary decisions by powerful leaders or shifting majorities, thereby eroding confidence in the institutional framework. For these reasons, the only legitimate path to address inadequate legislative procedures is through formal mechanisms for legal or procedural reform.

Not only should compliance with procedural rules be supported by enforcement mechanisms under the control of legislators, but it should also be ensured by third-party oversight. Instruments such as points of order and internal appeals enable lawmakers to uphold the procedural norms that structure legislative activity. However, these internal mechanisms may be insufficient on their own. For this reason, external actors—such as judges or parliamentary officers with expertise in legislative procedure and who are not directly involved in partisan dynamics—should also play a role in safeguarding compliance. These institutional considerations, including the forms and conditions under which enforcement mechanisms should operate, are examined in Parts C and D of this article. The former addresses tools available to legislators themselves; the latter explores third-party oversight arrangements.

A final note on methodology: this article adopts a philosophical and normative approach, focusing on procedural principles and illustrative cases from the national legislatures of Brazil and the United States. Although grounded in these two jurisdictions, the analysis is likely to be of broader relevance in contexts where legislative institutions operate under a comparable structural logic.

B. WHY LEGISLATORS SHOULD ABIDE BY PROCEDURAL RULES

1. Fairness: Rule of Law, Legislative Due Process

Compliance with legislative procedures is essential because the rules themselves shape the outcomes of the lawmaking process.[18] It could be argued that the enactment of legislation depends solely on securing sufficient political support. From this perspective, the procedural route taken to pass a bill would be irrelevant, provided the final outcome reflects the will of the majority (or supermajority, as required in some cases). However, this assumption fails to account for the fact that alternative procedural paths can produce significantly different results. Consider, for instance,

[18] Bar-Siman-Tov (n 11) 809–810, 813, 841; Jonathan S Gould, 'Law Within Congress' (2020) 129 The Yale Law Journal 1946, 1950; Adrian Vermeule, 'The Constitutional Law of Congressional Procedure' (2004) 71 The University of Chicago Law Review 361, 362.

a bicameral legislature in which the passage of a bill requires an absolute majority (more than half of the members) in both its chambers (or houses; terms used interchangeably in this paper).[19] Imagine that: (a) one of the chambers has 50 members, all of whom support the bill; and (b) the other chamber has 100 members, of whom only 26 are in favour. While the total number of supporters across both chambers amounts to 76 out of 150 members—more than half—this support would not suffice under a bicameral system where majority approval is required in each chamber independently. Despite overwhelming support in one house, the bill would fail in the other. This example illustrates how procedural frameworks directly influence legislative outcomes. Just as differing rules on institutional structure "affect which bills pass",[20] so too does compliance—or lack thereof—with procedural requirements during the legislative process.

The tax legislation enacted by the US Congress at the end of 2017, as compared to its Tax Reform Act of 1986,[21] provides a clear example of how different procedural paths can shape legislative outcomes. In the case of the 1986 Act, from the initial legislative hearings in June 1985 to President Reagan's signing of the bill in October 1986, the legislative process extended over approximately sixteen months.[22] The reform was passed with substantial bipartisan support in both chambers of Congress.[23] By contrast, the 2017 Act was enacted in less than two months, "without holding a single evidentiary hearing, through a parliamentary manoeuvre that dispensed with the need for any bipartisan support and the threat of a filibuster in the Senate".[24] Moreover, the final version of the bill was approved "with no meaningful deliberation".[25] As Gardbaum observes, "[f]or many critics, the flaws in the procedure and the reluctance to engage in deliberation or public consideration were directly related to—and an attempt to hide—its content, which vastly favours the rich at the expense of everyone else".[26] It may be argued that had Congress adhered to standard

[19] For the concepts of absolute majority and simple majority, see Adrian Vermeule, 'Absolute Majority Rules' (2007) 37 British Journal of Political Science 643.
[20] Gary W Cox, 'On the Effects of Legislative Rules' (2000) 25 Legislative Studies Quarterly 169, 170.
[21] Stephen Gardbaum, 'Due Process of Lawmaking Revisited' (2018) 21 University of Pennsylvania Journal of Constitutional Law 1, 6.
[22] David E Rosenbaum, 'The Tax Reform Act of 1986: How the Measure Came Together' *The New York Times* (New York City, 23 October 1986) D16.
[23] ibid.
[24] Gardbaum (n 21) 5.
[25] ibid 6.
[26] ibid.

deliberative procedures, the 2017 tax law might not have been enacted at all, or at the very least, its substantive provisions would have been significantly different.[27]

Compliance with legislative procedural rules may be conceptualised in terms of due process of lawmaking. The Fifth Amendment to the US Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law".[28] Similarly, section 1 of the Fourteenth Amendment stipulates that no state shall "deprive any person of life, liberty, or property, without due process of law".[29] One strand of interpretation views these clauses as imposing substantive limitations on legislation[30]—for example protecting individual rights such as privacy against governmental intrusion.[31] A second approach interprets due process as encompassing structural guarantees related to political representation. This understanding is famously associated with John Hart Ely's reading of Footnote Four in *US v Carolene Products Co*.[32] Under this view, procedural fairness in lawmaking—including the equality of voting power and access to deliberative participation—becomes a concern for the enactment of legislation.[33] A third perspective considers due process of lawmaking as requiring compliance with procedures in the legislative and executive branches to conform to foundational republican and democratic principles.[34]

This article adopts the third perspective outlined above, according to which the principle of due process of lawmaking requires adherence to procedural rules regardless of their normative source. From this standpoint, it is immaterial whether the applicable rule is constitutional or infra-constitutional, i.e., statutory or internal to the legislative body. While compliance may appear more straightforward in the case of constitutional or statutory provisions—given their perceived binding force[35]—the same obligation should apply to internal legislative rules unless a hierarchical conflict of norms arises.

[27] cf Gardbaum (n 21) 5–6, 17–18.
[28] US Const. amend. V.
[29] US Const. amend. XIV s 1.
[30] Gardbaum (n 21) 13.
[31] cf ibid.
[32] 304 US 144 (1398).
[33] John Hart Ely, *Democracy and Distrust* (Harvard University Press 1980) 73–104.
[34] Gardbaum (n 21) 14.
[35] Jacob E Gersen and Eric A Posner, 'Soft Law: Lessons from Congressional Practice' (2018) 61 Stanford Law Review 573, 577, 582; see also Michael B Miller, 'The Justiciability of Legislative Rules and the "Political" Political Question Doctrine' (1990) 78 California Law Review 1341.

Indeed, the distinction among different types of legal norms should relate only to their relative weight within the hierarchy of laws,[36] not to their enforceability in isolation. Thus, a rule contained in a legislative chamber's internal regulations must yield in the event of a conflict with a higher norm, such as a constitutional provision. In the absence of such a conflict, however, legislative authorities are not at liberty to disregard internal rules. Accordingly, the due process principle obliges competent authorities to carry out the legislative process in strict conformity with the established procedural framework—whatever its formal status—rather than on the basis of discretionary or extra-legal considerations.

Regardless of the hierarchical status of procedural norms—whether constitutional, statutory, or internal—legislative due process functions as a corollary of the rule of law in its liberal formulation.[37] As theorists such as Friedrich Hayek, Joseph Raz, and John Rawls have emphasised, adherence to the rule of law enables legal subjects to anticipate the consequences of their actions and to structure their conduct accordingly.[38] This principle of legal predictability applies equally to the legislative sphere.[39] Should rule-breaking become systematic, legislators would no longer be able to anticipate the normative effects of their conduct within the lawmaking process.[40] In such cases, the personal will of an individual or authority supplants the authority of the law, thereby undermining the very foundations of the rule of law.

Ultimately, the normative case for subjecting the legislative process to the rule of law rests on its implications for the citizenry. While the formal right to the due application of procedural rules belongs to legislators—who are institutionally empowered to participate in the production of legal norms[41]—those legislators, in a democracy, act as representatives of the population.[42] Admittedly, elected officials may pursue personal or partisan objectives, particularly when

[36] Hans Kelsen, *Introduction to the Problems of Legal Theory* (Bonnie Litschewski Paulson and Stanley L Paulson trs, OUP 1992) 54–75.
[37] Graça (n 2) 58–61.
[38] ibid. See also FA Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Routledge 1982) 98, 102, 113; Joseph Raz, *The Authority of Law: Essays on Law and Morality* (OUP 1979) 222; John Rawls, *A Theory of Justice* (rev edn, Harvard University Press 1999) 207.
[39] Graça (n 2) 58–61.
[40] ibid.
[41] cf Richard A Arenberg and Robert B Dove, *Defending the Filibuster* (Indiana University Press 2014) xv.
[42] cf Kenneth A Shepsle, *Rule Breaking and Political Imagination* (The University of Chicago Press 2017) 83; Gardbaum (n 21) 1, 6; Jonathan S Gould, 'The Law of Legislative Representation' (2021) 107 Virginia Law Review 765, 776–783.

political negotiations involve compromises or campaign financing.[43] In some cases, representatives may even misuse their office to advance private business interests.[44] The legitimacy of such conduct varies: the latter is clearly objectionable, while the former depends on whether political trade-offs ultimately promote public objectives. Either way, legal frameworks attempt to constrain illegitimate behaviour through a range of mechanisms. Some focus on enforcing anti-corruption statutes and conflict-of-interest rules;[45] others aim to enhance the accountability of political actors; others still relate to procedural compliance in the legislature (which is the focus of this article). A legislature that adheres to fair procedural rules can reasonably be expected to provide space for the expression of societal demands and, within the limits of the electoral system, to reflect the relative weight of those demands. In this sense, legislators' fidelity to the rule of law in legislative proceedings serves to strengthen democratic representation in favour of the people.

