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Table of Content

DOI: 10.14324/111.444.2052-1871.2312

Foreword

Virginia Mantouvalou*

Since its founding in 1826, UCL has been at the forefront of academic excellence, nurtured in a culture of academic freedom, and an environment of inquisitive and rigorous thinking. Originally known as The London University, it was the first university to be established in London, the first entirely secular university in the UK to admit students regardless of religion, and the first university in the UK to admit women on equal terms with men. In 2026, we mark 200 years of this remarkable institution and celebrate our community's exceptional research. I was fortunate to be editor of the commemorative volume *UCL at 200: Two Centuries of Insight and Impact*,[1] which provides a window into the incredible research conducted across all UCL Faculties. This book includes pieces involving the Faculty of Laws: Tim Causer on 'Jeremy Bentham's Auto-Icon', Alison Diduck on 'Women in Legal Education and the Legal Profession', George Letsas, Philip Schoffield and Kevin Toh on 'Jurisprudence' and David Ormerod on 'Legal Reform'. In such a dynamic Faculty, there is so much happening every day. These pieces illustrate some of the brilliant work of our community, but they of course do not exhaust everything that we examine and that is excellent about our work. They offer only a glimpse of the rich and diverse scholarship produced across the Faculty.

This volume of the UCL Journal of Law and Jurisprudence, published during our Bicentennial year, further underlines some of the great strengths of the academic community in the Faculty of Laws. It illustrates the outstanding academic leadership of post-graduate and PhD students as editors and the quality of work produced when academics, students and others work together. The pieces featured in this volume examine issues of tort law and environmental harms in France, the UK and New Zealand, sexual blasphemy in the case law of the European Court of Human Rights, legal pluralism in Malaysia, the conduct of UN peacekeepers and extraterritorial human rights obligations, and juryless trials in Northern Ireland, England and Wales. The volume is admirable for the breadth, depth and urgency of the issues examined, and for its geographical reach across regions and continents. It reflects the importance we place on

* Professor of Human Rights and Labour Law, and Co-Director of the UCL Institute for Human Rights.
[1] See further, Virginia Mantouvalou (ed.), *UCL at 200: Two Centuries of Insight and Impact*, UCL Press, 2026.

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pressing social issues, the role of the law in this context, and the imaginative solutions that the authors propose, all of which make it a fitting showcase of the Faculty's intellectual vitality.

The UCL Faculty of Laws is an extraordinary community. The editors, editorial board and authors should be congratulated for producing this new issue of the UCL Journal of Law and Jurisprudence, which exemplifies exactly that. There is no better way to celebrate our institution's 200 years than by showcasing such excellent work.

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Preface

Dear Readers,

We are proud to present Volume 15 of the UCL Journal of Law and Jurisprudence. The Journal has a longstanding tradition of providing a platform for important doctrinal and theoretical discussions across all areas of law. This year's Volume is no different. In collaboration with the Editorial Board, we have worked tirelessly to ensure this Volume would contribute to the Journal's rich tradition and would help mark another chapter in its history.

When appointing our Editorial Board, we were impressed by the level of interest across the UCL Laws student community, from undergraduate to postgraduate and research students. We were delighted to welcome 19 exceptional editors for this year's Volume of the Journal. We are especially grateful to the Editors, who have dedicated their time, expertise, and efforts to deliver Volume 15. The breadth and depth of the expertise we have been able to rely on in creating this Volume is unmatched. Our Editorial Board's expertise includes Human Rights, Environmental Law, Intellectual Property, Jurisprudence and Legal Theory, amongst other fascinating specialisms. We are also grateful to the Faculty Advisor of the Journal, Dr. Stavros Makris, for his support and guidance in creating Volume 15.

Finally, we are thankful to the UCL Faculty of Laws for continuing to support the work of the UCL Journal of Law and Jurisprudence, now a successful publication for past 15 years. We were thrilled to receive submissions from scholars based all over the world, from recent graduates to established academics. This level of reach and impact has only been made possible through the skill and commitment of successive editorial teams generously supported by the UCL Faculty of Laws.

This year is also very meaningful for University College London as an institution, marking its bicentennial anniversary. In honour of that, we decided to make Volume 15 a thematic issue of the journal. This year's theme - "Retrospective: Looking Back & Ahead" - serves as a reminder that in order to understand where legal scholarship can go, we must first appreciate where it has been before. That is exactly what the authors of this Volume have done. Each contribution takes legal scholarship further, which enables us as students, scholars, and academics to understand the direction of travel in legal research.

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Volume 15 begins with a moving Foreword from Prof. Virginia Mantouvalou, Professor of Human Rights and Labour Law at UCL Laws. This year, Professor Mantouvalou has edited a volume commemorating UCL's bicentennial anniversary,[1] and we are grateful that she has kindly contributed to Volume 15 of the Journal as well. Professor Mantouvalou reminds us of the value of legal scholarship and the impressive contributions that our University has made to law as a field of research and practice over the last 200 years.

In our first article, Mark Jhaveri analyses a timely topic of conversation: how we can respond to environmental harms caused by corporations. Jhaveri considers how English tort law might contribute to the broader legal toolkit in these complex cases.

After that, Eve Coffey then explores how the European Court of Human Rights in Strasbourg applies the 'margin of appreciation' in cases concerning sexual blasphemy, where the Court must contend with religion and sexual expression simultaneously. In such cases, Coffey finds tension in the Court's foundational commitment to freedom of expression.

In the third article, Saumya Verma considers legal pluralism in Malaysia through the Kelantan controversy, where the Federal Court found numerous provisions of Shari'ah law to be unconstitutional. Verma demonstrates that this case provides an excellent forum for thinking about the interactions of law and religion.

Isabella Gannon then brings us back into the realm of human rights law, considering sexual exploitation by UN Peacekeepers. Gannon's thought-provoking article explores extraterritoriality, especially with regards to the International Covenant on Economic, Social and Cultural Rights.

Finally, Joel Hames considers the Leveson Review and the impact of juryless trials on criminal justice in England and Wales. Through a comparative analysis with Northern Ireland, Hames offers a much-needed insight on perceptions of legitimacy and public participation in criminal justice.

All five authors have contributed novel ideas and approaches, enriching Volume 15 of the Journal – a Volume filled with fascinating legal research and nuanced argument that we are delighted to present you with. We are deeply proud to have played our part in continuing the

[1] See Virginia Mantouvalou (ed.), *UCL at 200: Two Centuries of Insight and Impact* (UCL Press, 2026), available at: < https://www.ucl.ac.uk/about/ucls-bicentenary/ucl200-publications/ucl-200-two-centuries-insight-and-impact> (accessed 22/06/2026).

DOI: 10.14324/111.444.2052-1871.2309

legacy of promoting innovative and brilliant scholarship in the UCL Journal of Law and Jurisprudence. We hope you enjoy reading this Volume, and thank you for the trust you place in us.

Enzo Rebelo, Kerri Bridges, and James Ball

Managing Editors, UCL Journal of Law and Jurisprudence

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A Tort Law Response to Corporate Environmental Harms?

Mark Benjamin Jhaveri*

Abstract: This article examines whether the English common law of torts can effectively address contemporary corporate environmental harms and whether such a role is normatively justified. While tort law initially appears unsuitable – due to its structural incompatibility with diffuse environmental damage, its retrospective focus, and litigation inefficiencies – this article proposes cautious optimism. First, drawing on lessons from the French Civil Code, the common law's historical adaptability, and a modern reassessment of causality, it contends that the doctrinal shortcomings of environmental tort law may be surmountable. Concurrently, it proposes that tort law's participation in a multi-dimensional legal response is justified through its capacity to complement environmental policy frameworks. Second, these claims are substantiated by recent Supreme Court jurisprudence from the United Kingdom (*Vedanta v Lungowe* and *Okpabi v Shell*) and New Zealand (*Smith v Fonterra*), which respectively recognise a duty of care owed by parent companies for environmentally harmful acts of their subsidiaries, and the potential for tortious liability in relation to corporate greenhouse gas emissions. Whilst conceding that imperfections remain, this article concludes that English tort law has an increasingly significant role to play in a holistic legal response to corporate environmental harms.

Keywords: *Tort Law; Corporate Environmental Harms; Parent Company Liability; Climate Change Litigation*.

* LLB Law with French Law (UCL); Certificate in French and International Law (Université Paris-Panthéon Assas). The author would like to thank Professor Maria Lee (UCL) for her comments on earlier drafts and guidance throughout the writing process. Any errors that remain are attributable exclusively to the author.

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I. Introduction

Can the English common law of torts effectively respond to environmental harms emanating from private sector companies, and if so, *should* it? Although orthodoxy suggests otherwise, this article argues that contemporary tort law is accumulating potential to form part of an effective, albeit imperfect, multi-dimensional solution to corporate environmental harms (CEHs).

Much attention has been placed on the tortious liability of governments for their shortcomings in today's environmental crisis.[1] Yet, a more company-centred analysis warrants attention due to mounting evidence demonstrating the magnitude at which private enterprises are contributing to environmental degradation. Strikingly, 22.3% of all fossil fuel and cement CO_2 emissions since the Industrial Revolution stem from merely 75 investor-owned companies,[2] emphasising the disproportionate role of corporate responsibility in climate change's escalating costs to both humans and nature.[3] Beyond global warming, corporations, particularly those involved in multinational resource-extraction activities,[4] directly pollute the environments they operate in, often with devastating local consequences. The Ogoniland in Nigeria provides a particularly stark example of how chronic oil spills from corporate pipelines have impaired livelihoods and necessitated the "largest terrestrial clean-up operation in history".[5]

Although domestic and international regulations attempting to address modern CEHs exist readily, questions about their effective implementation subsist.[6] Partially, this explains

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[1] Joana Setzer and Catherine Higham, 'Global Trends in Climate Change Litigation: 2024 Snapshot' (Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science 2024); see e.g. *Urgenda Foundation v State of the Netherlands* [2015] HAZA C/09/00456689, "*Affaire du Siècle"* Tribunal Administratif de Paris 3 févr. 2021 n°1904967-1904968-1904972-1904976, and *Minister for the Environment v Sharma* [2022] FCAFC 35.

[2] 'The Carbon Majors Database: Launch Report' (CarbonMajors 2024) <https://carbonmajors.org/briefing/The-Carbon-Majors-Database-26913> accessed 20 December 2024, 15.

[3] 'Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change' (IPCC 2023) <https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf> accessed 16 October 2024.

[4] Lisa Benjamin, 'Group Companies and Climate Justice' (2021) 74 Current Legal Problems 235.

[5] Daniel Leader, 'Human Rights Litigation against Multinationals in Practice: Lessons from the United Kingdom' in Richard Meeran and Jahan Meeran, *Human Rights Litigation against Multinationals in Practice* (Oxford University Press 2021), 59-60; see also United Nations Environment Programme, 'Environmental Assessment of Ogoniland' (United Nations Environment Programme 2011).

[6] United Nations Environment Programme, 'Environmental Rule of Law: First Global Report' (United Nations Environment Programme 2019), 3, describes environmental laws as existing "mostly on paper" as a result of "irregular, incomplete, and ineffective" enforcement. See also Michael Anderson, 'Transnational Corporations and Environmental Damage: Is Tort Law the Answer?' (2002) 41 Washburn Law Journal 399, 399; Maria Lee,

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why victims now turn more frequently to tort litigation to hold private enterprises accountable.[7] Still, balancing the swift rise of such actions[8] with the urgent need for impactful solutions to today's environmental difficulties,[9] it is crucial to evaluate whether tort law can – and should – play a meaningful role. Without such an assessment, society risks expending valuable energy towards a solution that may be fundamentally inadequate from the outset.[10]

Section II of this article explores various doctrinal difficulties that tort law faces in addressing environmental harms, querying whether these are sufficient to exclude tort law from a multi-dimensional solution altogether. Simultaneously, it is contended that tort law's place within a wider legal toolkit to combat contemporary CEHs is justified by its complementary function to regulatory regimes at both the national and international levels. This is followed by Section III, where recent common law developments are analysed to highlight the extent to which tort law is already surmounting the hurdles identified in Section II. Notably, the emergence of a parent company's duty of care (DoC) for environmental harms caused by its subsidiary and the recognition of potential liability for corporate greenhouse gas (GHG) emissions illustrate tort law's increasing capacity to face humankind's greatest challenge.

Environmental tort law has a long tradition of addressing CEHs, dating back to the Industrial Revolution.[11] However, as business operations have globalised and climate change has become increasingly pervasive, environmental claims have multiplied and diversified – they are therefore best analysed through distinct subcategories.[12] This article focuses on two relatively recent types of environmental tort litigation involving corporate defendants: *transnational* tort litigation, characterised by the "presence of a transnational element, such as

'Climate Change Tort' (2015), 2; Daniel Bertram, 'Environmental Justice "Light"? Transnational Tort Litigation in the Corporate Anthropocene' (2022) 23 German Law Journal 738, 741; Caroline E Foster, 'Novel Climate Tort? The New Zealand Court of Appeal Decision in Smith v Fonterra Co-Operative Group Limited and Others' (2022) 24 Environmental Law Review 224, 227; Benjamin (n 4), 241.

[7] Bertram (n 6), 741; Geetanjali Ganguly, Joana Setzer and Veerle Heyvaert, 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38 Oxford Journal of Legal Studies 841, 845-846; Lord Sales, 'Climate Change and the Future of Tort Law: Responding to Systemic Risk and Expanding Liability (Keynote Address Planning and Environment Bar Association Annual Conference 2025)' (2025) <https://supremecourt.uk/speeches/lord-sales-090525> accessed 9 May 2026, 2.