2. Participation, Democratic Representativeness

A sceptic might reasonably ask how strict adherence to legislative procedures—regardless of their specific content—can foster democratic representativeness. The answer lies in the institutional function of a legislature: to provide elected representatives with a structured environment in which to carry out their lawmaking responsibilities.[46] Legislators come from diverse backgrounds and represent a plurality of interests.[47] Accordingly, the legislative process should be structured to be harmonious and productive,[48] organised in a manner that supports deliberation and facilitates the expression of differing viewpoints.[49] Admittedly, some citizens may be indifferent to procedural integrity or may even support procedural irregularities if such deviations produce outcomes that align with or benefit their preferences.[50] However, the individual who benefits from rule-breaking today may find themselves disadvantaged by the same practice

[43] cf Gould (n 43) 776–783.
[44] Gardbaum (n 21) 7.
[45] ibid 10–12.
[46] Jeremy Waldron, 'Principles of Legislation' in Richard W Bauman and Tsvi Kahana (eds), *The Least Examined Branch* (CUP 2006) 15, 23–24.
[47] ibid 25.
[48] cf Oleszek and others (n 8) 11–12.
[49] Waldron (n 47) 23, 27; Graça (n 2) 62 See also Jürgen Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?' (2001) 29 Political Theory 766, 771.
[50] Bar-Siman-Tov (n 11) 833.

tomorrow.[51] In the long run, therefore, adherence to legislative procedure enhances fairness—understood here as the equal opportunity to influence political outcomes—by upholding the institutional integrity of representative democracy.

One of the core concerns in democratic theory relates to the right to participate in political decision-making—what Waldron has termed "the right of rights".[52] In complex societies, diversity is a defining feature: individuals differ in origin, background, identity, and preference. As a result, achieving consensus on collective problems is often difficult. Nevertheless, the demands of governance require that decisions be made, even when the resulting policies may be unsatisfactory to certain segments of the population. The challenge, then, is to create a normative structure in which disagreement does not undermine legitimacy. This is most plausibly achieved through participatory mechanisms in which citizens are not only entitled to vote, but also to contribute to public deliberation—to speak, to be heard, and to influence the process. The ultimate aim of such procedural safeguards is to prevent "the arbitrariness and insult that unequal or disproportionate treatment involves".[53]

In a representative democracy, the right of citizens to participate in political life is undermined if their elected legislators are unable to perform their functions effectively within legislative bodies.[54] The political system may be defective if legislatures do not transform the demands they receive into well-built policies or legislation. Just as any individual may count on the right to participate in the broad political arena, so too must their representatives in legislative bodies. Procedural violations can deny certain legislators the ability to debate legislative proposals. More gravely, such breaches may prevent them from voting, thereby silencing the voices of the constituents they represent. In such instances, the political system fails to avoid "the arbitrariness and insult" to which Waldron refers.[55]

Jeremy Bentham's reflections on the British Parliament's three readings rule offer a classical illustration of how legislative procedures can enhance the right to participate in

[51] Gould (n 18) 1958.
[52] Jeremy Waldron, *Law and Disagreement* (OUP 2004) 232–254. The rest of the paragraph flows from the same reference.
[53] Waldron (n 53) 238.
[54] cf Bar-Siman-Tov (n 11) 814.
[55] Waldron (n 53) 238.

lawmaking.[56] Describing the practice, he notes that "every bill shall be debated three times upon different days, and these days oftentimes distant from each other".[57] Bentham argues that this structure promotes "[m]aturity in the deliberations, arising from the opportunities given to a great number of persons of speaking upon different days, after they have profited by the information which discussion has elicited".[58] Relatedly, he notices that the procedure protects "the minority of the assembly, by securing to it different periods at which to state its opinions."[59] He further observes that the rule enables "the public to make itself heard".[60] Compliance with procedures of this kind strengthens the deliberative function of legislative institutions. By ensuring that representatives are given the institutional support to participate meaningfully in lawmaking, such rules reduce the risk that citizens' political engagement—mediated through their elected officials—will fail to result in appropriate legal responses.

3. Transparency and Justification

Another normative basis for compliance with legislative procedure lies in the demand for justification in lawmaking.[61] This is what "legisprudence" demands.[62] If the enactment of law entails the restriction of individual liberty, then those responsible for imposing such limitations must offer transparent and reasoned explanations for their necessity. In this context, lawmakers bear the burden of demonstrating that the legal constraints they propose are "an alternative for [allegedly] failing social interaction"—within the framework of possibilities available at a given historical moment.[63] As Wintgens puts it, "[t]he justification of legislation is marked as a process of weighing and balancing the moral and the political limitations of freedom ... Justification is part of the process of legitimation".[64]

[56] Jeremy Bentham, *Political Tactics* (Michael James, Cyprian Blamires and Catherine Pease-Watkin eds, OUP 1999) 129–131.
[57] ibid 129.
[58] ibid.
[59] ibid.
[60] ibid.
[61] Bar-Siman-Tov (n 11) 814. cf William N Eskridge, Jr, Philip P Frickey and Elizabeth Garrett, *Legislation and Statutory Interpretation* (2d edn, Foundation Press 2006) 81–83.
[62] "The duty of justification is what legisprudence is about. Legisprudence is defined as a rational theory of legislation. It consists of an elaboration of the idea of freedom as *principium*". Wintgens (n 6) 10.
[63] Wintgens (n 6) 10, 13–14.
[64] ibid 10.

It must be acknowledged that explanatory materials or public statements may, in some cases, obscure rather than illuminate the true motives behind a legislative proposal.[65] For example, a bill aimed at granting tax exemptions to certain economic sectors may be framed as promoting general welfare, while in reality serving to benefit businesses aligned with a political party's supporters. This concern was raised in relation to the 2017 US tax reform, which was allegedly "a pay-off to the tiny class of billionaire Republican donors".[66] By contrast, procedural scrutiny can serve to clarify—or at least raise doubts about—the underlying motivations of a proposed law. In this context, adherence to legislative procedures that guarantee lawmakers the opportunity to properly examine and debate proposals becomes critical. Indeed, those opposing a bill may be able to uncover and publicise concealed intentions. Even where the majority holds sufficient votes to ensure passage, following the appropriate procedural steps serves the broader function of justification. For the sake of transparency and public trust, the legislative process must adhere to due procedural standards.

Transparency in the legislative process is also reinforced through procedural rules that promote access to information. While exceptions may exist—such as protecting sensitive data or shielding legislators from undue external pressure in specific contexts—secrecy must remain the exception, not the rule or pattern.[67] In democratic regimes, although private political negotiations may occur, the expectation is that formal discussions and voting sessions will take place in public and that the time, location, and agenda of such sessions will be announced in advance. Physical access to legislative chambers or observation galleries may be limited due to security or logistical constraints. Nonetheless, where feasible, live broadcasting should be employed to ensure broad public access to proceedings. Generally, procedural rules should guarantee public access to relevant documents—such as bills, proposed amendments, reports, and supporting materials—prior to legislative deliberation and voting. Once decisions are made, the outcomes should be promptly and publicly disclosed.

That said, not all documents require disclosure. For example, legislators may draft multiple versions of a bill or report for internal evaluation. Likewise, advisory opinions prepared by technical staff may be intended solely for internal guidance, warning lawmakers about potential

[65] cf Eskridge, Jr, Frickey and Garrett (n 62) 76.
[66] Gardbaum (n 21) 5–6.
[67] Bentham (n 57) 39.

problems or offering policy options. It remains the responsibility of the elected representatives—those entrusted with a democratic mandate—to determine whether such internal inputs are integrated into the legislative debate. In short, procedural rules that ensure access to information serve to institutionalise a level of transparency through which the public can examine and evaluate the justifications underlying legislative action.

Finally, it is important to delineate the scope of the duty of justification. While legislators are expected to articulate the reasons underlying the enactment of a law, this obligation does not extend to providing detailed explanations for every individual provision. The duty to offer justification is addressed primarily to the citizenry, enabling them to monitor the conduct of their representatives and to "act from knowledge".[68] Given that legislative activity involves complex and voluminous subject matter, it would be neither feasible nor desirable to demand justification for every article, section, or clause of a statute. Excessive attention to minor technicalities could obscure the broader objectives of a legislative measure and overwhelm the public's capacity for meaningful scrutiny. As Bauerschmidt notes in the context of European Union law, "Union legislation is not required to go into every relevant point of fact and law".[69] He further explains that, "for acts of general application it suffices to disclose the essential objective pursued by the Union legislature and it would be excessive to require a specific statement of reasons for all the various technical choices made".[70] This reasoning is equally applicable to national legislatures. The greater the volume, complexity, and breadth of issues addressed by a legislative body, the less viable it becomes to justify every procedural or technical detail individually. Compliance with procedural rules that promote transparency, participation, and deliberation can serve to identify and foreground the most relevant aspects of proposed legislation.

C. SELF-ENFORCEMENT

Ideally, legislators should take primary responsibility for ensuring compliance with their own procedural rules.[71] As discussed in the previous part, adherence to established procedures tends to make legislative processes fairer and more predictable. Moreover, relying on external

[68] ibid 33.
[69] Jonathan Bauerschmidt, 'The Basic Principles of the European Union's Ordinary Legislative Procedure' (2021) 22 ERA Forum 211, 227.
[70] ibid.
[71] cf Joshua A Chafetz, *Congress's Constitution* (Yale University Press 2017) 290.

bodies such as the judiciary to resolve procedural disputes can raise complex questions concerning the separation of powers. Given these considerations, this part examines the internal arrangements through which legislators themselves seek to maintain procedural order and uphold the integrity of the lawmaking process.

1. Internal Compliance Mechanisms Applied by Lawmakers

Legislative bodies possess internal mechanisms—administered by their own members—for overseeing compliance with procedural rules. This section outlines how such mechanisms operate in both the Brazilian and US Congresses. First, the enforcement of procedural norms is the responsibility of institutional actors such as presiding officers and committee chairs. Second, individual legislators are empowered to invoke specific procedural tools. When a dispute or uncertainty arises regarding the application of a rule, a member may raise a point of order. [72] The resolution of such a point is typically entrusted to the presiding officer of the chamber or the relevant committee chair, depending on the context.[73] Should the author of the point of order disagree with the ruling, they may file an appeal, which is then submitted to a higher deliberative body—generally the full chamber—for a final decision.[74]

The presiding officer of a legislative chamber is not necessarily required to be a member of that body, although this is typically the case in both the Brazilian and US Congresses. In Brazil, the possibility of a non-member presiding over the Chamber of Deputies or the Federal Senate is contemplated neither in legislation nor in conventional practice. Each house elects one of its own members to serve as President for a term of two years.[75] In the United States, the Vice President of the Republic serves *ex officio* as President of the Senate,[76] though this function is rarely exercised in practice.[77] Day-to-day presiding duties are usually performed by the President pro

[72] Bar-Siman-Tov (n 11) 818.
[73] ibid.
[74] ibid.
[75] Constitution of the Federative Republic of Brazil (CF 88) art 57 para 4 (for an English translation, see Federal Supreme Court, *Constitution of the Federative Republic of Brazil* (2022) <https://www.stf.jus.br/arquivo/cms/legislacaoConstituicao/anexo/Brazil_Federal_Constitution_EC_125.pdf> accessed 5 October 2025; Regimento Interno da Câmara dos Deputados (RICD) arts 5 and 6 para 1 <https://www2.camara.leg.br/atividade-legislativa/legislacao/regimento-interno-da-camara-dos-deputados/> accessed 5 October 2025; RISF arts 59 and 60 para 1(I).
[76] US Const. art I s 3 cl 5.
[77] Roger H Davidson and others, *Congress and Its Members* (18th edn, CQ Press 2022) 159.

tempore, who is a senator selected by their colleagues.[78] In the House of Representatives, the presiding officer is the Speaker.[79] Although, in principle, the Speaker is not required to be a sitting member, in practice, every individual elected to the office has been one.[80]

Presiding officers are expected to apply the procedural rules that regulate the legislative process and shape the adoption of new laws. In the Brazilian Federal Senate, for example, an internal rule explicitly provides that decisions resulting from leadership agreements or full-chamber discussions may not override standing procedural norms—except in cases where there is a unanimous roll-call vote, with a quorum of at least three-fifths of the members.[81] The rationale behind such a guideline seems to relate to the legal, and thus binding, nature of procedural rules—even when they do not enjoy constitutional or statutory status.[82] Therefore, compliance is required not only from the majority and party leaders but also from the presiding officer. For Bentham, the latter should not "possess any power, the effect of which would be to give him a control in any degree over the will of the assembly".[83] Admittedly, speakers or presidents may act politically and may exercise discretion in the interpretation and application of procedural rules.[84] However, this discretionary authority cannot serve as a license for arbitrary procedural deviations, which would risk undermining the fairness and legitimacy of the legislative process.

When a potential violation of procedural rules occurs, a legislator may typically submit a parliamentary inquiry or raise a point of order.[85] These mechanisms operate in broadly similar ways in both the US Congress and the Brazilian National Congress. A parliamentary inquiry is a

[78] US Const. art I s 3 cl 5; Standing Rules of the Senate (S Doc No 113-18, 2013) (SRS) r I cl 1 <https://www.rules.senate.gov/imo/media/doc/CDOC-113sdoc18.pdf> accessed 5 October 2025.
[79] US Const. art I s 2 cl 5.
[80] Davidson and others (n 78) 146.
[81] RISF art 412(III).
[82] Luís Otávio Barroso da Graça, 'The Legal Nature of the Legislative Process' (JSD thesis, University of California, Berkeley 2024) 1–56.
[83] Bentham (n 57) 67.
[84] Valerie Heitshusen, *The Speaker of the House: House Officer, Party Leader, and Representative* (Congressional Research Service Report No 97-780, 16 May 2017) 4 <https://crsreports.congress.gov/product/pdf/RL/97-780> accessed 5 October 2025.
[85] Regimento Comum do Congresso Nacional (RCCN) art 131 <https://www25.senado.leg.br/documents/59501/97171143/RCCN.pdf/> accessed 5 October 2025; RICD art 95; RISF arts 403 and 408; Charles W Johnson, John V Sullivan and Thomas Wickham, Jr, *House Practice: A Guide to the Rules, Precedents and Procedures of the House* (US Government Publishing Office 2017) 679 (ch 37 s 1); Floyd M Riddick and Alan S Frumin, *Riddick's Senate Procedure: Precedents and Practices* (Alan S Frumin ed, revised edn, S Doc No 101-28, US Government Publishing Office 1992) 987.

request for clarification addressed to the presiding officer[86]—such as the Speaker, the President of the chamber, or another official responsible for conducting the session at that time. The response to such an inquiry is generally explanatory rather than adjudicative in nature.[87] As it does not constitute a formal ruling, it is not subject to appeal,[88] and carries limited authority as a procedural precedent. By contrast, a point of order typically elicits a decision with binding force for the ongoing proceedings, and it may establish a precedent depending on its content and context.[89]

A point of order is a more specific and consequential mechanism than a parliamentary inquiry. It is typically raised in response to a concrete and immediate procedural issue that arises during legislative proceedings.[90] Accordingly, the member must formulate the point objectively, clearly identifying the controversy or doubt and specifying the relevant rules, or precedents.[91] To be admissible, the point of order must also be raised in a timely manner**.** Failure to do so generally results in forfeiture of the right to challenge the issue. As explained in the context of US congressional procedure, "[o]n the demand for the 'regular order,'... the [m]ember must either make his or her point of order at that time or lose the opportunity to do so".[92]

The authority to decide on a point of order lies primarily with the presiding officer of the chamber. However, such decisions are generally subject to appeal, allowing the matter to be submitted to the full house.[93] The purpose is to circumvent equivocal or arbitrary positions from just one person.[94] Usually, not only the one who raised the question may challenge the chair's ruling but any member may do so.[95] That is so because, on the one hand, the original author or a