[8] Antonia Langford, 'Sharp Rise in Number of Climate Lawsuits against Companies, Report Says' *The Guardian* (27 June 2024) <https://www.theguardian.com/environment/article/2024/jun/27/sharp-rise-in-number-of-climate-lawsuits-against-companies-report-says> accessed 5 November 2024.

[9] IPCC, 'Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change' (Cambridge University Press 2022) <https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_FullReport.pdf> accessed 23 January 2025.

[10] Lee (n 6), 5.

[11] E.g. *St Helens Smelting Co v Tipping* [1865] 11 HLC 642; see Section II(B)(ii) for further discussion.

[12] See e.g. Setzer and Higham (n 1).

a foreign party or evidence located abroad";[13] and *climate change* tort litigation, in which climate change itself forms a "key consideration in legal argumentation and adjudication".[14] Three apex court decisions from the United Kingdom and New Zealand – *Vedanta Resources v Lungowe*,[15] *Okpabi v Shell*[16] and *Smith v Fonterra*[17]– are examined in depth as indicative and authoritative case studies of how the contemporary common law is navigating the distinct challenges each subcategory presents. The doctrinal proximity of New Zealand and English tort law[18] permits meaningful conclusions to be drawn specifically about the English common law's capacity to respond to CEHs. Engagement with the wider body of comparable developments in other jurisdictions,[19] whilst acknowledged, falls beyond the scope of this article.

II. *Prima Facie* Limitations of Tort Law in Addressing Corporate Environmental Harms

This Section explores a non-exhaustive list of factors explaining why environmental tort law – as an overarching category – appears constrained in its capacity to counter CEHs (A). Nonetheless, it subsequently reveals why tort law's participation in a multi-dimensional solution to CEHs should not be so easily dismissed (B).

A. Tort Orthodoxy's Underlying Deficiencies in Addressing Corporate Environmental Harms

The proposition that tort law is unsuited to respond effectively to CEHs can be distilled into three principal objections: structural limitations, a retrospective purpose, and, finally, practical and ethical concerns inherent in litigation.

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[13] Bertram (n 6), 740.
[14] Ganguly, Setzer and Heyvaert (n 7), 843.
[15] [2019] UKSC 20.
[16] [2021] UKSC 3.
[17] [2024] NZSC 5.
[18] Lord Sales (n 7), 7.
[19] For reference, see 'The Climate Litigation Database - The Climate Litigation Database' (*Columbia Climate School Sabin Center for Climate Change Law*) <https://www.climatecasechart.com> accessed 9 May 2026.

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(i) Structural Incompatibility of Tort Law and Corporate Environmental Harms

The "deep structure"[20] of tort law suggests it is poorly equipped to address CEHs. Tort orthodoxy generally requires "harm to recognised interests (…) held by one or a number of identifiable claimants, caused by one or a number of identifiable defendants".[21] This "correlative"[22] design underscores tort law's intrinsically *interpersonal* nature, necessitating a clear connection[23] between involved parties for liability to arise. At its core, therefore, lies what can be termed an element of "privateness".[24] It is undisputed that tort law effectively resolves straightforward situations where, for example, Company A has polluted a specific area, directly causing an identifiable injury to Person B's body or property. However, real-life CEHs rarely fit this well within this *private* framework of tort law;[25] often, there are "gradual release[s]" of toxic substances, multiple origins,[26] and harm to interests which may or may not be recognised in tort. Combined, these complexities expose tort law's structural limitations and threaten its ability to mitigate CEHs effectively.

A concrete hurdle stemming from the *privateness* of tort law is the difficulty of establishing causal connections between a defendant's actions and the environmental harm for which compensation is claimed.[27] For instance, Cane argued that it is commonly impossible to prove scientifically that a company's pollution has "increased the probability of the harm suffered by the amount" required by law.[28] Additionally, a multiplicity in the sources of pollution makes it unrealistic to discern one specific company's contributions as being significant enough to constitute *the* cause[29] of harm without "grossly distorting the meaning"[30] of the term. In fact, these concerns are reflected in a "primary wave"[31] of climate change tort

[20] Kim Bouwer, 'When Gist Is Mist: Mismatches in Small-Scale Climate Change Litigation' (2015) 27 Environmental Law & Management 11.
[21] Lee (n 6), 1.
[22] Bouwer (n 20).
[23] Lee (n 6), 1.
[24] ibid., 4.
[25] ibid.
[26] Mark Latham, Victor E Schwartz and Christopher E Appel, 'The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart' (2011) 80 Fordham Law Review 737, 753.
[27] Monika Hinteregger, 'Civil Liability and the Challenges of Climate Change: A Functional Analysis' (2017) Journal of European Tort Law 238, 240.
[28] Peter Cane, 'Are Environmental Harms Special' (2001) 13 Journal of Environmental Law 3, 15.
[29] ibid.
[30] Latham, Schwartz and Appel (n 26), 761.
[31] Ganguly, Setzer and Heyvaert (n 7), 849.

litigation, where courts were reluctant to acknowledge causation between corporate GHG emissions and harms for which claimants sought compensation. A notable example is *Kivalina v ExxonMobil,*[32] where Native Alaskans sought compensation for the threat climate change posed to their Arctic village. Their case was dismissed as they failed to prove that their injuries were "fairly traceable"[33] to ExxonMobil's GHG emissions. Per Judge Armstrong, there was "no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity, [or] group at any particular point in time".[34] This finding accentuates how the interplay of various sources underlying CEHs complicates the establishment of clear causal links – an essential feature of the *privateness* of tort law.[35]

An equally prevalent barrier relating to *privateness* is that tort law necessitates harm to a "recognised private interest".[36] Tort law relies on an arguably reductive understanding of recognised interests, limited predominantly to property and the physical body.[37] Consequently, tort compensation is not only restricted to injuries suffered by recognised interests, but these interests are also critical in regulating a person's legal standing to bring a claim.[38] In the environmental context, this menaces the usefulness of tort because, in principle, it means that claims can only be brought by persons who have suffered identifiable harm to their property or body as a result of environmental harm. While some commentators have explored the possibility of achieving comprehensive environmental protection through the enforcement of proprietary rights,[39] the environmental challenges which the world faces today go far beyond the scope of this strategy. Notably, key parts of the environment which corporations damage do not actually belong to anyone and therefore cannot be beneficiary to any legally enforceable right in tort – for example, the atmosphere, oceans, or wild creatures.[40]

(ii) The 'Backwards-Looking' Nature of Tort Law

[32] 663 F. Supp. 2d 863 (N.D. Cal. Sept. 30, 2009).
[33] ibid.
[34] ibid.
[35] See, however, a rebuttal of Cane and Judge Armstrong's conclusions at Section II(B)(iii).

[36] Jenny Steele, 'Private Law and the Environment: Nuisance in Context' (1995) 15 Legal Studies 236, 245.
[37] Lee (n 6), 1.
[38] Latham, Schwartz and Appel (n 26), 80; see e.g. *Hunter v Canary Wharf Limited* [1997] AC 655.
[39] E.g. Elizabeth Brubaker, *Property Rights in Defence of Nature* (Earthscan 1995) and Richard A Epstein, 'Property Rights, State of Nature, and Environmental Protection' (2009) 4 New York University Journal of Law & Liberty 1.
[40] Cane (n 28), 9. Note however the growing scholarship on "rights of nature", addressing this very issue – see e.g. Ralf Michaels and Daniel Bonilla Maldonado, *Global Legal Pluralism and Rights of Nature* (1. Auflage, Mohr Siebeck, 2026).

Tort law's efficacy in the environmental context has also been criticised from the angle that its overarching purpose makes it incompatible with resolving CEHs. Particularly, Lee underlines that actions in tort are generally retrospective;[41] the primary objective of tort law is to react[42] to existing harms instead of stopping them from occurring in the first place. This logic is re-emphasised by Latham, Schwartz and Appel, stating that the fundamental purpose of tort law is to provide *corrective justice* and restore injured parties to their original condition.[43]

The focus on financially restoring[44] injured parties to their original conditions, rather than restoring the environment *per se*, suggests that environmental tort law is an inefficient way of funding the clean-up of the environment and that this might be better achieved through systems of taxation or criminal fines.[45] Furthermore, while claims in tort could provide compensation for CEHs which have occurred *in the past*, the long-term solution to today's environmental crisis lies in the future. To slow down the irreversible consequences of climate change and corporate pollution, the law must provide prospective answers[46] that emphasise *prevention*; thus, if tort law only views this as a secondary objective,[47] there is a discrepancy between what tort law can achieve and what the environment actually *needs*.

Related to this is the point that parties commonly avoid tort litigation by reaching settlement agreements.[48] From a social justice perspective, settlements are an inadequate solution to CEHs because, in essence, they constitute a form of "hush money" that denies victims "public recognition of their injury" and "fails to expose corporations' illegal and predatory practises".[49] The implication is that tort law inadequately fulfils the function of publicly condemning corporations engaging in environmental wrongdoing, a critical component of deterring future CEHs. Consequently, even if it were accepted that tort law does not serve an exclusively backwards-looking purpose, the frequency of settlements insinuates that tort law could never execute a sufficiently forward-looking one either.

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[41] Lee (n 6), 1.
[42] Steele (n 36), 247.
[43] Latham, Schwartz and Appel (n 26), 746.
[44] See the "primacy of reparative damages" in John Gardner, 'Torts and Other Wrongs' in John Gardner, *Torts and Other Wrongs* (1st edn, Oxford University Press 2019) <https://doi.org/10.1093/oso/9780198852940.003.0001> accessed 3 December 2024.
[45] Cane (n 28), 11 and 14.
[46] Lee (n 6), 3.
[47] Latham, Schwartz and Appel (n 26), 754.
[48] See e.g. *Vedanta* (n 15).
[49] Bertram (n 6), 753.

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(iii) Impracticalities and Ethical Concerns Inherent in Tort Litigation

Moving away from theoretical difficulties, the process of tort litigation itself is often constrained by practical limitations, reducing its attractiveness in dealing with environmental issues. Steele describes tort litigation as extremely cost-burdensome, lengthy and unpredictable since courts are forced to establish liability based on rather ambiguous concepts such as "reasonableness".[50] With tort litigation relying on claimants coming forward, these factors may disincentivise victims from bringing claims to hold corporations to account in the first place.

Moreover, tort litigation's ability to resolve complex environmental disputes appears to have been hindered by insufficient judicial expertise. As acknowledged by the United States Supreme Court, judges, unlike policymakers, "lack the scientific, economic and technological resources" needed to achieve principled outcomes in cases of complex environmental harm.[51] Taking this further, the classification of diffuse environmental harms like climate change as "polycentric"[52] – requiring input from all stakeholders to balance various public policy objectives[53] – makes them particularly unsuitable for judicial resolution, where principally only the perspectives of the claimant and defendant are considered.[54] Thus, any attempts to address environmental harms of this kind through tort litigation seem overly simplistic,[55] bolstering the argument that deference towards the legislative and executive branches may be more appropriate.[56]

A final, moral argument against the involvement of tort litigation in response to CEHs relates to its potentially discriminatory effect on the world's poorest communities. Anderson[57] identified that damages awarded against tortfeasors are likely to be lower in poorer countries, given that factors such as wage levels – which reflect a lower "cost of human life" – are

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[50] Jenny Steele, '11. Nuisance' in Jenny Steele, *Tort Law: Text, Cases and Materials* (5th edn, Oxford University Press 2022), 712.
[51] *Connecticut v American Electric Power Co.*, 131 S. Ct. 2527, 2540 (2011). This concern persists despite contemporary efforts to re-educate the judiciary on climate related topics – e.g. 'Climate Judiciary Project' (20 November 2025) <https://cjp.eli.org/> accessed 9 May 2026 – as evidenced by *Smith v Fonterra* [2021] NZCA 552, [26].
[52] *Smith* (n 51), [26].
[53] Latham, Schwartz and Appel (n 26), 758.
[54] *Smith* (n 51), [26]; *Sharma* (n 1), [249]-[250].
[55] Latham, Schwartz and Appel (n 26), 762-763.
[56] *Sharma* (n 1), (Allsop J); *Smith* (n 51); *Kivalina* (n 32).
[57] Anderson (n 6), 419.

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routinely accounted for when calculating quantum. Consequently, if tort law were to become a prevalent mechanism in holding corporations accountable for environmental harms, the strategic advantage of paying reduced damages would incentivise multinational companies (multinationals) to move their most environmentally hazardous activities to developing countries, where the financial consequences of adverse judgments are reduced. The result is a race to the bottom, in which vulnerable communities bear a disproportionate share of the environmental costs of corporate activity – a problem further compounded by jurisdictional incompatibilities raised by tort law's application to multinationals, as is explored further in Section III(A). Whether tort law can provide an ethical framework for addressing CEHs in a globalised society is, therefore, genuinely questionable.

B. A Necessary Relegation of Environmental Tort Law?

Before the enactment of tailored domestic and international environmental statutes, tort law was a primary mechanism for mitigating CEHs.[58] However, following the logic proposed by Latham, Schwartz and Appel, the shortcomings discussed above seem to justify tort law's relegation in favour of customised regulatory regimes.[59] Despite this, a more optimistic perspective is advanced here. France is introduced as a comparative benchmark, offering an example of an existing jurisdiction with enhanced environmental tort law mechanisms. When considered alongside the common law's historical adaptability to environmental difficulties, and a modern reassessment of causality, a case can be made that the aforementioned challenges are surmountable. Moreover, a normative justification for tort law's response to CEHs is advanced, rooted in its ability to reinforce existing and future regulatory frameworks. Taken together, these factors suggest that tort law's ability to contribute to a multi-dimensional solution to CEHs is more promising than made out.

(i) France's Article 1246 Code Civil: A Modern Testament to the Viability of Environmental Tort Law

[58] Latham, Schwartz and Appel (n 26), 739.
[59] ibid., citing, *inter alia*, the Clean Water Act 33 U.S.C. §1251 et seq. (1972) (USA).

The marginalisation of environmental tort law in common law jurisdictions can be contrasted with the French civil law jurisdiction.[60] In 2016, the French Parliament introduced a novel cause of action in civil responsibility in Article 1246 of its Civil Code,[61] symbolically legitimising tort law's response to CEHs.[62] Article 1246 dramatically stretched the frontiers[63] of French environmental tort law by recognising "ecological harm" ("*le préjudice écologique*") as a legally protected interest, independent from harm to the physical body or property.[64] Moreover, the eligibility to bring environmental tort claims was widened to include "any person who has the standing and interest to bring proceedings",[65] followed by a non-exhaustive list of recognised governmental and environmental protection entities. In terms of remedies, the reform prioritises specific performance of environmental restoration over the payment of compensatory damages[66] and allows for preventative measures.[67]

These elements have significantly broken down the barriers of *privateness* in tort law and challenged its retrospective nature. While it is beyond the scope of this article to consider whether similar legislative reform in common law jurisdictions is warranted, the French Civil Code is nevertheless instructive in tempering the general scepticism directed at environmental tort law's capacity to address CEHs. Despite the fundamental differences between the two legal traditions, the French jurisdiction exemplifies that, with appropriate adaptations, tort law can indeed be meaningfully reconfigured to respond to environmental degradation. Ultimately, the English common law may not follow an identical path; yet, as Section III demonstrates, doctrinal evolution of this kind is neither imaginary nor unprecedented.

(ii) Lessons Learned from the Past: Previous Environmental Tort Successes at Common Law

[60] Maria Hook et al., 'Tort to the Environment: A Stretch Too Far or a Simple Step Forward?' (2021) 33 Journal of Environmental Law 195, 206-207.
[61] See Article 1246 Code Civil (FR), translated by Simon Taylor, 'Extending the Frontiers of Tort Law: Liability for Ecological Harm in the French Civil Code' (2018) 9 Journal of European Tort Law 81, 85: "any person responsible for ecological harm is liable to repair that harm."
[62] G.J. Martin, 'Réflexions autour du nouveau Régime de Réparation du Préjudice Écologique introduit dans le Code Civil par la Loi "Biodiversité"', *Mélanges en l'honneur de F. Collart-Dutilleul* (Dalloz 2017), 505.
[63] Taylor (n 61).
[64] Laurent Neyret, 'La Consécration Du Préjudice Écologique Dans Le Code Civil' [2017] Recueil Dalloz 924.
[65] Article 1248 Code Civil (FR); translated by Taylor (n 61), 86.
[66] Article 1249 Code Civil (FR).
[67] Article 1251 Code Civil (FR).

A revival of tort law in response to CEHs need not be restricted to France, for the common law has the equal potential to reanimate itself in the environmental sector. Tort law is not "isolated from social change"[68] and has already once contributed to addressing one of the toughest environmental crises in human history: the Industrial Revolution.[69] Throughout the 19th and 20th centuries, nuisance law developed to assist in tackling British industrial pollution:[70] outcomes in litigation, and the fear thereof, incentivised corporations to invest millions of pounds towards cleaner technologies, making Britain the first "broadly green industrial […] economy the world has known".[71] While the gravity of today's environmental crisis may well be more burdensome than that of the Victorian era, the underlying difficulties are similar in nature.[72] Ultimately, if the common law has navigated this terrain before, there is reason to believe that today's environmental challenges might too be addressable, at least in part, by tort law.

(iii) A modern reappraisal of causation in environmental tort law

Although an extensive discussion of causation lies beyond the scope of this article,[73] it is worth mentioning how advancements in attribution science have improved our ability to draw causal links between environmental harms and the actions of specific corporate actors. Modern scientists are not only able to pinpoint the amount of historical GHG emissions which are attributable to a single company, but also map probabilistically the cause-and-effect relationships between anthropogenic climate change and specific, quantifiable harm resulting therefrom.[74] In response to the concerns highlighted in Section II(A)(i), it follows, therefore, that tort law's *private* structure might no longer hinder it from mitigating CEHs to the same extent as initially believed.

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[68] Lee (n 6), 3.
[69] *Smith* (n17), [156].
[70] Ben Pontin, 'Nuisance Law and the Industrial Revolution: A Reinterpretation of Doctrine and Institutional Competence' (2012) 75 The Modern Law Review 1010.
[71] Ben Pontin, 'The Common Law Clean Up of the "Workshop of the World": More Realism About Nuisance Law's Historic Environmental Achievements' (2013) 40 Journal of Law and Society 173, 197.
[72] David Bullock, 'Public Nuisance and Climate Change: The Common Law's Solutions to the Plaintiff, Defendant and Causation Problems' (2022) 85 The Modern Law Review 1136, 1159-1160.
[73] See instead e.g. Lisa Benjamin and Sara Seck, 'Causation' in Margaretha Wewerinke-Singh and Sarah Mead, *The Cambridge Handbook on Climate Litigation* (1st edn, Cambridge University Press, 2025).
[74] Sophie Marjanac and Lindene Patton, 'Extreme Weather Event Attribution Science and Climate Change Litigation: An Essential Step in the Causal Chain?' (2018) 36 Journal of Energy & Natural Resources Law 265 and 'The Carbon Majors Database: Launch Report' (n 2).

Equally significant is tort law's tendency to accept alternative causal tests to the 'but-for' standard where issues of multiple causation arise. For example, it has been suggested that the "material contribution to the risk of injury" test, as advanced in *Fairchild v Glenhaven Funeral Services*,[75] could inspire future environmental tort claims.[76] For climate change tort litigation specifically, there is a case to be made for a "market-share"-based test following *Sindell v Abbott Laboratories.*[77] Overall, continued improvements in attribution science and future adjustments in causal standards could drastically lower the evidential barriers faced by litigants in proving causation, paving the way for tort law to play a more active role in addressing CEHs.

(iv) The positive case for tort law's contribution to the legal response to CEHs

So far, Section II(B) has sought to challenge the proposition that tort law is ill-suited to respond to CEHs. Now, however, a normative argument as to why tort *should* in fact contribute to mitigating CEHs is proposed.

As Kysar observes, academic debate tends to oversimplify the possible responses to CEHs by viewing tort law and regulatory regimes as mutually exclusive alternatives.[78] This article rejects that framing. The argument advanced here is not that tort law is better positioned to address CEHs than other sources of law; rather, it is that tort law should participate in a multi-dimensional legal solution to CEHs, acting as a complement to existing and future regulatory regimes.

Two justifications support this position. The first is that tort law effectively provides a safety net for victims of CEHs where regulatory regimes fail to deliver effective justice.[79] Unfortunately, domestic environmental regulations and international treaties have not, by themselves, proven capable of effectively curbing CEHs. At the international level, the 2015 Paris Agreement is illustrative: while 195 countries agreed to use best endeavours to limit the

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[75] [2002] UKHL 22.
[76] Ganguly, Setzer and Heyvaert (n 7), 857.
[77] 26 Cal 3d 588 (1980); see Daniel Grimm, 'Global Warming and Market Share Liability: A Proposed Model for Allocating Tort Damages among CO2 Producers' (2007) 32 Columbia Journal of Environmental Law 209.
[78] Douglas A Kysar, 'The Public Life of Private Law: Tort Law as a Risk Regulation Mechanism' (2018) 9 European Journal of Risk Regulation 48, 63.
[79] Jim Rossi and JB Ruhl, 'Adapting Private Law for Climate Change Adaptation' (2022) 76 Vanderbilt Law Review 827, 842; Keith N Hylton, 'When Should We Prefer Tort Law to Environmental Regulation?' (2001) 41 Washburn Law Journal, 534; Lord Sales (n 7), 17.

global temperature increase to 1.5C° above pre-industrial levels,[80] not a single country is currently on track to meet this commitment.[81] Exacerbating this is the absence of any effective accountability mechanism for countries that fall short of their targets,[82] seriously undermining the prospect of meaningful implementation. In fact, countries retain the capacity to simply withdraw from the Agreement entirely where this conflicts with national policy.[83]

Similarly, domestic regulatory mechanisms are equally susceptible to political volatility. For example, the number of civil lawsuits filed against polluters by the U.S. Department of Justice reached a historic low in the first year of President Trump's second administration – declining by 76% compared to President Biden's first year – despite continued instances of air and water pollution.[84] This must be viewed alongside sustained budget cuts to the U.S. Environmental Protection Agency,[85] which may further threaten the institutional capacity required for effective enforcement. More systemically, policymakers are subject to sustained lobbying pressure[86] from corporate interest groups, a pressure to which individual litigants are not exposed in the same way. As a result, well-intentioned regulations to mitigate CEHs are often watered down during the legislative process.[87]

These observations are not intended to suggest that regulatory approaches are inappropriate. Instead, they merely serve to show that the existing frameworks are imperfect and could benefit from supplementary enforcement mechanisms. Tort law is well-placed in this regard. By nature, tort law adapts incrementally over time[88] and may therefore prove a more stable form of recourse for victims than regulatory regimes that remain vulnerable to political fluctuations. Furthermore, tort law provides a "decentralised and citizen-empowering means of

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[80] Article 2(1)(a).
[81] 'Countries' (*Climate Action Tracker*) <https://climateactiontracker.org/countries/> accessed 11 May 2026.
[82] Imad Antoine Ibrahim, Sandrine Maljean-Dubois and Jessica Owley, 'The Paris Agreement Compliance Mechanism: Beyond COP 26' (2021) 11 Wake Forest Law Review Online 147.
[83] See e.g. the United States' departures under both Trump administrations; Dharna Noor, '"Abdication": Trump Takes US out of Paris Climate Agreement for a Second Time' *The Guardian* (27 January 2026) <https://www.theguardian.com/us-news/2026/jan/27/trump-withdraws-paris-climate-agreement> accessed 13 May 2026.
[84] Keene Kelderman, Vincent Bregman and Jen Duggan, 'Declining Environmental Enforcement in Trump's Second Term' (Environmental Integrity Project 2026) <https://environmentalintegrity.org/reports/declining-environmental-enforcement-in-trumps-second-term/> accessed 14 May 2026, 1.
[85] ibid., 9.
[86] Hylton (n 79) 520-524; Pamela Carina Tolosa, 'Advantages and Restrictions of Tort Law to Deal with Environmental Damages' (2014) 38 Revue générale de droit 111, 119.
[87] See e.g. 'Preliminary Legal Analysis – From Ambition to Erosion: How Omnibus I Rolls Back the CSDDD' (European Coalition for Corporate Justice 2026) <https://corporatejustice.org/publications/preliminary-legal-analysis-from-ambition-to-erosion-how-omnibus-i-rolls-back-the-csddd/> accessed 11 May 2026 for a description of how the EU Corporate Sustainability Due Diligence Directive has been diluted by the Omnibus I reform.
[88] Rossi and Ruhl (n 79), 855.

formulating and addressing regulatory goals",[89] enabling individuals to act as enforcers of their own rights rather than "passive beneficiaries"[90] of public law. This could prove especially valuable in contexts where enforcement of public laws and international treaties is waning.

The second justification for tort law's participation in a broader legal response to CEHs relates to the indirect benefits derived by regulatory regimes from tort litigation. As purported in Section II(A)(i), tort law is generally viewed as a *private* form of law, concerned predominantly with the bilateral relationship between injured party and wrongdoer, and therefore inappropriate for addressing societal problems such as CEHs. Again, however, this characterisation is overly simplistic. Despite its private law foundations, tort law leads a "public life" of its own,[91] generating spontaneous spillover-benefits for public law regulations. In particular, tort litigation can serve as a "catalyst for and even inform future public law solutions" to CEHs.[92]

At its core, environmental tort litigation represents a one-of-a-kind information-gathering exercise. Compared to public agents, private litigants have considerably stronger incentives to amass the information needed to vindicate their rights when these have been infringed.[93] Moreover, a claimant generally "knows more about his injury than any other party", while a "defendant knows more about his burden of precaution than anyone else".[94] At trial, courts therefore draw on a wealth of accumulated evidence – for example, disclosed documents, expert testimony and witness accounts – to determine which account of events is more convincing.[95]

Naturally, one might ask how this is relevant to the mitigation of CEHs. Although the main output of tort litigation is an adjudicative decision of the merits of a claim between the parties, its effects extend far beyond the individual dispute. In the first instance, environmental tort litigation draws public attention to specific problems and inspires regulators to act.[96] More importantly, the information generated throughout the litigation process can subsequently be leveraged to shape the designs of future environmental regulation. For example, Kysar explains

[89] Kysar (n 78), 54.
[90] ibid., 57.
[91] ibid., 50.
[92] Rossi and Ruhl (n 79), 843.
[93] Kysar (n 78), 54; Tolosa (n 86), 118.
[94] Hylton (n 79), 525.
[95] ibid.
[96] Kysar (n 78), 62.

how the expertise amassed throughout the *Renken v Harvey Aluminium Inc*[97] litigation directly informed the subsequent creation of modern air pollution legislation in the United States.[98] Consequently, by serving as a "laboratory for policy experimentation",[99] the common law earns a defensible place within the broader legal response to CEHs. Indeed, the development of the most effective environmental regulations may ultimately depend[100] on tort law.