[86] RISF art 14(X)(a); Valerie Heitshusen, *Points of Order, Rulings, and Appeals in the Senate* (Congressional Research Service Report No 98-306, 29 August 2018) 3 <https://crsreports.congress.gov/product/pdf/RS/98-306> accessed 5 October 2025; Valerie Heitshusen, *Points of Order, Rulings, and Appeals in the House of Representatives* (Congressional Research Service Report No 98-307*,* 12 December 2018) 3 <https://crsreports.congress.gov/product/pdf/RS/98-307> accessed 5 October 2025.
[87] Heitshusen, *Points of Order in the Senate* (n 87) 3; Heitshusen, *Points of Order in the House* (n 87) 3.
[88] Heitshusen, *Points of Order in the Senate* (n 87) 3; Heitshusen, *Points of Order in the House* (n 87) 3; Johnson, Sullivan, and Wickham, Jr (n 86) 67 (ch 3 s 3).
[89] Heitshusen, *Points of Order in the Senate* (n 87) 3; Heitshusen, *Points of Order in the House* (n 87) 3.
[90] RCCN art 131; RICD art 95; RISF arts 403 and 408; Johnson, Sullivan, and Wickham, Jr (n 86) 679 (ch 37 s 1); Riddick and Frumin (n 86) 987.
[91] RCCN art 131; RICD art 95 para 4; RISF art 404; Heitshusen, *Points of Order in the Senate* (n 87) 1–2; Heitshusen, *Points of Order in the House* (n 87) 1; Johnson, Sullivan, and Wickham, Jr (n 86) 680 (ch 37 s 1).
[92] Heitshusen, *Points of Order in the House* (n 87) 1. See also Bar-Siman-Tov (n 11) 818.
[93] RCCN art 132; RICD art 17(I)(n); RISF art 48(XIII); Rules of the House of Representatives (118th Congress, 2023) (RHR-118th) r I cl 5 <https://www.govinfo.gov/content/pkg/HMAN-118/pdf/HMAN-118.pdf> accessed 5 October 2025; SRS r XX cl 1; Bar-Siman-Tov (n 11) 818.
[94] cf Johnson, Sullivan, and Wickham, Jr (n 86) 65 (ch 3 s 1).
[95] RICD art 95 para 8; RHR-118th r I cl 5; Heitshusen, *Points of Order in the Senate* (n 87) 2.

peer with the same interest may resist a denial; on the other hand, any other congressperson may disagree with the granting of a point of order.

Decisions on points of order may also establish procedural precedents.[96] In the United States, both the House of Representatives and the Senate regularly apply previous rulings to analogous situations as precedents, reflecting a practice similar to the *stare decisis* doctrine in judicial proceedings.[97] Decisions rendered by the full chamber generally carry greater authoritative weight than those issued solely by the presiding officer.[98] A comparable dynamic exists in the Brazilian Congress, though in that context, procedural precedents tend to serve as guidance rather than binding authority, irrespective of whether they originate from the plenary or the chair.[99]

To summarise, legislatures possess internal mechanisms designed to oversee and enforce compliance with procedural norms. First, presiding officers are expected to administer the legislative process in accordance with applicable rules—whether constitutional, statutory, or internal. Second, when lawmakers identify procedural irregularities, they may raise a point of order (or a comparable motion) to request a procedural correction. The responsibility for ruling on such matters generally falls to the presiding officer. Third, any dissatisfied member may appeal the decision, seeking a determination by the full chamber. In theory, this internal oversight framework appears institutionally sound. Nevertheless, its effectiveness in practice may be limited.

2. Waiving Tools and Circumvention of Due Procedures

Despite their formal existence, internal mechanisms such as points of order and appeals may prove ineffective in practice within the federal legislatures of Brazil and the United States. Presiding officers or majority coalitions may disregard procedural objections or appeals, as no enforceable internal obligation compels them to act on such challenges. Remarkably, chambers' rules may offer broad opportunities for waiving procedural enforcement tools, and the majority may even questionably use points of order to circumvent supermajority requirements.

[96] RCCN art 132 para 2; RICD art 95 para 10; RISF art 406; Heitshusen, *Points of Order in the Senate* (n 87) 3; Heitshusen, *Points of Order in the House* (n 87) 2; Johnson, Sullivan, and Wickham, Jr (n 86) 683 (ch 37 s 2); Riddick and Frumin (n 86) 987.
[97] Johnson, Sullivan, and Wickham, Jr (n 86) 683 (ch 37 s 2); Gould (n 18) 1956.
[98] Heitshusen, *Points of Order in the Senate* (n 87) 3.
[99] RCCN art 132 para 2; RICD art 95 para 10; RISF art 406; Luciano Henrique da Silva Oliveira, *Comentários ao Regimento Interno do Senado Federal: Regras e práticas regimentais da Câmara Alta da República* vol 2 (Senado Federal 2021) 580.

(i) Waiving Tools

Waiving instruments may be used to work around points of order. In the US House of Representatives, members can adopt an expeditious route by suspending regular procedures,[100] save specified ones.[101] A single voting process is necessary for both suspension and passing, but the threshold amounts to two-thirds of those "present and voting, a quorum being present".[102] Together with debate and amendment limitations,[103] such a fast-track course precludes points of order related to the bill under consideration.[104] Another possibility involves the adoption of a "special order of business reported from the Committee on Rules".[105] Such a special rule, adopted by a majority in the House of Representatives,[106] may temporarily set aside current procedures "for the consideration of a particular bill".[107] Like suspension, a special rule may waive points of order,[108] except where constraints limit the committee's authority to issue such waivers.[109] Finally, in both the US House of Representatives and Senate, unanimous consent, provided that a quorum is present, may also provisionally suspend standing rules and bar points of order in relation to a particular legislative action.[110]

Waiving the regular process is also possible in the Brazilian Congress. In the Senate, unanimous consent regarding a specific matter may set aside the internal rules provided three-fifths of the senators are present.[111] Additionally, both chambers make use of motions which, if

[100] Johnson, Sullivan, and Wickham, Jr (n 86) 898 (ch 53 s 2); Elizabeth Rybicki, *Suspension of the Rules in the House: Principal Features* (Congressional Research Service Report No 98-314, 1 June 2025) 1 <https://crsreports.congress.gov/product/pdf/RS/98-314> accessed 5 October 2025.
[101] Johnson, Sullivan, and Wickham, Jr (n 86) 899 (ch 53 s 3).
[102] Rybicki (n 101) 1. See also RHR-118th r XV cl 1; Johnson, Sullivan, and Wickham, Jr (n 86) 897 (ch 53 s 1).
[103] Rybicki (n 101) 1.
[104] Johnson, Sullivan, and Wickham, Jr (n 86) 897, 899 (ch 53 ss 1 and 2); Rybicki (n 101) 1.
[105] Johnson, Sullivan, and Wickham, Jr (n 86) 855 (ch 50 s 4). For the competence of the House Committee on Rules, see RHR-118th r X cl 1(o). See also Walter J Oleszek, *The 'Regular Order': A Perspective* (Congressional Research Service Report No R46597, 6 November 2020) 31–33 <https://crsreports.congress.gov/product/pdf/R/R46597> accessed 5 October 2025.
[106] Johnson, Sullivan, and Wickham, Jr (n 86) 892 (ch 52 s 5).
[107] ibid 855 (ch 50 s 4).
[108] ibid.
[109] ibid 888 (ch 52 s 1).
[110] SRS r V cl 1 and r XII cl 4; Valerie Heitshusen, *Constitutional Points of Order in the Senate* (Congressional Research Service Report No R40948, 24 April 2017) 1 <https://crsreports.congress.gov/product/pdf/R/R40948> accessed 5 October 2025; Johnson, Sullivan, and Wickham, Jr (n 86) 855, 907 (ch 50 s 4 and ch 54 s 1); Walter J Oleszek, *The Rise of Senate Unanimous Consent Agreements* (Congressional Research Service Report No RL33939, 14 March 2008) 1, 4 <https://crsreports.congress.gov/product/pdf/RL/RL33939> accessed 5 October 2025.
[111] RISF art 412(III).

approved by a majority (a simple majority, in most cases[112]), may instigate expedited procedures. These procedures typically involve shortening deadlines, bypassing committee review, limiting debate, and restricting the opportunity to propose amendments.[113] Finally, regardless of a request, an automatic waiver applies for matters or situations specified in the procedural rules,[114] such as the authorisation to "the president of the Republic to declare war" or the approval of "a state of defense".[115] While unanimous consent or expedited procedures are in place, points of order referring to ordinary legislative procedures are not admissible. Yet, any member may still raise an objection if the rules governing the use of these waiving mechanisms are themselves misapplied.[116]

The overall purpose of such waivers of legislative procedures' is to accelerate the lawmaking process. In some cases, proposed measures do not generate significant opposition because they do not involve substantial legal or policy changes. In others, there may be broad consensus surrounding the matter at hand. Under such circumstances, subjecting a bill to the full sequence of ordinary legislative steps may be procedurally unnecessary or pointless.[117] Therefore, waiving the standard procedures and their corresponding points of order may be reasonable in some situations. This conclusion holds especially when the waiver is not imposed unilaterally by a presiding officer or majority faction but instead derives its legitimacy from rules that expressly authorise such procedural flexibility. In other words, as long as constitutional, statutory, or internal regulation on the waiving tools are themselves embedded in the legal framework, their use may be theoretically justifiable. That said, the potential for abuse remains, especially when the rules allow a simple majority to authorise waivers.[118] In such cases, it becomes legitimate to question whether legislative bodies should have such broad discretion to circumvent standard procedures, especially as this neutralises the points of order that ordinarily serve as the primary instrument of procedural oversight in legislatures.[119]

[112] For the distinction between the concepts of absolute and simple majorities for voting purposes, see Vermeule (n 19).
[113] RICD arts 152–155; RISF arts 336–337.
[114] CF 88 arts 64 and 223 para 1; RICD art 151(I) read with art 159 para 2; RISF art 353.
[115] CF 88 art 49(II) and (IV).
[116] RCCN art 131; RICD art 95; RISF arts 403 and 408.
[117] Johnson, Sullivan, and Wickham, Jr (n 86) 898, 907–908 (ch 53 s 2 and ch 54 s 1); Oleszek (n 111) 1.
[118] cf Bryan W Marshall, *Rules for War: Procedural Choice in the US House of Representatives* (Routledge 2005) 5.
[119] cf Bar-Siman-Tov (n 11) 819.