III. Rethinking Modern Tort Law's Response to Corporate Environmental Harms

Drawing on three Supreme Court decisions, this Section demonstrates how contemporary tort law is overcoming the barriers discussed in Section II and, therefore, might contribute meaningfully to addressing CEHs. The argument is developed by reference to the two subcategories of environmental tort law identified in the introduction – *transnational* and *climate change* tort litigation against corporations – examining, in turn, the emergence of a parent company DoC for environmentally harmful acts committed by its subsidiary (A) and the potential recognition of tortious liability for corporate GHG emissions (B).

A. Transnational Tort Litigation in Action: The Parent Company Duty of Care for Environmentally Harmful Acts of Subsidiaries

Modern company law's principles of separate personality and limited liability treat companies as distinct legal entities from their shareholders[101] and shield shareholders from personal liability for corporate debts.[102] While these principles promote entrepreneurialism and investment,[103] they also provide the "ingredients for a cocktail of externalising environmental

[97] 226 F Supp 169 (D Or 1963).
[98] Kysar (n 78), 58-64.
[99] Rossi and Ruhl (n 79), 879.
[100] Kysar (n 78), 63.
[101] *Salamon v A Salomon & Co Ltd* [1897] AC 22.
[102] Ben Pettet, 'Limited Liability - A Principle for the 21st Century?' (1995) 48 Current Legal Problems 125; John Armour and others, 'What Is Corporate Law?' in Reinier Kraakman and others, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, Oxford University Press 2017).
[103] Pettet (n 102), 142.

[…] harm, moral hazard and a catalogue of corporate irresponsibility”.[104] This statement applies particularly to multinationals which tactically organise themselves in group structures.[105] By setting up subsidiaries for undertaking environmentally dangerous activities, parent companies may[106] reap the financial benefits from those activities while simultaneously insulating themselves from any liability. To hold the parent liable in such circumstances would require piercing the corporate veil,[107] a remedy which the courts allow only in the most limited circumstances.[108] The corporate veil is supplemented by a “jurisdictional veil”[109] since home-state courts of multinational parents lack jurisdiction over subsidiaries’ foreign activities, while, simultaneously, host-state courts in which the subsidiaries operate lack jurisdiction over the parent.[110] In addition, subsidiaries are often incorporated in countries with weaker governance structures, where victims’ hopes of obtaining justice locally for CEHs are often paralysed[111] by delays in the court system, corruption, claim-funding difficulties and/or undercapitalised subsidiaries.[112] Cumulatively, these factors make it practically impossible for foreign victims of CEHs to obtain any effective remedy against multinationals. Two recent UK Supreme Court (UKSC) decisions demonstrate, however, that transnational tort litigation may provide a solution to this difficulty.

(i) The Decisions in Vedanta and Okpabi

In *Vedanta,*[113] Zambian citizens brought proceedings against Vedanta Resources (Vedanta), a UK-domiciled company, and its subsidiary Konkola Copper Mines plc (KCM), incorporated in Zambia. The claimants alleged that their livelihoods were damaged by the discharge of toxic materials into local watercourses from KCM’s copper mine. Consequently, the claimants argued that Vedanta owed them a DoC for the environmentally harmful acts of its subsidiary,

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[104] Carrie Bradshaw, ‘Corporate Liability for Toxic Torts Abroad: Vedanta v Lungowe in the Supreme Court’ (2020) 32 Journal of Environmental Law 139, 139-140.
[105] Benjamin (n 4), 252.
[106] This strategy’s permissibility was confirmed in *Adams v Cape Industries plc* [1990] (Slade LJ).
[107] Bradshaw (n 104), 140.
[108] *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [35].
[109] Peter Muchlinski, ‘Limited Liability and Multinational Enterprises: A Case for Reform?’ (2010) 34 Cambridge Journal of Economics 915, 920.
[110] Anderson (n 6), 402.
[111] Leader (n 5), 60.
[112] Bradshaw (n 104), 140.
[113] *Vedanta* (n 15).

since Vedanta professedly exercised a "high level of control and direction"[114] over KCM's mining operations and compliance with environmental standards. In asserting that there was "nothing special" about the parent/subsidiary relationship,[115] Lord Briggs rejected that parent company liability constituted a "novel and controversial extension of the boundaries of the tort of negligence".[116] Rather, parent company liability for the actions of its subsidiaries was traceable to duties arising towards third parties.[117] Therefore, whether a parent company DoC would arise depended not on the traditional *Caparo*[118] three-limbed test, but on "the extent to which […] the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the […] the relevant operations […] of the subsidiary".[119] The UKSC inferred from Vedanta's environmental group-wide policies that it assumed responsibility "for the maintenance of proper standards of environmental control"[120] over KCM's activities. Therefore, it was held to be arguable that Vedanta owed the claimants a DoC for the environmental pollution caused by its subsidiary.

In *Okpabi,*[121] the Ogale and Bille communities in Nigeria brought claims against Royal Dutch Shell (RDS), a UK-domiciled parent company, and its subsidiary, Shell Petroleum Development Company of Nigeria (SPDC), incorporated in Nigeria, in respect of widespread oil spills originating from pipelines operated by the latter. Similar to *Vedanta*, the claimants alleged that RDS owed them a DoC since it exercised control over and/or assumed responsibility for SPDC's operations by promulgating and imposing mandatory environmental policies.[122] The UKSC validated that the liability of parent companies should not be approached as a novel category of DoC,[123] and that instead, the true test resided in the extent to which the parent took over and/or shared with the subsidiary the management of the oil-pipeline operation.[124] Most importantly, the UKSC overturned the Court of Appeal's[125] finding that the promulgation of environmental group policies was in itself insufficient to demonstrate

[114] ibid., [3].
[115] ibid., [54].
[116] ibid., [46].
[117] ibid., [49]; reference made to *Home Office v Dorset Yacht* [1970] AC 1004.
[118] *Caparo Industries v Dickman* [1990] (Lord Bridge).
[119] *Vedanta* (n 15), [49].
[120] ibid., [61].
[121] *Okpabi* (n16).
[122] ibid., [7].
[123] ibid., [151].
[124] ibid., [147].
[125] *Okpabi v Shell* [2018] EWCA Civ 191, [89].

control and thereby give rise to a parent DoC since this would be inconsistent[126] with *Vedanta*. Applying these principles, the court relied on internal documents to find that the parent was not only aware of the environmental damage caused by its subsidiary, but also that the promulgation of group-policies evidenced the parent's assumption of responsibility in managing its subsidiary's oil-pipelines. On this basis, the court held that a parent DoC could indeed be warranted.[127]

(ii) The Parent Company Duty of Care: A Justified Response to Corporate Pollution

Although the decisions above were jurisdictional in nature,[128] they cemented the proposition that a UK-domiciled parent company may be liable, via the tort of negligence, for environmentally harmful acts committed by its foreign-incorporated subsidiaries. This development marks a significant step forward in transnational tort law's ability to meaningfully respond to CEHs because it grants foreign victims a unique opportunity to obtain economic compensation, which otherwise would be hindered by the corporate and jurisdictional veils. As indicated by Bradshaw, the decisions lay the foundations for claimants to outmanoeuvre the traditional constraints of company law by "skirting"[129] the corporate veil – as opposed to piercing it – in instances where the parent company has exercised sufficient control over the relevant subsidiary activity.

This alternative route to compensation via tort law is defensible. First, given that the decision-making nucleus in multinationals often resides at the parent level, a rigorous application of separate personality seems artificial when subsidiaries are clearly carrying out the former's instructions.[130] The artificiality of separate personality is further encapsulated when accounting for the anomaly that financial gains are transferable within the group while legal liability is not. Second, the appropriateness of limited liability in the context of environmental pollution is questionable. According to Benjamin, "limited liability does not eliminate business risk, but instead transfers it [from entrepreneurs] to creditors."[131] While a contract creditor, for example a bank lender, will be compensated through the payment of

[126] *Okpabi* (n 16), [143].
[127] ibid., [153]-[159].
[128] Relating to a determination under Civil Procedure Rules Part 6 Practice Direction B para 3.1(3)(a).
[129] Bradshaw (n 104), 141.
[130] Muchlinski (n 109), 922.
[131] Benjamin (n 4), 250.

interest for taking on risk when transacting with a limited liability company, this does not apply to victims of environmental harm. They are "involuntary creditors"[132] who have not bargained with the company for shouldering the consequences of a company's environmental pollution.[133] The fact that tort victims bear the costs of CEHs without receiving anything in return demonstrates how the economic justifications advanced in favour of limited liability in respect to contract creditors do not carry the same weight – if any at all – in respect to involuntary tort victims.[134] For the law to allow companies to externalise their environmental risk onto involuntary victims and avoid any resulting liability via group structures is, therefore, not only economically but also morally dubious.[135] As such, the solutions in *Vedanta* and *Okpabi* signal a much-needed shift in attitude by the courts, whereby companies could be compelled to internalise[136] the environmental costs of their ventures.

Although the remedies sought in *Vedanta* and *Okpabi* consisted of monetary damages, the cases illustrate tort law's ability to serve not only a corrective function but also act as prophylaxis, thereby aligning tort law's overarching purposes with the necessities of preventative solutions to the modern environmental crisis. In the aftermath of the decisions, multinationals must reconsider similarly hazardous environmental practices to avoid the legal risk their parent companies may incur for damage caused by their subsidiaries. Following the logic proposed by Anderson, *Vedanta* and *Okpabi* "send out what are effectively price signals to deter or discourage similar polluting or degrading activities by other actors in the market".[137] Even so, the practical consequences of *Vedanta* and *Okpabi* in respect to modern corporate governance transcend the legal risk of an adverse judgment.

Beyond litigious risk, multinationals also face a variety of financial, reputational and transactional risks when similar ESG claims are brought against them.[138] Defendant companies find it harder to access financing and will see their valuations negatively impacted. For example, stock prices of Carbon Majors[139] on average took a hit of -0.57% following a case

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[132] Muchlinski (n 109), 918.
[133] Pettet (n 102), 153.
[134] ibid.
[135] Benjamin (n 4), 251; Andrew Sanger, 'Parent Company Duty of Care to Third Parties Harmed by Overseas Subsidiaries' (2019) 78 The Cambridge Law Journal 486, 489-490.
[136] Monika Hinteregger, 'Environmental Liability' in Emma Lees and Jorge E Viñuales, *The Oxford Handbook of Comparative Environmental Law* (Oxford University Press 2019), 1042; Rossi and Ruhl (n 79), 854.
[137] Anderson (n 6), 408.
[138] Neil Blake and Keillor Joanne, 'Webinar: Transnational Torts and Parent Company Liability' (*Herbert Smith Freehills*, 28 January 2022) <https://www.herbertsmithfreehills.com/notes/litigation/2022-01/webinar-transnational-torts-and-parent-company-liability> accessed 22 December 2024.
[139] For a comprehensive list, see 'Entities' (*CarbonMajors*) <https://carbonmajors.org/Entities> accessed 20 December 2024.

filing and -1.50% following an unfavourable judgment in climate litigation.[140] Similarly, the reputational damage a defendant company suffers may impact its ability to complete corporate transactions, as is best exemplified by Unilever's difficulties in divesting its black-tea business.[141] Together, these factors constitute an effective mechanism to deter multinationals from engaging in environmentally harmful activities since there are real consequences they risk facing if involved in related tort litigation. Per analogy to the Industrial Revolution as discussed in Section II(B)(ii), companies are incentivised to invest in cleaner technologies[142] to avoid the adverse consequences above, demonstrating that the common law of torts is not only useful in *responding* to but also shows potential in *preventing* future CEHs.

Further, the cases illustrate that tort law's response to CEHs may not be as constrained by its interpersonal structure. Particularly, the UKSC's emphasis on parental control and/or responsibility over the subsidiary in assessing whether a parent company DoC emerges could expand the geographical frontiers in which duties arise.[143] Originally, a DoC was restricted to situations where the claimant and defendant were in a sufficiently proximate relationship to fall within the "neighbourhood" principle.[144] However, *Vedanta* and *Okpabi* confirm that whether a parent company DoC arises depends not on the direct proximity between a parent company and victim, but rather on the extent to which the parent exerts control/responsibility over the subsidiary.[145] Henceforth, once sufficient correlativity between a parent and subsidiary is made out,[146] a parent company DoC may arise *indirectly* towards any third parties who suffer detriment as a result of the subsidiary's environmentally harmful activities, provided that detriment flows from the parent's assumption of responsibility over those activities.[147] Crucially, this holds true despite victims of transnational harm being distantly located *in space*

[140] Misato Sato et al., 'Impacts of Climate Litigation on Firm Value' (Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science 2023) Working Paper 421/397, 1.
[141] Andres Schipani and others, 'Bidders for Unilever's Tea Business Pulled out on Plantation Concerns' *Financial Times* (19 November 2021) <https://www.ft.com/content/5c7bbed1-c0ce-4767-a275-530b8ab9a1fc?syn-25a6b1a6=1> accessed 22 December 2024.
[142] Rossi and Ruhl (n 79), 854; Lord Sales (n 7), 10-11.
[143] Dalia Palombo, 'Business, Human Rights and Climate Change: The Gradual Expansion of the Duty of Care' (2024) 44 Oxford Journal of Legal Studies 889, 902.
[144] *Donoghue v Stevenson* [1932] AC 562 (Lord Atkin); ibid., 901.
[145] Focussing on the parent company and subsidiary relationship instead of the parent company and tort victim relationship when determining whether a DoC arises was first proposed in *Chandler v Cape Plc* [2012] EWCA Civ 525; see Palombo (n 143), 896.
[146] See "Vedanta routes" in Leader (n 5), 68-69.
[147] Palombo (n 143), 898.

from parent companies,[148] accentuating the nascent potential of tort law in achieving environmental justice on a global stage.