A reported episode in the 59th US Congress (1905-1907) illustrates how a procedural waiver may be deemed inappropriate, at least from the perspective of dissatisfied legislators.[120] The case involved authorisations in an appropriation bill in breach of Rule XXI of the House of Representatives. Specifically, members of the House of Representatives sought to insert provisions authorising salary increases for certain federal employees and the creation of new positions, despite the fact that the bill's formal purpose was limited to appropriating government funds.[121] To facilitate this outcome, a special rule from the Committee on Rules was used, which "contained a waiver for Rule XXI that would prohibit members from bringing points of order to strike provisions contained in the bill that had not been previously authorized".[122] In response, "several members complained that the waiver protecting unauthorized provisions unfairly advantaged the Committee on Appropriation at the expense of the rest of the House".[123] Today, special rules, including those suspending the standing regulations, have become a reliable tool for the majority in the US House of Representatives.[124]

(ii) Circumvention of Due Procedures

Although points of order and appeals are designed to uphold procedural integrity, they may also be repurposed to circumvent the formal requirements of the legislative process.[125] Such an outcome may follow when the pressure to approve a measure is high, but the procedures impose barriers that stand in the way. A clear example arises in the US Senate, where a two-thirds vote is required to close debates (cloture) on a proposal to amend the standing rules. Given this high threshold, passing new internal rules is often impractical. Nevertheless, an alternative, unorthodox strategy has occasionally been employed: "First, a senator makes a point of order, knowing that the point of order will fail under current rules. Next, the point of order fails, as expected. Finally, the senator appeals to the full Senate and a simple majority reverses the decision of the chair, thereby creating a new precedent".[126] This manoeuvre is typically feasible when the appeal itself

[120] Marshall (n 119) 105–106.
[121] ibid.
[122] ibid.
[123] ibid.
[124] ibid 105–115; Barbara Sinclair, *Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress* (5th edn, CQ Press 2017) 152–155.
[125] Gould (n 18) 1976–1977.
[126] ibid.

is non-debatable,[127] otherwise, the motion would be subject to the same supermajority cloture requirement that blocked the original proposal.[128] In short, through procedural mechanisms originally intended to enforce the rules, a simple majority may bypass the very same rules and achieve its objective.

Some cases illustrate the issue. A notable situation occurred in 1975, when the Senate modified the cloture rule to reduce the supermajority requirement from two-thirds to three-fifths, while still maintaining the higher threshold for proposals to amend the Senate's standing rules—consistent with the scenario outlined in the previous paragraph.[129] In 2013, "the Senate reinterpreted the cloture rule to lower the threshold for invoking clotures for all nominations *except* to the Supreme Court".[130] Then in 2017, this procedural reinterpretation was further extended to include nominations to the Supreme Court itself.[131] In both situations, the change meant that a simple majority would henceforth suffice to invoke cloture and proceed to a vote on nominees.[132] As one account of the 1975 episode concludes, "[t]he filibuster was modified, but only because the rules were broken".[133] It seems such a statement also applies to the nomination examples.[134] Although such nontraditional—arguably unlawful—procedural manoeuvres may serve to overcome short-term political deadlock, they raise serious concerns about the legitimacy of the legislative business over time.[135]

Legislatures' internal enforcement mechanisms—administered by their own members—may prove insufficient to ensure compliance with the rule of law in legislative procedure. On the one hand, due to political commitments or any other motive, those deciding the issues may opt for breaching the norms to facilitate a bill's approval.[136] On the other hand, the same procedural tool

[127] Richard S Beth, *Procedures for Considering Changes in Senate Rules* (Congressional Research Service Report No R42929, 22 January 2013) 12 <https://crsreports.congress.gov/product/pdf/R/R42929> accessed 5 October 2025; Christopher M Davis, *Eight Mechanisms to Enact Procedural Change in the U.S. Senate* (Congressional Research Service Report No IN10875, 2 December 2020) <https://crsreports.congress.gov/product/pdf/IN/IN10875> accessed 5 October 2025.
[128] Beth (n 128) 12; Davis (n 128) 2.
[129] Shepsle (n 43) 51–53.
[130] Valerie Heitshusen, *Senate Proceedings Establishing Majority Cloture for Supreme Court Nominations: In Brief* (Congressional Research Service Report No R44819, 14 April 2017) 1 <https://crsreports.congress.gov/product/pdf/R/R44819> accessed 5 October 2025 (emphasis in original).
[131] ibid.
[132] ibid.
[133] Shepsle (n 43) 53.
[134] ibid 53–54.
[135] ibid 54.
[136] Bar-Siman-Tov (n 11) 866.

may be used to circumvent the strategies of minority factions.[137] Accordingly, one might conclude that reliance on legislators alone may be inadequate for safeguarding procedural integrity in lawmaking.

D. NEUTRAL PLAYERS

> No man is allowed to be a judge in his own case, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judge and parties at the same time ... .[138]

Strengthening the role of neutral actors may provide a means of counteracting partisan distortions of procedural norms. In this context, neutrality does not imply personal detachment or apathy but rather a formally institutionalised position of impartiality—analogous to that of a referee in sport. The same rationale applies to judges in courts or to any situation where disputes arise, including procedural legislative struggles.

Even when nonpartisan chairing is unfeasible, other neutral actors may help ensure compliance with procedural rules. In particular, a legislative chamber's staff may play a critical role. Specialised personnel can enhance the legislative branch's autonomy and reinforce its institutional stability.[139] Nonpartisan professionals with strong educational backgrounds and familiarity with legislative procedures are likely to provide more reliable guidance. Even when their advice is not binding, well-reasoned arguments may persuade political actors to refrain from procedural deviations. Whether this outcome materialises depends largely on how protected these professionals feel from external or internal pressure.[140] Fixed terms or tenure and sufficient work autonomy are essential safeguards. Additionally, the legislators' freedom of speech should extend to chambers' nonpartisan staff in charge of delivering professional advice or opinions about legislative procedures.[141] While this privilege protects elected officials from "action in the courts

[137] ibid 865.
[138] James Madison, 'The Federalist No 10' in Isaac Kramnick (ed), *The Federalist Papers* (Penguin 1987) 124.
[139] cf Chafetz (n 72) 290–295.
[140] cf Frederick Schauer, 'Legislatures as Rule-Followers' in Richard W Bauman and Tsvi Kahana (eds), *The Least Examined Branch* (CUP 2006) 477.
[141] On the legislator's freedom of speech, cf Bill of Rights 1689 art 9 (England and Wales); CF 88 art 53; US Const. art I s 6 cl 1.

or any place outside of Parliament",[142] its rationale should also shield staff—not only externally,[143] but also within the legislative houses themselves. Such protection would enable advisors to speak with confidence, thereby contributing to the prevention of improper procedural manoeuvrers.

1. The US House of Representatives Office of Congressional Ethics as a Benchmark

The US Office of Congressional Ethics (OCE) provides a valuable benchmark for the potential role of neutral actors within legislatures. The office is tasked with "assisting the House in carrying out its responsibilities" with respect to disciplinary matters.[144] Established in 2008, the OCE emerged in response to widespread concerns about the effectiveness of entrusting representatives with the responsibility of policing their own conduct. Critics of such self-judgment processes highlight the risks of "conflict of interest"[145] and "partisan abuse of the process",[146] which have contributed to "[d]oubts about the fairness of the proceedings and public distrust".[147] Although the OCE's mandate is limited,[148] its activities appear to mitigate some of these concerns.[149] This effect is attributed to the office's structural design. Its board consists of "six 'outsiders'",[150] with half appointed "by the Speaker subject to the concurrence of the minority leader", and the other half "by the minority leader subject to the concurrence of the Speaker".[151] Board members serve "a four-year term",[152] and they can only "be removed from office for cause", through a joint decision by the appointing authorities.[153] Although decision-making power relating to misconduct remains with representatives,[154] the OCE contributes to the process through

[142] Oonagh Gay and Hugh Tomlinson, 'Privilege and Freedom of Speech' in Alexander Horne, Gavin Drewry and Dawn Oliver (eds), *Parliament and the Law* (Hart Publishing 2013).
[143] ibid 44. See also 'Freedom of Speech in Debate, Paragraph 13.2' in David Natzler and others (eds), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (25th edn, LexisNexis 2019) <https://erskinemay.parliament.uk/section/4581/freedom-of-speech-in-debate/> accessed 5 October 2025.
[144] House of Representatives Resolution (HRes) 895, 110th Congress, s 1(a) (2008) (enacted).
[145] Dennis F Thompson, 'Both Judge and Party: Why Congressional Ethics Committees Are Unethical' (1995) 13 The Brookings Review 44.
[146] Denis Saint-Martin, 'Gradual Institutional Change in Congressional Ethics: Endogenous Pressures toward Third-Party Enforcement' (2014) 28 Studies in American Political Development 161, 161.
[147] Thompson (n 146).
[148] cf Saint-Martin (n 147) 162.
[149] cf Chafetz (n 72) 263.
[150] Saint-Martin (n 147) 161.
[151] HRes 895, 110th Congress, s 1(b)(1) (2008) (enacted).
[152] Jacob R Straus, *House Office of Congressional Ethics: History, Authority, and Procedures* (Congressional Research Service Report No R40760, 5 August 2025) <https://crsreports.congress.gov/product/pdf/R/R40760> accessed 5 October 2025. See also HRes 895, 110th Congress s 1(b)(6)(A) (2008) (enacted).
[153] HRes 895, 110th Congress s 1(b)(6)(C) (2008) (enacted).
[154] Chafetz (n 72) 263; Saint-Martin (n 147) 162.

"preliminary investigations and ... referrals and recommendations to the House Ethics Committee".[155] The arrangement allegedly enhances the legitimacy of disciplinary procedures.[156] This conclusion would follow, not from OCE professionals' character, but from the fact that they would not be acting, theoretically at least, "on their own cause".[157]

While the OCE is not directly involved in overseeing the legislative process, it nonetheless offers meaningful insights into how compliance with internal rules might be promoted. The challenges that generate public distrust in systems of mutual oversight among politicians—especially regarding adherence to ethical standards—are similarly present in the context of lawmaking. Few would seriously dispute that "conflict of interest"[158] and "partisan abuse of the process"[159] may also arise during the passage of legislation. Indeed, in 2009, a member of the House of Representatives (Ron Paul) introduced a proposal intended "to ensure that Members have a reasonable amount of time to read legislation that will be voted upon."[160] Although the proposal concerned procedural safeguards in the lawmaking process, it notably sought to assign to the OCE the authority to investigate "allegations that a [House of Representatives] Member voted for any measure that violated" the proposed rule.[161] The author of that initiative thus appears to have viewed disregard for the prescribed time-lapse as a form of serious misconduct, and the OCE as an appropriate institutional body to address such procedural breaches.

2. US Congress Parliamentarians

The role of the parliamentarians[162] in the US House of Representatives and Senate also warrants close attention. Each chamber appoints one such official, "appointed by the majority party leadership".[163] Despite that, they are seen as "nonpartisan quasi-judicial figures".[164] That is so

[155] Saint-Martin (n 147) 161.
[156] cf ibid 171.
[157] Thompson (n 146).
[158] ibid.
[159] Saint-Martin (n 147) 161.
[160] HRes 216, 111th Congress (2009).
[161] ibid.
[162] Notice that, in the context of US Congress, the term "parliamentarian" refers not to a member of Parliament, as in other contexts, but to an official in charge of advising representatives and senators about legislative procedures.
[163] Gould (n 18) 1950.
[164] Gould (n 18) ibid.

because they are neither a representative nor a senator, and the appointment process is "in practice" a matter of "succession", filling the position with aides of previous parliamentarians.[165]

The parliamentarians' primary function is to provide "expert advice and assistance on questions relating to the meaning and application" of internal legislative rules[166]—particularly to the presiding officer during floor proceedings.[167] In addition, parliamentarians are responsible for recommending the appropriate committee referrals for legislative proposals.[168] Their role becomes especially prominent in the Senate during the budget reconciliation process,[169] in which senators modify legislation to meet budget constraints.[170] Since reconciliation is not subject to filibustering,[171] there is often pressure to insert provisions unrelated to budget matters. In such instances, it falls to the parliamentarian to determine "which provisions are extraneous, and which are not".[172] Ultimately, the House of Representatives and Senate parliamentarians, supported by professional staff, function as "procedural referees" whose guidance helps preserve the integrity of legislative procedure.[173]

3. The Limitations of the OCE and Parliamentarians

Both the US House of Representatives' OCE and the House of Representatives and Senate parliamentarians serve as examples of neutral actors that support compliance with legislative rules. Nonetheless, their institutional designs may fall short of what would be required for a more robust role. For instance, majorities can replace parliamentarians when their opinions are seen as obstructing legislative objectives—as occurred "several times between 1981 and 2001" in the US Senate.[174] As for the OCE, legal scholarship has proposed reforms aimed at reinforcing the office's role.[175] Notably, one suggested improvement involves attributing the office a more perennial status by establishing it through statute, rather than by a House of Representatives resolution (as is

[165] ibid 1950–1951.
[166] Heitshusen (n 165)
[167] ibid; Gould (n 18) 1965.
[168] Heitshusen (n 165) 1; Gould (n 18) 1969–1971.
[169] Oleszek and others (n 8) 76; Gould (n 18) 1971–1973.
[170] Oleszek and others (n 8) 71.
[171] ibid 74; Gould (n 18) 1975.
[172] Oleszek and others (n 8) 76.
[173] Gould (n 18) 1951.
[174] Gould (n 18) 1976; see also Anthony J Madonna, Michael S Lynch and Ryan D Williamson, 'Questions of Order in the U.S. Senate: Procedural Uncertainty and the Role of the Parliamentarian' (2019) 100 Social Science Quarterly 1343, 1355.
[175] Chafetz (n 72) 263–264; Straus (n 153) 25; Saint-Martin (n 147) 162.

currently the case).[176] More fundamentally, both the OCE and congressional parliamentarians face structural limitations in that their findings and opinions are not binding.[177] Formal decision-making power remains exclusively in the hands of elected representatives and senators, which is also the case in Brazil, as the next section will elaborate.

4. Drafters in the Brazilian Congress

In the Brazilian Congress, the responsibility for overseeing legislative procedures primarily rests with elected legislators. However, neutral actors also contribute to this function. Among them are specialised groups of nonpartisan civil servants, who are tasked with drafting legislation in accordance with their respective areas of expertise and providing technical advice to any legislator regarding the substantive matters under deliberation. Moreover, these professionals may also offer nonbinding guidance on procedural questions.[178] In this capacity, their institutional role seems to differ from that of parliamentarians in the US Congress. The involvement of Brazilian legislative drafters in procedural matters tends to be more decentralised, with less frequent interaction with the presiding officer. Nevertheless, their technical opinions—particularly when issued on politically sensitive matters—may provoke dissatisfaction among legislators. Notably, most of these civil servants enjoy protections of tenure,[179] and therefore cannot be easily dismissed for offering unwelcome advice. However, they may still face institutional or political pressures, including, at least in theory, unfounded legal actions or internal disciplinary proceedings, depending on the context.

Enhanced institutional safeguards for legislative drafters in the Brazilian Congress could build upon the United Kingdom (UK) and US models concerning the speech and debate clauses. In the UK, "the freedom of speech and debates or proceedings"[180] in Parliament applies not only to members but also "to officers of Parliament and non-members who participate in proceedings in Parliament".[181] Similarly, in the United States, "[a]n aide of a Senator or Representative is ... protected [under the speech and debate clause][182] when performing legislative acts which would

[176] Straus (n 153) 25; Saint-Martin (n 147) 162.
[177] Heitshusen (n 165) 1; Straus (n 153); Gould (n 18) 1979; Saint-Martin (n 147) 162.
[178] RICD art 262 sole para (IV and V); Regulamento Administrativo do Senado Federal (RASF) arts 29 and 30 <https://www12.senado.leg.br/transparencia/leg/rasf/view> accessed 5 October 2025.
[179] Lei 8112/1990 arts 21 and 22; RICD art 262 sole para (IV and V); RASF arts 5, 6(I), and 9.
[180] Bill of Rights 1689 art 9.
[181] Gay and Tomlinson (n 143) 44.
[182] US Const. art I s 6 cl 1.

be protected by the Member himself".[183] These guarantees function, at least in part, to shield legislative staff from judicial liability. A notable example is a case in which both members and staff of the US House of Representatives were held immune from a suit after publicising students' private information in a committee report.[184] A comparable approach in Brazil would require extending the national version of the speech and debate clause to include nonpartisan congressional drafters.[185] Nevertheless, this move would not suffice to immunise them from internal (or administrative) charges.