Finally, the UKSC alleviated some procedural difficulties of transnational tort litigation. Condemning the extensive evidence presented at a jurisdictional stage, it suggested that the resulting costs and time of litigation were overly disproportionate.[149] To avoid "beating its head against a brick wall",[150] the court stressed the need to avoid a "mini-trial" and reserve factual determinations for the merits stage.[151] This signals a possible reduction in the evidential burden for claimants at the interlocutory stage, which would in turn decrease litigation costs and length. Expanding upon this, the commitment to render trial more accessible resurfaced in the latest *Okpabi* ruling, where the Court of Appeal[152] dismissed the application of a "Global Claims" test, which would have required the claimants to attribute 100% of the respective environmental harm to RDS.[153] Acknowledging the "inequality of arms and asymmetry of information" between victims of CEHs and multinationals like RDS, the court considered itself under a duty to ensure that the "parties are on an equal footing".[154] This reflects a wider effort by the courts to alleviate the power imbalances inherent in transnational environmental tort litigation,[155] ultimately empowering victims with more realistic chances at justice.

(iii) Challenges Associated with the Parent Company Duty of Care

Although these developments have been described as a "victory"[156] for claimants seeking compensation for CEHs, challenges subsist. First, the UKSC's heavy reliance on group-wide policies to conclude that Vedanta and RDS may owe parent company DoCs could have unintended consequences. Particularly, the rulings create a "perverse incentive" for parent

[148] ibid., 902. In fact, geographical distance as a defence to liability under German civil law for transnational CEHs was expressly rejected by Oberlandesgericht Hamm, I-5 U15/17, 39.
[149] ibid., 904-905.
[150] *Vedanta* (n 15), [14].
[151] *Okpabi* (n 16).
[152] *Alame v Shell* [2024] EWCA Civ 1500.
[153] 'Full Trial of Nigerian Communities' Claims against Shell to Finally Go Ahead in 2025' (*Leigh Day*) <https://www.leighday.co.uk/news/press-releases/2024-news/court-of-appeal-ruling-clears-the-way-for-full-trial-of-nigerian-communities-oil-pollution-claims-against-shell-to-finally-go-ahead-in-2025/> accessed 13 May 2026.
[154] *Alame* (n 152), [86].
[155] Benjamin (n 4).
[156] Leader (n 5), 72.

companies to "pull back from [their environmental] commitments"[157] and disassociate themselves from control over subsidiaries' environmentally hazardous activities to avoid tortious liability.[158] In fear of this, proposals have been made to place mandatory environmental due diligence requirements for multinationals on a "statutory footing"[159] or establish an "enterprise liability"[160] regime. While such measures are welcomed, the anxiety of such a change in corporate behaviour could be overstated. It is strategically unwise for directors of parent companies to create an impression to investors that they no longer control their group-wide operations, as effective governance requires parent companies to monitor their subsidiaries and implement changes in cases of underperformance.[161] Any failure to do so might suggest that "the directors [of parent companies] do not take their duties seriously."[162]

A second concern stems from the international dimension of transnational environmental tort litigation. Specifically, the English courts asserted jurisdiction over the UK-domiciled parent companies (Vedanta and RDS) through Article 4.1 Brussels I Recast Regulation 1215/2012 (Recast). Jurisdiction was guaranteed through *Owusu v Jackson*,[163] confirming claimants' right to sue EU-domiciled companies in their respective domiciles without facing jurisdictional challenges under *forum non conveniens (FNC)*,[164] even if another, more appropriate jurisdiction had been available.[165] This position has, however, dramatically shifted since Brexit, because the Recast no longer applies in the UK, and *Owusu* no longer offers "a safe jurisdictional haven for victims" of environmental harm.[166] Instead, parent companies have regained the ability to contest the jurisdiction of English courts under *FNC*, adding additional litigious risk to victims of environmental harm seeking recourse before English courts. Per Grušic, "many alleged [environmental] abusers will benefit from this and, thus, collect a handsome 'Brexit dividend'."[167] In fact, this risk temporarily materialised in

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[157] ibid., 84.
[158] Marilyn Croser and others, 'Vedanta v Lungowe and Kiobel v Shell: The Implications for Parent Company Accountability' (2020) 5 Business and Human Rights Journal 130, 134.
[159] Bradshaw (n 104), 149; see e.g. the Code de Commerce (FR) at Article L225-102-4.
[160] Benjamin (n 4), 266.
[161] Cees Van Dam, 'Breakthrough in Parent Company Liability: Three Shell Defeats, the End of an Era and New Paradigms' (2021) 18 European Company and Financial Law Review 714, 741.
[162] ibid.
[163] (Case C-281/02) 2005 QB 801.
[164] William Day, 'Piggyback Jurisdiction and the Corporate Veil' (2019) 135 Law Quarterly Review 551; see *Spiliada Maritime v Cansulex Ltd* [1987] AC 460, 476, for an authoritative explanation of *FNC*.
[165] E.g. the Zambian forum in *Vedanta* (n 15), [75].
[166] Uglješa Grušić, 'Dyson Collects a "Brexit Dividend" in a Business and Human Rights Case in England' (*European Association of Private International Law*, 30 October 2023) <https://eapil.org/2023/10/30/dyson-collects-a-brexit-dividend-in-a-business-and-human-rights-case-in-england/> accessed 22 December 2024.
[167] ibid.

Limbu v Dyson Technology[168], where the English High Court stayed negligence proceedings against Dyson, a UK-domiciled company, relating to business-related human rights violations on *FNC* grounds; the Malaysian forum was deemed to be more closely connected to the dispute's factual matrix and there was no reason to believe that its courts could not provide substantial justice to the parties. If followed in future environmental tort claims, this approach may "jeopardise the encouraging steps that [*Vedanta*] and *Okpabi* took in terms of lowering the jurisdictional burden on victims and limiting the cost and time of transnational litigation against UK parent companies."[169] Although the Court of Appeal eventually overturned the High Court's *FNC* analysis for failing to recognise Dyson UK's role as the "principal protagonist"[170] in the claim, *FNC* remains an extremely fact-sensitive test.[171] Hence, jurisdictional battles remain a genuine threat in future transnational tort claims against English multinationals.

Thirdly, Bertram is sceptical of the effectiveness of monetary compensation as a remedy to flagrant instances of environmental pollution such as in *Vedanta* and *Okpabi*: "no amount of monetary compensation can do justice to the livelihoods lost, the trauma caused and the health impaired."[172] While there is truth to this, damages awarded for the breach of a parent company DoC appear to be the only currently available, effective remedy[173] at the disposal of foreign victims of environmental harm who wish to sue UK-domiciled parent companies. As outlined above, piercing the veil remains judicially near-impossible, and other areas of company law have fared no better. In fact, the English High Court in *ClientEarth v Shell* recently dismissed the derivative claim[174] as an inappropriate vehicle for advancing environmental protection,[175] implicitly confirming that the duty to "have regard" to the environment within UK corporate governance[176] may still be undercut by the overarching objective of shareholder wealth maximisation.[177] Hence, with other avenues seeming prospectless, the selection of remedy *per*

[168] [2023] EWHC 2592.
[169] Palombo (n 143), 906.
[170] [2024] EWCA Civ 1564.
[171] Ardavan Arzandeh, 'Should the *Spiliada* Test Be Revised?' (2014) 10 Journal of Private International Law 89.
[172] Daniel Bertram, 'Transnational Experts Wanted: Nigerian Oil Spills before the Dutch Courts' (2021) 33 Journal of Environmental Law 423, 434.
[173] Anderson (n 6), 424.
[174] Companies Act 2006, ss260-264.
[175] *ClientEarth v Shell* [2023] EWHC 1897 (Ch), [92]-[93].
[176] Companies Act 2006, s172(1)(d).
[177] Nicholas Grier, 'Directors Deliver - Just Not Very Much: Further Reflections on Section 172 of the Companies Act 2006' (2022) 4 Juridical Review 212. This is especially true if courts continue to defer to directors' underlying discretion on how to manage environmental risks associated with business operations – see [2023] EWHC 1137 (Ch), [19].

se should not diminish the overall importance of the parent company DoC. Afterall, “imperfect justice is better than no justice at all.”[178]

Although difficulties remain, *Vedanta* and *Okpabi* illustrate that, generally, tort law is capable of overcoming many of the traditional barriers faced in the environmental context. This development underscores not only tort law’s increasing effectiveness[179] in responding to CEHs but also justifies its participation in a multi-dimensional solution to the issue.

B. Climate Change Tort Litigation Reignited: Towards Recognition of Tortious Liability for Corporate Greenhouse Gas Emissions

The second area where tort law shows increased potential to address CEHs relates to anthropogenic GHG emissions. Climate change tort litigation in this sense is inherently controversial. Simply by existing, every human contributes to global warming through their own GHG emissions. Nonetheless, claimants target specific corporate defendants and argue that they have acted *wrongfully* by emitting GHGs.[180] Kysar has summarised GHG emissions as constituting the “paradigmatic anti-tort” since they pose “a collective action problem so pervasive and so complicated as to render at once both all of us and none of us responsible”.[181] Faced with this contradiction, courts have often dismissed climate change tort actions under the pretext that climate change is an “inherently political” issue that cannot be effectively resolved through the common law and should therefore be addressed through democratic processes.[182] Summarised by the New Zealand Court of Appeal in *Smith v Fonterra*, “climate change simply cannot be appropriately or adequately addressed by common law tort claims pursued through the courts. It is quintessentially a matter that calls for a sophisticated regulatory response at national level supported by international co-ordination.”[183]

[178] Bertram (n 6), 755.
[179] See *Municipio de Mariana v BHP Group* [2025] EWHC 3001 TCC for a more recent saga of cases building on the principles developed in *Vedanta* (n 15) and *Okpabi* (n 16).
[180] Latham, Schwartz and Appel (n 26), 767.
[181] Douglas Kysar, ‘What Climate Change Can Do about Tort Law’ (2011) 41 Environmental Law 1, 3-4.
[182] Ganguly, Setzer and Heyvaert (n 7), 848; see e.g. *Kivalina v ExxonMobil* 696 F.3d 849, 2012 WL 4215921 (9th Cir 2012), cert. denied, 133 S. Ct. 2390 (2013). Note, however, that this view is not universally shared and, e.g., has been bluntly rejected in *Lliuya* (n 148), 59.
[183] *Smith* (n 51), [16]; see also *Sharma* (n 1), [246]-[266].

Nevertheless, a potentially global[184] reversal of this trend has been kick-started by the New Zealand Supreme Court (NZSC), which, on appeal in *Smith*, embraced tort law's capacity to confront corporate GHG emissions.

(i) The decision in Smith v Fonterra

Mr Smith, an elder of the Ngāpuhi and Ngāti Khu people, brought claims against the seven largest corporate GHG emitters in New Zealand. By materially contributing to climate change, the companies had supposedly "damaged, and will continue to damage, his whenua [land] and moana [ocean], including places of customary, cultural, historical, nutritional and spiritual significance to him and his whānau [family]".[185] In this respect, Smith pleaded three causes of action in tort: public nuisance, negligence and a newly "proposed climate system damage tort".[186] The defendants applied to strike out all three causes of action and succeeded before the Court of Appeal due to the policy reason, *inter alia*, above. However, the NZSC unanimously overturned this ruling, reinstating all three of Smith's claims and allowing "what may be the first full climate tort claim in a common law jurisdiction"[187] to proceed to trial.

The NZSC's decision is "deceptively simple".[188] Instead of discussing the issue of corporate GHG emissions through a public policy lens, as done in the Court of Appeal, the NZSC simply engaged with the individual elements of public nuisance, asking whether the defendants' GHG emissions could satisfy the legal test in a strike-out-motion.[189] Cautiously approaching the strike-out threshold,[190] the NZSC relied on public nuisance jurisprudence from the Victorian era to deduce through analogy that Smith's claim was reasonably arguable.[191] While the NZSC did not comment on the merits of the two remaining claims, these were also reinstated since they were unlikely to produce additional, disproportionate burdens on the trial

[184] 'Tortious Claims for Climate Change Damage to Proceed in Common Law Courts' (*Debevoise & Plimpton*) <https://www.debevoise.com/insights/publications/2024/02/tortious-claims-for-climate-change-damage> accessed 3 January 2025.
[185] *Smith* (n 17), [3]; translations provided by Sam Bookman, 'Smith v Fonterra and the Climatisation of Tort Law' (2024) 88 The Modern Law Review 192, 193.
[186] *Smith* (n 17), [4].
[187] Sam Bookman, 'Smith v Fonterra: A Common Law Climate Litigation Breakthrough' (*Climate Law A Sabin Center blog*, 12 February 2024) <https://blogs.law.columbia.edu/climatechange/2024/02/12/smith-v-fonterra-a-common-law-climate-litigation-breakthrough/> accessed 3 January 2025.
[188] Bookman (n 185), 192.
[189] ibid., 195.
[190] *Smith* (n 17), [83]-[85].
[191] ibid., [143]-[171].

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court's resources.[192] Hence, that the defendants' GHG emissions could theoretically amount to a public nuisance in law was enough for the NZSC to deem that Smith's action was deserving of a trial. In the NZSC's words, "the common law must develop, if at all, in the fertile fields of trial, not on the barren rocks of a strike out application."[193]

(ii) Climate Change: A Shared Regulatory Domain between Parliament and the Common Law

Although the practical effect of the NZSC's decision in *Smith* remains entirely procedural, it represents a turning point in tort law's potential to contribute to a response to CEHs. Not only does the decision mark an increased judicial receptiveness to hearing climate change tort actions against corporate GHG emitters, but it also legitimises the common law's role in contributing alongside policymakers to a combined effort in the response to climate change.

By allowing Smith's claims to proceed to trial, the NZSC implicitly rejected the Court of Appeal's assertion that the issue of climate change was incapable of being addressed at common law.[194] While acknowledging that the common law has never dealt with an environmental crisis of the same magnitude,[195] the NZSC underlined tort law's historical credentials in dealing with issues involving a "mix of public and private harm and […] good".[196] As such, the court presumed that the difficulties posed by climate change were qualitatively[197] comparable[198] to those faced in the Industrial Revolution, so that there was "no reason why the challenges posed by climate change [could not] be tried on the basis of traditional tort law doctrine".[199] Therefore, by underscoring "the common law's robustness"[200] in adapting to environmental challenges generally, the NZSC confirmed as a starting point that, in theory, tort law could be capable of dealing with climate change-related harms.

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192 ibid., [175].
193 ibid., [173].
194 ibid., [154].
195 ibid., [156].
196 ibid., [157].
197 Bookman (n 185), 193.
198 *Smith* (n 17), [157].
199 Bookman (n 185), 192.
200 'Tortious Claims for Climate Change Damage to Proceed in Common Law Courts' (n 184); see similarly Hook and others (n 60), 203.

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The NZSC's decision is equally important because it resets the boundaries of competence over New Zealand's national GHG emissions policy. To meet international obligations of reducing the threat of climate change,[201] the New Zealand Parliament has enacted numerous climate change-related statutes.[202] Initially, the High Court believed that the mere existence of this statutory framework excluded the application of the common law. By imposing tortious liability on the defendants for their GHG emissions, the judiciary would supposedly "compromise Parliament's response"[203] to climate change, a finding with which the Court of Appeal agreed.[204] However, the NZSC clarified that the regulatory response towards climate change-related issues did not fall within the exclusive competence of Parliament. Instead, tort law may equally contribute to a multi-dimensional solution. First, while the enactment of climate change statutes may reduce the need for climate change tort litigation,[205] the existing legislation neither "cover[s] the entire field"[206] nor takes away from tort law's complementary role to regulatory regimes as outlined in Section II(B)(iv). Second, the mere existence of climate change-related legislation does not automatically prohibit the operation of the common law, unless a parliamentary intention to this effect was visible within the statutory text.[207] In fact, the NZSC pointed to s.23(1) of the Resource Management Act 1991 to prove that Parliament expressly preserved the possibility for the law of torts to operate within the environmental domain.[208] Accordingly, despite having legislated within the "realm of climate change", Parliament has not excluded the operation of the common law – rather, it has retained a "pathway" for the common law to simultaneously "operate, develop and evolve … amid a statutory landscape".[209]

The notion that tort law can contribute towards a solution to corporate GHG emissions *in addition to* a legislative framework is justified since a common law participation in the solution towards climate change would not undermine the policies implemented by Parliament.

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[201] (n 80).
[202] *Smith* (n 17), [31]- [48].
[203] *Smith v Fonterra* [2020] NZHC 419, [98].
[204] *Smith* (n 51), [116].
[205] *Smith* (n 17), [95].
[206] ibid., [101]. Note that the interplay between the common law and statute in highly regulated areas is a reoccurring debate, see e.g. *Marcic v Thames Water Utilities* [2003] UKHL 66 and *Manchester Ship Canal Company v United Utilities Water (No2)* [2024] UKSC 22.
[207] *Smith* (n 17), [98].
[208] ibid., [96].
[209] ibid., [101]. Note that the NZSC's reasoning on this point finds resemblance in both *Milieudefensie v Shell* [2024] Gerechtshof Den Haag 200.302.332/01, [7.53], and *Lliuya* (n 148), 79-80, where the courts equally rejected the proposition that the existence of climate change related legislation ousted the possibility of private law civil liability.

Of relevance here is the Emissions Trading Scheme (ETS),[210] New Zealand's primary tool for reducing the GHG emissions of economic actors in intensive CO2-emitting sectors.[211] The defendants suggested that, although the ETS scheme regulated GHG emissions, Parliament had not thereby "prohibited" them and thus allowed emitting activities to continue as a matter of law.[212] Thus, if they were to be found tortiously liable despite complying with the ETS, this would create a "parallel, and inconsistent, regulatory regime".[213] Dismissing this line of reasoning, the NZSC clarified that the ETS "neither authorises nor immunises GHG emissions"; instead, it merely introduces a market-based GHG emissions trading scheme based on behavioural incentives.[214] If Parliament, therefore, does not legally endorse GHG emissions *per se*, tortious liability for GHG emissions cannot contradict Parliament's implemented climate policy. Conversely, as suggested in Section II(B)(iv), tort law actually *strengthens*[215] Parliament's overall ambition of reducing GHG emissions domestically[216] by allowing private individuals to contribute to an already existing regulatory framework.[217]

The remedies sought in *Smith* illuminate this point. Instead of monetary damages, Smith demanded, *inter alia*, an injunction requiring the defendants to "produce or cause a peaking of their emissions by 2025" or "immediately cease emitting (or contributing to) net emissions".[218] The complaint in *Smith* has therefore embraced a "forward-looking regulatory" purpose since these remedies would require the defendants to "change their future course of conduct" and deter "other similarly-situated companies"[219] from emitting GHGs. Hereby, *Smith* again illustrates tort law's capacity to serve not only a *corrective* justice function but also a *preventative* function towards corporate GHG emissions, which aligns with existing legislative goals. Besides, as alluded to in Section II(B)(iv), the existing domestic and international statutory framework has not adequately reduced New Zealand's GHG emissions and, therefore, might require additional "stimulus"[220] from climate change tort litigation.

[210] ibid., [40]-[45].
[211] ibid., [40].
[212] ibid., [45].
[213] ibid., [91].
[214] ibid., [99].
[215] Foster (n 6).
[216] See e.g. Climate Change Response Act 2002 (NZ).
[217] Steele (n 36), 240; Anderson (n 6), 409.
[218] *Smith* (n 17), [4].
[219] Bookman (n 185), 203.
[220] Foster (n 6), 231.

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(iii) Public Nuisance's Viability in Curtailing Corporate Greenhouse Gas Emissions?

Recognising tort law's legitimacy in contributing to a multi-dimensional solution to climate change was only the first step. Building on this, the NZSC expanded tort law's capacity to address CEHs by enhancing the viability of public nuisance in restraining GHG emissions. Specifically, the NZSC decision hints towards a more "*climatised*"[221] understanding of public nuisance, whereby its structural components may be reconciled more neatly with the all-encompassing nature of climate change. This is significant because it exemplifies how tort orthodoxy's *private* framework is necessarily being redesigned to "survive"[222] the "legally disruptive"[223] features of climate change.

The first area of public nuisance that shows signs of *climatisation* is the 'special damage rule' (SDR), requiring a claimant to demonstrate that he/she "suffered greater hurt"[224] than the public to obtain standing to sue. This condition has proven itself to be paradoxical[225] in the climate change context: since the issue is globally so pervasive, and since, to a certain extent, its impacts are universally experienced, claimants have difficulties proving that their damage is sufficiently unique. To illustrate, the High Court and Court of Appeal dismissed Smith's claim in public nuisance because the harm to his coastal property was not deemed to be sufficiently "different in kind"[226] or worse "in degree"[227] than the harm suffered by other coastal landowners in New Zealand or globally. Consequently, the SDR has often barred public nuisance from responding to GHG emissions.[228]

To mitigate this, the NZSC applied the SDR in a way that makes public nuisance more compatible with the "ubiquitous"[229] consequences of GHG emissions. Particularly, the NZSC advanced a more nuanced conceptualisation of climate change, suggesting that its "precise impact is distributed and different".[230] Bearing this in mind, it concluded that Smith's damage

[221] Bookman (n 185).
[222] For the proposition that climate change is an existential threat to tort law, see Kysar (n 181), 7, and Bookman (n 185), 198.
[223] Elizabeth Fisher, Eloise Scotford and Emily Barritt, 'The Legally Disruptive Nature of Climate Change' (2017) 80 The Modern Law Review 173.
[224] *Anonymous* (1535) YB Mich 27 Hen 8, f 26 pl 10.
[225] Denise E Antolini, 'Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule' (2001) 28 Ecology Law Quarterly 755, 761.
[226] *Smith* (n 203), [62].
[227] *Smith* (n 51), [82].
[228] Bullock (n 72), 1140.
[229] Bookman (n 185), 198.
[230] *Smith* (n 17), [152].

to coastal land – including harm to fisheries and cultural interests – went “beyond a wholly common interference with public rights”.[231] Because the language used by NZSC reflected the distinctively *individual* impacts of climate change more realistically, the actionability of Smith’s public nuisance claim became less threatened by the widespread effects of GHG emissions.

Furthermore, the climate change context encouraged the NZSC to doubt the very existence of the SDR.[232] It is unsatisfactory that a claimant’s action in public nuisance could be dismissed because many others suffered similar harm from GHG emissions. Simply put, this contradicts society’s “renewed consciousness for safeguarding the environment and the desirability of encouraging private initiative against polluters”.[233] At the same time, the *raison d’être* of the SDR has faded; per the NZSC, the scientific implications of climate change are now better understood so that the courts’ existing class action and case management systems allow it to efficiently counter the risk of “an oppressive multiplicity of actions”.[234] Implicitly then, the NZSC welcomed structural reconsideration[235] of the rule, or possibly even its abandonment, to allow public nuisance to grow more resistant to the omnipresence of climate change.

Compounding the effects of the SDR is the problem of causation, which has arguably been the most significant[236] hurdle preventing public nuisance from responding to corporate GHG emissions. Climate change has developed via GHG emissions from millions of sources over hundreds of years,[237] making it nearly impossible for a claimant to “single out” a specific corporation’s emissions as constituting the direct “cause of [his] harm”.[238] The High Court decision exhibits this difficulty, rejecting Smith’s public nuisance claim for failing to establish a ‘but-for’ causation.[239]

Still, following the logic advanced in Section II(B)(iii), the NZSC was equally willing to attune public nuisance to climate change’s non-linear causal pathways. First, it distinguished

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231 ibid.
232 ibid., [151].
233 ibid., [149], citing Carolyn Sappideen and Prue Vines *Fleming’s The Law of Torts* (10th ed, Thomson Reuters, Sydney, 2011).
234 ibid., [151].
235 Bookman (n 185), 198.
236 Kysar (n 181), 29.
237 *Smith* (n 17), [135].
238 Kysar (n 181), 30-31.
239 *Smith* (n 203), [67].

public nuisance from the stricter 'but-for' standard normally used in negligence claims.[240] In finding that Smith's public nuisance claim plausibly established causation, the NZSC instead relied comparatively on river-pollution precedents[241] where a defendant's mere "*contribution* to a common interference with public rights" was sufficient,[242] notwithstanding that other polluters were involved (for example, householders and other industrial users).

Second, the NZSC justified why an analogous application of the 'contribution test' from the river-pollution cases was feasible in the GHG context. Initially, the Court of Appeal sought to differentiate the two situations. Per Bullock, it wrongly[243] concluded that the 'contribution test' only applied to river-pollution instances since there was allegedly a "finite number of known contributors to the harm, all of whom were before the Court". Meanwhile, in the GHG context, there is "no identifiable group of defendants that can be brought before the Court to stop the pleaded harm".[244] However, this analysis was rightfully rejected by the NZSC. In reality, numerous river-pollution precedents existed where the 'contribution test' still applied, despite there being an undefined number of polluters, many of which were not before the court.[245] While the NZSC ultimately left the question of how public nuisance should deal with the issue of cumulative causation in the GHG context of a policy consideration at trial,[246] the NZSC's selection of river-pollution cases implicitly reveals its belief that more "conventional" approaches to causation deserve reconsideration in the climate change context, especially when forward-looking equitable relief is sought.[247] In these circumstances then, a reduction in the required causal threshold in GHG-related public nuisance actions is not only accessible but also suitable.[248]

Although this guidance certainly improves public nuisance's potential in responding to corporate GHG emissions, its prospects should not be exaggerated.[249] The NZSC's *climatised* construal of public nuisance definitely helped Smith overcome the strike-out threshold. Still, any significant amendment of the law of public nuisance as a response to GHG emissions has been reserved for trial. As a result, he still faces a huge task in pleading public nuisance at the

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240 *Smith* (n 17), [165].
241 ibid., [160]-[163].
242 ibid., [164].
243 Bullock (n 72), 1166.
244 *Smith* (n 51), [92].
245 *Smith* (n 17), [164]; Bullock (n 72), 1166.
246 *Smith* (n 17), [166].
247 ibid., [171]; Bookman (n 185), 199.
248 Bullock (n 72), 1165-1167.
249 Bookman (n 187).

merits stage, not to mention the remaining two actions. Ironically, the case may even become a victim of its own success, as the New Zealand government has recently threatened legislative amendments to impede future *Smith*-esque claims under the pretext of legal certainty.[250] While it is therefore possible that this particular action may eventually fail and that prospective climate change tort litigation could be thwarted by democratic processes, the effects of the NZSC decision should not be understated either. Notably, the judgment marks the start of a process whereby climate change becomes integrated[251] into public nuisance's structural framework. This proves that the *privateness* in tort orthodoxy is malleable and that, where there is a will, it can be further *climatised*. Recognising this in itself amounts to a noteworthy improvement in tort law's potential to counter contemporary CEHs.