To prevent undue internal pressures and to strengthen their institutional standing, the same constitutional guarantees that shield legislative drafters from external judicial liability should also apply within the legislature. Given their professional responsibilities, these civil servants may be called upon to provide technical opinions amid intense political disputes, thereby displeasing one or more factions involved. A revealing example took place at the end of 2021, in the context of allegations that amendments to the federal budget law were being used as a form of comprehensive logrolling. In response to legal challenges brought by political parties, the Federal Supreme Court ordered the National Congress to disclose information concerning the matter, invoking the constitutional principle of publicity of official acts.[186] In reaction, the boards of the Chamber of Deputies and the Federal Senate jointly argued that compliance with the order was impracticable. They claimed that the budget mechanism in question was not formally institutionalised and that relevant documentation was dispersed across various sources.[187] However, in response to a request from a senator seeking technical clarification, a drafter issued an opinion that contradicted the official position of the legislative boards.[188] While it is beyond the scope of this discussion to determine which view was substantively correct, the episode illustrates the sensitivity of the

[183] William McKay and Charles W Johnson, *Parliament and Congress: Representation and Scrutiny in the Twenty-First Century* (OUP 2010) 491.
[184] *Doe v McMillan* 412 US 306 (1973).
[185] CF 88 art 53 (on legislators' guarantees).
[186] Supremo Tribunal Federal (STF), *Ação de Descumprimento de Preceito Fundamental (ADPF) 854* (Precautionary measure, endorsement, rapporteur Rosa Weber J, full court, 11 November 2021) DJe 225 (16 November 2021) 35 <https://www.stf.jus.br/arquivo/djEletronico/DJE_20211112_225.pdf> accessed 5 October 2025.
[187] *Ato Conjunto das Mesas da Câmara dos Deputados e do Senado Federal* (ACM) 1/2021 <https://www25.senado.leg.br/documents/59501/119895056/Ato+Conjunto+das+Mesas+1+de+2021/28e48918-667e-4d76-a9aa-43ab53f376a7> accessed 5 October 2025.
[188] Fernando Moutinho Ramalho Bittencourt, *Consultoria de Orçamentos, Fiscalização e Controle, Nota Técnica 152/2021, PRN 4/2021 e Ato Anexo - Compatibilidade com Decisão do STF na ADPF 854* (Senado Federal 2021) <https://static.poder360.com.br/2021/11/nota-tecnica-senado-rp9.pdf> accessed 5 October 2025.

drafter's position—situated at the intersection of political conflict over federal budget transparency and institutional tension between the legislative and judicial branches.[189] Regardless of any institutional embarrassment caused by the drafter's position, it is critical to note that the opinion was rendered at the formal request of a legislator, in connection with an issue under active parliamentary discussion. As such, granting professional staff immunity from potential internal disciplinary or political retaliation for offering technical advice—particularly when requested by members—is essential to safeguarding the deliberative function of legislators themselves.

In conclusion, there are institutional pathways through which legislatures may strengthen their adherence to procedural norms. Nonpartisan chairing, expert advice, and impartial dispute resolution emerge as important internal mechanisms, particularly when attributed to nonpartisan actors shielded by tenured positions or fixed mandates, and freedom of speech. Notwithstanding, the legislative branch's capacity may still be insufficient for protecting fairness within the lawmaking process.

5. The Role of the Judiciary

The judicial branch may, under certain circumstances, exercise an oversight function while a legislature is examining a bill.[190] In doing so, courts must avoid undue interference in the political domain. This may be achieved through a framework of measured deference, whereby the judiciary takes as its reference point the procedural norms set out in legislation—including the internal regulations of the legislative chambers themselves.

In my view, judicial intervention in procedural disputes within legislatures should be approached with caution. There is an undeniable risk that courts may become entangled in partisan political conflicts. Yet this risk can be mitigated. First, courts should confine their analysis to the established procedural rules, including those adopted by the legislative body itself. Examining such norms does not amount to a political intrusion. On the contrary, it is a core function of judicial review under the rule of law—analogous to cases involving civil procedure. Second, judicial

[189] Julia Lindner and Bruno Góes, 'Orçamento Secreto: Consultoria Do Senado Diz Que é Possível Divulgar Responsáveis Pelas Emendas de Relator' (*O Globo*, 29 November 2021) <https://oglobo.globo.com/politica/orcamento-secreto-consultoria-do-senado-diz-que-possivel-divulgar-responsaveis-pelas-emendas-de-relator-25297890> accessed 5 October 2025; Daniel Weterman and Breno Pires, 'Consultoria do Senado Contradiz Lira e Pacheco e Alega Ser Viável Revelar Nomes do Orçamento Secreto' (*Estadão*, 29 November 2021) <https://www.estadao.com.br/politica/consultoria-do-senado-contradiz-lira-e-pacheco-e-alega-ser-viavel-revelar-nomes-do-orcamento-secreto/> accessed 5 October 2025.

[190] cf CF 88 art 5(XXXV).

deference may be operationalised in two ways: through doctrinal standards or through institutional supermajority decision-making rules.[191] Under the doctrinal approach,[192] courts would intervene only when a legislature's procedural solution clearly amounts to "rule breaking."[193] Under the institutional approach, judges in collegiate settings could adopt supermajority voting thresholds as a prerequisite for overturning a legislature's interpretation of its own procedural rules.[194] In conclusion, a combination of adherence to legislative rules and interpretational deference offers a way for courts to adjudicate procedural challenges while minimizing the appearance of partisanship.

Judicial adjudication grounded in the specific rules governing legislative procedure may serve as an effective strategy for avoiding questionable incursions into the political domain. This approach stands in contrast to forms of judicial scrutiny that rely primarily on broad constitutional principles, such as the protection of rights or the notion of democracy.[195] When courts invoke such expansive concepts without anchoring them in procedural norms, they risk exercising a level of discretion more appropriately reserved for legislators. By contrast, assuming that lawmaking rules are designed to promote fairness, participation, and transparency, courts can advance these values indirectly and institutionally by applying the regulatory framework enacted by the legislature itself. In doing so, the judiciary would remain within its traditional jurisdictional boundaries, resolving disputes concerning the lawmaking process by enforcing specific provisions adopted by lawmakers.[196] Should this rule-based approach still raise concerns about judicial overreach, the principle of deference offers an additional safeguard.

Judicial deference brings the US *Chevron* ruling into the discussion.[197] The case concerned the interpretation of statutory provisions regulating air pollution from "major stationary sources".[198] At issue was whether the Environmental Protection Agency (EPA) could lawfully adopt a "plantwide definition" of such sources—treating "all of the pollution-emitting devices

[191] *Chevron USA Inc v Natural Resources Defense Council, Inc* 467 US 837 (1984) (*Chevron*); Jacob E Gersen and Adrian Vermeule, 'Chevron as a Voting Rule' (2007) 116 The Yale Law Journal 676.
[192] *Chevron* (n 193).
[193] Shepsle (n 43).
[194] Gersen and Vermeule (n 193).
[195] Rose-Ackerman, Egidy and Fowkes (n 3) 103, 178.
[196] Graça (n 2) 70–71, 80–81.
[197] *Chevron* (n 193).
[198] Clean Air Act Amendments of 1977, Pub L No 95-95, s 129(b), ss 172–173, 91 Stat 685, 745–748 (1977).

within the same industrial grouping ... [as] encased within a single 'bubble'".[199] A narrower reading of the statute would have required each individual pollution-emitting device to comply with environmental standards independently.[200] To resolve the dispute, the Supreme Court articulated a two-step framework. First, courts should ask "whether Congress has directly spoken to the precise question at issue".[201] If so, the clear legislative command must prevail.[202] "Rather [and second], if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute".[203] Applying this framework, the Court deferred to the EPA's interpretation.[204] A comparable logic could inform the judicial scrutiny of legislatures' procedural disputes, where constitutional, statutory, or internal legislative rules dictate how a procedural matter should be resolved.[205]