IV. Conclusion

As today's environmental challenges intensify, the search for effective remedies to CEHs has never been more acute. Deficiencies in current domestic and international regulations have compelled society to think outside the box and recognise that a successful resolution to these issues might lie beyond the stand-alone capacities of policymakers. Against this backdrop, it was queried whether the English common law of torts *could*, and *should*, contribute to solving contemporary CEHs. This article has neither contended that tort law alone can resolve the CEH crisis nor sought to downplay the importance of existing regulatory mechanisms. Instead, the argument advanced here is that English tort law increasingly holds a place within a broader legal toolkit to address CEHs, and that its potential in this respect has too easily been dismissed.

Section II explored why, *prima facie*, tort law appears as a suboptimal solution for mitigating environmental degradation. Nevertheless, it concluded more hopefully by suggesting that the picture painted by critics is overly draconian – at least in theory. Subsequently, Section III identified *Vedanta*, *Okpabi* and *Smith* as authoritative illustrations within both the *transnational* and *climate change* tort litigation contexts to show how, in

[250] Hon Paul Goldsmith, 'Government Brings Certainty to Climate Change Tort Law' (*The Official Website of the New Zealand Government*, 12 May 2026) <https://www.beehive.govt.nz/release/government-brings-certainty-climate-change-tort-law> accessed 10 June 2026.
[251] Fisher, Scotford and Barritt (n 223), 196.

practice, modern environmental tort law is overcoming the identified shortcomings and participating positively in a response to CEHs.

Although these Supreme Court judgments lay the foundation for English tort law's contribution to the response to modern CEHs, doctrinal imperfections remain. Likewise, any progress made hangs in limbo as the outcomes were purely procedural and could be overturned on the merits[252] or via legislative interventions. Clearly, numerous steps still need to be taken before environmental tort law can be considered a serious player in the mitigation of CEHs. Nevertheless, the key takeaway from this article is that a future where this becomes the *status quo* is increasingly realistic and that a serious normative argument can be made in this respect.

Corporation-induced climate change and environmental pollution will never be solved exclusively through tort law. Yet, thanks to the unwavering efforts made by the claimants in *Vedanta*, *Okpabi* and *Smith*, it has most certainly "change[d] the air".[253]

[252] Save for *Vedanta* (n 15), which was already settled.
[253] Kysar (n 181), 71.

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The Erotic Taboo: An Investigation into the Margin of Appreciation Concerning Cases of Sexual Blasphemy at the European Court of Human Rights

Eve Coffey*

Abstract: The European Court of Human Rights' jurisprudence shows the Court affords State Parties a wider margin of appreciation when restricting freedom of expression in cases involving religious offence than in cases concerning political speech. This article argues that this already-broad margin is widened further when the impugned expression contains a sexual element. The article advances this claim through a comparative analysis of three categories of case: non-sexual blasphemy, sexualised blasphemy, and sexual expression without a religious element. It argues that sexualised blasphemy forces the Court to contend simultaneously with two spheres, religion and sexuality, that it is institutionally reluctant to define, and that the doctrine of 'living together' functions as a substitute for principled reasoning in this double bind. Drawing on liberal political philosophy's public/private distinction and its implications for human rights adjudication, the article contends that the resulting deference to state authorities is doctrinally inconsistent and risks insulating dominant moral orthodoxies from legitimate criticism. The article concludes that a sexual element in blasphemy does indeed affect the Court's application of the margin of appreciation, and that this effect is in tension with the Court's own commitment to freedom of expression as a foundational democratic principle.

Keywords: *EU law; freedom of expression; freedom of religion; human rights; blasphemy.*

I. Introduction

* LLM Candidate (Law with Social Justice), UCL Laws.

It has become generally understood that the European Court of Human Rights (ECtHR) lends States a wider margin of appreciation when dealing with restrictions on freedom of expression concerning offence to religion compared to non-religious offence, being a conflict involving 'inalienable', fundamental rights.[1] However, even within this wider margin, there are certain cases where states are awarded an even wider margin still. This essay argues that this broader margin of appreciation is granted when there is a sexual element to the blasphemy, and advances that claim through a systematic comparison of three categories of case: non-sexual blasphemy, sexualised blasphemy, and sexual expression without a religious element.

The comparison reveals a coherent, if implicit, pattern: the ECtHR is institutionally unwilling to adjudicate on either religious doctrine or sexual morality and, when both are present simultaneously, the result is a compound deference that far exceeds what doctrinal consistency would require. Representing two categories the Court sees as outside of its jurisdiction, defining religion and sexual morals, the ECtHR is left in a double bind. As a court with a distinctly humanist tradition, the ECtHR has the difficult task of balancing the traditions of countries with a multitude of religious and legal histories, which has led to an increasingly deferential stance.[2] The deference in blasphemy cases applies in relation to the caveat to the European Convention on Human Rights' (ECHR) Article 10 freedom of expression. This allows expression to be limited where such restrictions 'are prescribed by law and necessary in a democratic society' for purposes including national security, public safety, the prevention of crime, the protection of health or morals, and the protection of the reputation or rights of others.[3] As a concept not enshrined in the ECHR, the Strasbourg Court has never formally defined 'blasphemy', but it can be generally understood as speech which insults religious tenets, texts, institutions, or figures, resulting in offence to believers. This essay analyses how the Court's interpretation of the margin of appreciation in blasphemy cases has evolved, focusing in particular on its novel reliance on the concept of 'living together'.

II. The Margin of Appreciation

[1] See *Morice v France* App no 29368/10 (ECtHR, 23 April 2016) 62 EHRR 1 and Joanna Kulesza, 'Free Speech, Artistic Expression and Blasphemy Laws within the ECHR Margin of Appreciation' in *Law, Language and the Courtroom* (Routledge 2022) 160–72.

[2] Ronan McCrea, *Religion and the Public Order of the European Union* (Oxford University Press 2013) Chapter 2.

[3] European Convention on Human Rights (ECHR) (1950) article 10(2).

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Though *Engel and Others v The Netherlands* saw the first application of the margin of appreciation formula, *Handyside v UK* was the foundational decision for its rationale at the ECtHR, specifically with the interference with Article 10 freedom of expression rights.[4] The Court established in *Handyside* a stringent standard of review for restrictions on expression, emphasising the importance of freedom of speech in democracy, stating that "[f]reedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man."[5] The case clarified three major points of law concerning the doctrine: that the margin is linked with subsidiarity; that it is granted to both the legislature and the judiciary of the Member State; and that it is not boundless as it is necessarily outlined by European jurisprudence.[6] A crucial further point is that the Convention machinery is subsidiary to national systems of safeguarding human rights, and that there is a clear sequential chain where national authorities make the initial assessment.[7]

The position of national authorities has subsequently been fortified by the Brighton Declaration and Protocol 15 to the ECHR, which added subsidiarity and the margin of appreciation to the Convention explicitly. One issue with the margin of appreciation, as the UK's 2013 Joint Committee Report identified, is that "rather than [being] an explicit qualification of specific rights, [it] is not strictly defined, with the result that its application is at the sole discretion of the Court",[8] leading to a lack of predictability. Protocol 15 has increased deference towards local authorities concerning the interpretation of human rights even further, particularly in conditions where mature democracies are considered by the ECtHR to have sufficient executive scrutiny measures.[9]

III. Blasphemy Laws and Their European Context

[4] *Engel v The Netherlands* (1976) 1 EHRR 647*; Handyside v United Kingdom* (1976) 1 EHRR 737.

[5] *Handyside v United Kingdom* (n 4) para 49.

[6] ibid.

[7] Dean Spielmann, 'Whither the Margin of Appreciation?' (2014) 67 *Current Legal Problems* 49, 53.

[8] Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, *Draft Voting Eligibility (Prisoners) Bill: Report* (2013-24, HL 103, HC 924) para 35.

[9] Ian Cram, 'Protocol 15 and Articles 10 and 11 ECHR—The Partial Triumph of Political Incumbency post-Brighton?' (2018) 67 *ICLQ* 477.

DOI: 10.14324/111.444.2052-1871.2184

To understand why the Court is particularly deferential concerning blasphemy and sexualised blasphemy, it is essential to understand Europe's religious background and its crucial role in the ECtHR's approach to interpreting these laws. Today, Western Europe stands out in its secularity; it has some of the lowest recorded rates of religious practice and belief globally, with rates that continue to decline.[10] However, Europe was once a majority Christian continent, and this is reflected in the common law and jurisprudence which have become the basis of modern legal systems.[11] In recent years, immigration, and religious diversity along with it, have increased, changing the societal context of blasphemy laws, most of which were drafted solely to protect Christianity, or at least only with Christian values in mind.[12] The ECtHR has therefore had the difficult job of translating blasphemy laws across religions, in the context of increasingly secular societies.[13] This is not a new concept; Montesquieu emphasised the need for an inclusive and tolerant legal system, requiring that "[w]hen the laws of a state have thought it best to allow multiple religions, they must also oblige them to tolerate each other."[14]

The issue for the ECtHR is ensuring this tolerance without infringing on state sovereignty, which would disrespect the doctrine of the margin of appreciation. The context of the ECtHR's decisions is therefore a delicate balancing test concerning fundamental rights overlaid by significant political complexities.

IV. The Balancing Test and Its Inconsistent Application

When two rights are in competition in this manner, as the Article 9 right to "freedom of thought, conscience and religion" and Article 10 "freedom of expression" are for blasphemy, the

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[10] See the data on religious affiliation in European Commission, Directorate-General for Justice and Consumers, Discrimination in the EU in 2023: Report (European Commission 2023), 110 <https://data.europa.eu/doi/10.2838/499763> accessed 26 February 2026; and the data on attitudes towards religion and society in 'Being Christian in Western Europe' (The Pew Center, 29 May 2018) <https://www.pewresearch.org/religion/2018/05/29/being-christian-in-western-europe/> accessed 26 February 2026.

[11] For a detailed analysis, see Ronan McCrea, *Religion and the Public Order of the European Union* (Oxford University Press 2011) 16-17.

[12] ibid.

[13] Illias Trispiotis, 'Two Interpretations of "Living Together" in European Human Rights Law' (2016) 75(3) Cambridge Law Journal 580, 590–96.

[14] David W Carrithers and Philip Stewart (eds), *Montesquieu: Discourses, Dissertations, and Dialogues on Politics, Science, and Religion* (Cambridge University Press 2020) 246.

Strasbourg Court must apply a balancing test. In cases concerning blasphemy, there is an inherent clashing of rights, and the Court must determine whether the Article 9 right justifies the exceptional restriction of freedom of expression.[15] This difficulty arises from the EU's fundamental commitment to the equality of religious and non-religious worldviews as part of its broader commitment to fundamental rights.[16] It is the ECtHR's liberal and "individual" autonomy-focused approach to religious freedom which requires the Court to balance the freedoms guaranteed in Articles 9 and 10 ECHR.[17]

Balancing of Article 10 is possible as it is a qualified right, allowing for restriction where the three requirements previously mentioned are satisfied: the restriction is prescribed by law, is necessary in a democratic society and, among other justifications, is necessary for protecting the rights of others.[18] The Court stressed in *Handyside* that Article 10 rights are not applicable only to forms of expression that are favourable but also to "those that offend, shock or disturb the State or any sector of the population."[19] Similarly, in *Morice v France*, the Court clearly set out that freedom of expression is a crucial fundamental right which should only be restricted in exceptional circumstances, stating that "[t]here is little scope under art 10(2) of the Convention for restrictions on political speech or on the debate on matters of public interest. Accordingly, a high level of protection of freedom of expression, with the authorities thus having a particularly narrow margin of appreciation, will normally be accorded where the remarks concern a matter of public interest."[20]

However, the Court does not appear to follow this logic when determining the margin of appreciation concerning expression that offends religious feelings. This inconsistency has provoked criticism from legal scholars, particularly for the potential to lead to unpredictable case law where different interpretative standards are applied depending on which rights are

[15] ECHR (n 3).

[16] McCrea (n 2) Chapter 4.

[17] ibid.

[18] ECHR (n 3) article 10(2).

[19] *Handyside v United Kingdom* (n 4) para 49.

[20] *Morice v France* (n 1) para 125.

DOI: 10.14324/111.444.2052-1871.2184

being balanced.[21] Considering that balancing is described as one of the Court's core judicial tools, this is a concerning trend.

Over recent years, the Court has used the balancing exercise to become increasingly deferential to states in matters of restricting freedom of expression in favour of protecting religious feelings.[22] Of course, religious morality varies significantly across Europe (take for example, Turkey's Islamic tradition compared to Hungary's Christian nationalism)[23] and this affects the application of the margin of appreciation; the less consensus between states on blasphemy laws, the wider the margin. However, Member States have been getting closer to achieving consensus on the undesirability of blasphemy laws, demonstrated by the 2013 guidelines unanimously agreed to by EU foreign ministers.[24] This called for blasphemy laws to be repealed in the context of EU foreign policy, and which state that the EU "should firmly oppose any attempt to criminalise freedom of speech in relation to religious issues, such as blasphemy laws."[25] It should follow that when considering European consensus the ECtHR should regard countries with blasphemy laws as the outliers, producing a narrower margin of appreciation. As the case law shows, this has not been the consequence.