Alternatively, judicial deference may also be implemented through decision-making rules.[206] Admittedly, the *Chevron* model might leave excessive room for uncertainty.[207] For instance, how can one be certain whether a legislative body has straightforwardly tackled an issue? Or how broad is the range of permissible readings of a given rule?[208] In practice, it may prove more difficult to resolve such uncertainties than to proceed in the manner courts traditionally do: weigh competing interpretations and adopt the one deemed most persuasive in the eyes of the judges.[209] To address this tension, an alternative approach proposes preserving standard judicial reasoning while introducing supermajority voting thresholds in collegiate courts. Rather than adding new interpretive burdens to individual judges, this model fosters deference by requiring a qualified

[199] *Chevron* (n 193) 839.
[200] ibid.
[201] ibid 842.
[202] ibid 842-843.
[203] ibid 843.
[204] ibid 865.
[205] Gersen and Vermeule (n 193) 679, 692–693. Note that *Chevron* was overruled by the US Supreme Court, noting that "… *Chevron* fosters unwarranted instability in the law, leaving those attempting to plan around agency action in an eternal fog of uncertainty." *Loper Bright Enterprises v Raimondo* 144 S Ct 2244, 2272 (2024). Nevertheless, that does not affect the argument in this paper. An interpreter may think *Chevron*'s rationale should apply to no context and may prefer the alternative approach herein offered. Alternatively, another interpreter may think *Chevron*'s principles would still work well in the case of legislative procedures, a context that ultimately does not involve agency power.
[206] Gersen and Vermeule (n 193) 679, 692–693.
[207] ibid 680.
[208] ibid 690–692.
[209] ibid.

majority to override an agency's interpretation. For instance, in an eleven-member body, such as the Brazilian Federal Supreme Court, a number ranging from seven to eleven judges, depending on the institutional arrangement, would be necessary to overcome the challenged interpretation. Applied to legislative procedural disputes, such a proposal could enhance judicial deference to legislatures in cases regarding their procedural disputes.[210]

Finally, judicial oversight of legislative procedure should also be sensitive to the timing of its application. Legislators should be entitled to seek judicial intervention while the legislative process is still ongoing. Once the process has concluded and a bill has entered into force as law, however, the admissibility of judicial review depends on the legal nature of the procedural norm allegedly violated. Specifically, if the challenged procedural rule holds constitutional status, and if the jurisdiction recognises some form of constitutional review, post-enactment judicial scrutiny may be appropriate. In such cases, the review could be initiated by legislators or other constitutionally authorised actors, depending on the legal framework. Conversely, no statute should be invalidated solely on the grounds of an alleged breach of infra-constitutional procedural rules. In this case, the right to challenge the legislative process would be precluded. To allow such challenges would be to elevate those rules to constitutional rank,[211] a move that would not only raise profound legal controversies but would also jeopardise legal certainty by subjecting a wide range of laws to procedural invalidation. Accordingly, as a matter of prudence, judicial review of legislation already in force should be limited to alleged violations of procedural norms with constitutional authority. Infra-constitutional procedural rules should not form the basis for post-enactment annulment.

This consideration points to an additional constraint on judicial involvement in the legislative process: the question of standing. Prior to the enactment of a bill, the right to bring a procedural challenge before the courts should be limited to those actors who are institutionally entitled to raise comparable objections within the legislature itself. For example, if under parliamentary rules only sitting senators may raise points of order in the Senate, then only those senators should be allowed

[210] For a discussion on judicial supermajority decision-making, Mauro Arturo Rivera León, *Supermajorities in Constitutional Courts* (Routledge 2024). Although the book focuses on "constitutional adjudication when deciding on the constitutionality of statutes" (ibid 5), it might offer interesting insights for those concerned with the debate proposed in this article.

[211] José Alcione Bernardes Júnior, *O Controle Judicial Do Processo Legislativo* (Fórum 2009) 84–96; Cristiane Branco Macedo, 'A Legitimidade e a Extensão do Controle Judicial sobre o Processo Legislativo no Estado Democrático de Direito' (Master of Laws thesis, University of Brasilia 2007) 70.

to initiate judicial proceedings based on the same alleged procedural breach. The same logic applies to representatives in the Chamber of Deputies (House of Representatives). In other words, while the legislative process is ongoing, only lawmakers directly affected by a potential procedural irregularity should be admitted as plaintiffs in related judicial actions. This scenario is categorically distinct from constitutional challenges to statutes after enactment, where the relevant constitutional framework may authorise a broader range of plaintiffs to contest the constitutionality of a law on procedural or substantive grounds. By contrast, when the legislative process is still in progress—regardless of whether the challenged procedural rule is constitutional, statutory, or internal—the initiative to trigger judicial review should lie solely with legislators. If lawmakers, whether explicitly or implicitly, choose not to pursue judicial recourse in such instances, the scope for judicial intervention in parliamentary procedure is further limited.

E. CONCLUSION

> The first essential of deliberative assemblies is a system of parliamentary practice. In countries where the sense of political order is weak and self-control is wanting, popular government is exposed to the greatest dangers.[212]

Historical calls for orderly legislative procedures are even more urgent today, as contemporary democracies grapple with intensifying political conflict and the increasing complexity of state regulation. The overarching objective is to sustain a legislative environment in which fairness, transparency, and broad participation are not only valued in principle but operationalised through regulation and practice, thereby enhancing the legitimacy of enacted laws. Legislators should therefore design internal procedural rules with these normative aims in mind. Yet, the mere existence of such rules is not sufficient. Their effectiveness depends on sustained compliance.

In the face of growing social complexity and persistent disagreement across a wide range of issues, achieving consensus might only be feasible through aggregate decision-making mechanisms. Yet the legitimacy of their outcomes depends on whether the decision-making forum safeguards lawmakers' rights to fair participation and voting. Moreover, adherence to procedural rules contributes to the transparency of the legislative process. This is achieved through public access to debates and documents, as well as the structured organisation of communication flows

[212] MP Follett, *The Speaker of the House of Representatives* (Longmans, Green, and Co 1896) 1.

within the legislature. As institutions of representation, adherence to legislative due process (an expression of the rule of law) ultimately enhances democratic ideals.

Under such a reasoning, rule breaking cannot be admitted even under the majorities' acquiescence. In an ideal scenario, each legislator's commitment to institutional norms would be sufficient to prevent procedural deviations. However, amid intense political disputes, the incentives to bypass procedural safeguards to achieve short-term objectives may prove irresistible. For this reason, enforcement mechanisms are indispensable.

Legislatures are equipped with internal oversight instruments designed to keep procedural activity in alignment with applicable legal norms. Typically, presiding officers are empowered to direct legislative proceedings in accordance with these rules. However, such authority is not absolute: their conduct may be challenged by colleagues through points of order or similar motions. If the presiding officer's decision is deemed unsatisfactory, members can often appeal to the full chamber.

Yet these internal safeguards are not without vulnerabilities. On one hand, inertia, political pressures, or the strategic abuse of procedural waivers may weaken their effectiveness. On the other hand, points of order and appeals themselves may be misused, serving as tools to circumvent procedural constraints—such as supermajority requirements—rather than uphold them. These limitations reveal a deeper institutional concern: the reliance on procedural referees who are themselves politically invested in the controversies at stake. Considering this conflict of interest, additional external or neutral checks are necessary to preserve the integrity of the legislative process.

Neutral actors—agents without direct partisan affiliation—should play a meaningful role in the oversight of legislative procedures. Generally, legislatures may be supported by nonpartisan officers whose responsibilities include issuing technical opinions or offering advisory input in cases of procedural uncertainty or conflict. While such guidance may lack formal binding force, it can nonetheless constrain actors inclined to circumvent established rules, particularly when grounded in professional expertise and institutional credibility. To perform this function effectively, these officers should be protected from external and internal pressures. Accordingly, they should benefit from institutional guarantees such as fixed mandates, tenure, and freedom of expression. Crucially, their right to articulate procedural positions should be safeguarded by protections equivalent to those afforded to legislators under parliamentary privilege. Moreover,

such protection should extend not only beyond the legislature, shielding them from judicial reprisal, but also within it, preventing politically motivated disciplinary actions that could compromise their independence.

Finally, the judiciary should remain accessible to legislators who seek to challenge undue procedural manoeuvres. However, to preserve its legitimacy and avoid accusations of partisanship, judicial intervention should be guided in this regard by a set of institutional safeguards. First, courts should base their rulings not on broad constitutional principles, but on the specific procedural rules at issue, including those found in internal legislative regulations. Second, a degree of judicial deference should be observed—whether grounded in doctrinal standards or implemented through supermajority voting thresholds within collegiate courts. Third, challenges aimed at invalidating legislation post-enactment should be barred if based solely on violations of infra-constitutional procedural norms. Fourth and finally, standing to raise procedural claims during an ongoing legislative process should be limited to actors who are institutionally authorised to challenge such rules within the legislature itself.