V. A Comparative Analysis of Three Categories of Case

Case 1 – Sexual Expression Without Religious Content: Müller v Switzerland

An example of sexual expression without religious content, *Müller v Switzerland*, saw the applicants contend that the phrasing of Article 204 of the Swiss Criminal Code prohibiting possessing, distributing, and displaying obscene pictures and films in public was too vague, particularly the use of the word 'obscene', to allow individuals to regulate their conduct.[26] The

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[21] Marko Novak, 'Three Models of Balancing (in Constitutional Review)' (2010) 23 *Ratio Juris* 101, 106.

[22] Eleanor Spaventa, 'What Is the Point of Minimum Harmonization of Fundamental Rights?: Some Further Reflections on the Achbita Case' (*EU Law Analysis Blog*, 21 March 2017) http://eulawanalysis.blogspot.com/2017/03/what-is-point-of-minimum-harmonization.html accessed 17 April 2026.

[23] See, respectively, Kim Shively, *Islam in Modern Turkey* (Edinburgh University Press 2021) and Susanna Mancini and Michel Rosenfeld, 'Politicized Religion and the Reframing of Fundamental Rights' in Michel Rosenfeld and András Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012).

[24] European Parliament recommendation to the Council of 13 June 2013 on the draft EU Guidelines on the Promotion and Protection of Freedom of Religion or Belief (2013/2082(INI)).

[25] ibid.

[26] *Müller v Switzerland*, App no 10737/84 (ECtHR, 24 May 1988).

Court rejected this, noting the need for flexibility to allow legislation to 'keep pace with changing circumstances.'[27] For the legitimacy of the aim, the Court found a 'natural' connection between the protection of public morals and the protection of the rights of others.[28] The judgment is notable for the width of the margin afforded to Switzerland: the Court did not find the view of the Swiss courts that the paintings were "liable grossly to offend the sense of sexual propriety of persons of ordinary sensibility" to be unreasonable.[29] There is an important parallel here with the blasphemy cases: in both *Müller* and the religious offence cases, the Court accepts a right not to be offended in public as a sufficient basis for restricting expression, despite having previously held in *Handyside* that there is no such right.

However, the critical difference from the sexualised blasphemy cases is that in *Müller* the Court engaged directly with the nature and context of the sexual imagery on its own terms, analysing the circumstances of the exhibition, the public nature of the display, and the absence of content restrictions. In the sexualised blasphemy cases, the Court conspicuously avoids this engagement, retreating to a wider margin of appreciation without providing equivalent analysis.

Cases 2, 3, and 4 – Sexualised Blasphemy: Otto-Preminger, İ.A. v Turkey, and E.S. v Austria

To understand why this has been the case, it is essential to analyse the role of the sexual element. The first blasphemy case to come before the ECtHR, *Otto-Preminger-Institut v Austria*, concerned 'Das Liebeskonzil', a film planned for six restricted screenings, advertised with warnings that Christianity would be ridiculed and caricatured.[30] Although the Court noted the importance of the film having an explicitly sexual element as essential to awarding Austria a wide margin of appreciation, it gave this consideration no weight in its formal reasoning, stressing only that religious offence was very likely to be caused. The sexual element, mostly concerning the sexualisation of Jesus Christ and the Mother Mary's relationship, is only referred to in the partly dissenting opinion of Mr. F. Ermacora, joined by Mm. A. Weitzel and L. Loucaides:

[27] ibid para 29.

[28] ibid para 30.

[29] ibid para 36.

[30] *Otto-Preminger-Institut v Austria* (1995) 19 EHRR 34.

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> The film's version of Jesus Christ as a mentally deficient and voluptuous young man who approaches Mary in a sexual way cannot be justified as satirical. It is out of any proportion as an attack against religious feelings and the common understanding of the image of Jesus Christ prevailing in countries where the majority of peoples belong, at least formally, to the Christian religion - an image which has prevailed over centuries in objects of art and in the public life of the society in the Tyrol.[31]

No particular explanation is given for why the sexual element aggravates the offence; it is presumed to be understood. The fact that it is not the 'historical' depiction of Jesus Christ cannot be a satisfying explanation in itself; religious practices are constantly evolving and this is one of the reasons that the Court has avoided defining characteristics of specific religions, known as the 'religious question doctrine.'[32] In its various expressions, this doctrine bars courts from engaging in the resolution of disputes on the tenets of religion – whether those involve fundamental theological claims or factual questions concerning the beliefs or practices of particular individuals or faith communities.[33] It is now well established in constitutional law that courts must refrain from involving themselves in such matters.[34] What goes unsaid but is heavily implied is that the Court considers persons with religious convictions to be more sensitive to sexual imagery — a presumption that, if it underlies the reasoning, should have been supported by evidence and made explicit.

It would be reasonable to suggest the Court's approach comes from the fact that sexual conduct is a sensitive topic in religion and, depending on which religious sect is at issue, is often regulated by the relevant holy book: the Bible condemns sexual immorality as sins both against God and one's own body (Leviticus 18); the Quran has stringent rules against extramarital sex (*zina*) and encourages chastity outside of marriage (Quran 17:32); the Torah regulates sexual activity within marriage, forbidding adultery, incest, etc. (Leviticus 18,

[31] ibid para 83.

[32] Cécile Laborde, 'Dworkin's Freedom of Religion without God' (2014) 94(4) Boston University Law Review 1255, 1270-71.

[33] Jared A Goldstein, 'Is There a Religious Question Doctrine? Judicial Authority to Examine Religious Practices and Beliefs' (2005) 54 *Catholic University Law Review* 497.

[34] Anna Su, 'Judging Religious Sincerity' (2016) 5(1) *Oxford Journal of Law and Religion* 28, 29.

Deuteronomy 23:18). An example of the manifestation of such tenets is that religious schools often choose not to include sexual health in their relationships and sex education, believing these to be private matters, taught to children by their families in line with their religious beliefs.[35] Additionally, many religions construct traditions requiring abstinence from sexual activity. Catholicism, for example, dictates that "only celibate hands can administer the sacraments."[36] As sacred figures are often perceived as inviolable, sexual imagery of said figures can act as a tool of de-sacralisation, possibly constituting a violation of Article 9 rights.

There is scope for such an argument, and Abdou (2022) argues that the reason why believers are particularly vulnerable to offensive speech based on their beliefs, whether sexual or not, is that it involves an interaction with a fundamental element of the forum internum of the Article 9 freedom of religion, one that involves the believer's innate identity of "identifying with the divine and its omnipresent existence".[37] Abdou argues this has resulted in the creation of an enumerated ECHR right: the right not to be offended in your beliefs.[38] This would certainly seem to be the case considering how deferential the Strasbourg Court has been considering blasphemy generally. Proponents of strong freedom of expression protection, on the other hand, argue that there is no right not to have one's beliefs insulted, and this needs to be distinguished from the fact that speech likely to lead to imminent violence should be restricted and that prohibiting certain speech prevents discrimination, which Letsas identifies as being irrelevant to the goal of restricting speech which is "rather to promote distributive justice."[39] Either way, the Court has failed so far to make an argument justifying its findings, leaving its judgments with an insufficiently developed coherence. Virgili identifies this as an inherent flaw in the Court's reasoning; "either religious feelings are a corollary of freedom of

[35] J Mark Halstead and Sue Waite, 'Love and Trust': Making Space for Feelings in Sex Education (2003) 21(2) *Education and Health* 23.

[36] Daniel C Maguire, 'Sex and the Sacred' (2004) 54(3) *CrossCurrents* 23, 24.

[37] Noureldin Abdou, 'A Brief Account of Offending Public Morals and Religious Sensibilities Before the European Court of Human Rights' (2022) 3(1) *International Journal of Doctrine, Judiciary and Legislation* 135.

[38] ibid.

[39] George Letsas, 'Is There a Right Not to Be Offended in One's Religious Beliefs?' in Lorenza Zunna (ed), *Law, State and Religion in the New Europe: Debates and Dilemmas* (Cambridge University Press 2011) 258.

religion, in which case their protection, in the form of a blasphemy law of some sort, should not be left to the margin of appreciation but be mandatory for the state[...]; or they are not."[40]

This same incoherent pattern recurs in *İ.A. v Turkey*, where the Court upheld a conviction for a novel containing sexually explicit passages involving the Prophet Muhammad, including passages depicting him as having sexual relations with his wife immediately after prayers.[41] The majority found that the interference with Article 10 was proportionate, citing the fact that the speech in the case extended past that covered by *Handyside*, constituting "an abusive attack on the Prophet of Islam."[42] The dissent, by contrast, argued that the importance of freedom of speech, the ability of people to avoid purchasing such a book, and the "chilling effect" of imposing fines is "dangerous" for democracy.[43] As with Otto-Preminger, the sexual element is present but its legal relevance is neither explained nor justified: the Court simply treats it as self-evidently aggravating. However, important to note about *İ.A.* is that Judges Costa, Cabral Barreto and Jungwiert noted in their final joint dissenting opinion that "the time has perhaps come to 'revisit' this [blasphemy] case law", which it notes as potentially having been too deferential to states, reflecting "an overcautious and timid conception of freedom of the press."[44] Although this holds no legal weight, it is interesting to see that at least some of the Court's judges have become aware of the dangers of its increasingly deferential stance and its chilling effect on freedom of expression, including that of the media. Additionally, the dissenting judges stressed the opinion in *Handyside* that freedom of expression also includes shocking and offensive expression, implying that the ECtHR's judgments have taken on a "ritual[istic]" structure where cases like *Handyside* are quoted, only to be given no weight.[45] However, the case was decided in 2005 and the Court's deference has stayed consistent to the present day.

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[40] Tommaso Virgili, 'Rabczewska v Poland and Blasphemy Before the ECtHR: A Neverending Story of Inconsistency' (Strasbourg Observers, 21 October 2022) https://strasbourgobservers.com/2022/10/21/rabczewska-v-poland-and-blasphemy-before-the-ecthr-a-neverending-story-of-inconsistency/ accessed 6 May 2026.

[41] *İ.A. v Turkey* App no. 42571/98 (ECtHR, 13 September 2005).

[42] ibid para 29.

[43] ibid Joint Dissenting Opinion of Judges Costa, Cabral Barreto and Jungwiert.

[44] ibid Joint Dissenting Opinion of Judges Costa, Cabral Barreto and Jungwiert at 8.

[45] ibid.

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A more recent example of this consistency, *E.S. v Austria,* can be considered the most doctrinally complex of the sexualised blasphemy cases.[46] The applicant, a member of the Freedom Party in Austria, held a series of seminars she called 'Basic Information on Islam', open to both party members and the public. After making comments on the Prophet Muhammad's sexuality, the applicant was charged under Articles 188 and 283 of the Austrian Criminal Code, for disparaging religious doctrines and inciting hatred respectively. The statements that were upheld at the case before the ECtHR involved the applicant suggesting that the Prophet was a paedophile due to his marriage to Aisha, a seven-year-old girl, with whom he had a sexual relationship.

The ECtHR applied the three-part proportionality test, finding that the interference had been prescribed by law, that the legitimate aim was to safeguard religious peace and protect religious feelings, and that it was necessary in a democratic society in the event of an improper or even abusive attack on an object of religious veneration, engaging State responsibility for Article 9 rights.[47] The Court referred to the absence of a uniform European conception of the requirements of balancing these rights, giving the Member State a broader margin of appreciation, making specific reference to the *Otto-Preminger* case.[48]

An important analytical problem in *E.S.* is that the Court considered the definition of 'paedophilia' to reach its conclusion. According to the Court, "the common definition of paedophilia was a *primary* sexual interest in children who had not yet reached puberty."[49] The Court drew from this definition that Muhammad was not a paedophile as he had purportedly only had one sexual relationship with a child and had stayed married to her after she had become an adult. This is an arbitrary definition; the general public would consider an adult man who had had even one sexual relationship with a nine-year-old to be a paedophile, even if the relationship lasted into adulthood, particularly in the context of contemporary understanding of grooming. The fact that the ECtHR gave weight to establishing the definition of paedophile demonstrates that the Strasbourg Court conflated or, at the very least, combined principles of

46 *E.S. v Austria* App no. 38450/12 (ECtHR, 25 October 2018).

47 ibid paras 39-58.

48 ibid para 44.

49 ibid para 14 (emphasis added).

determining value and fact judgements.[50] As Smet points out, it is verging on ridiculous to balance a case on the question of whether having a sexual relationship with *only* one child over one thousand years ago is enough to be considered a paedophile today.[51] It also resulted in the Court coming perilously close to interpreting Islamic scripture and doctrine which, although consistent with the Court's previous engagement in making distinctions "where a statement amounts to a value judgment" where it noted that "the proportionality of an interference [depends] on whether there exists a sufficient factual basis for the impugned statement", is something it has deliberately sought to avoid and which scholars have determined should not be the role of secular courts.[52]

This difficulty directly contradicts the religious question doctrine. By borrowing defamation law principles when determining the distinction between value judgements and statements of fact and applying them to determine whether a statement about a religious figure is disproportionate, the Court effectively treated the Prophet as a legal person, raising a troubling hierarchy of rights, with those of a historical or religious figure placed above the rights of a living member of society. The absorption of this reasoning from the local court, without critical scrutiny, is precisely the kind of doctrinal inconsistency that an excessively wide margin of appreciation enables.

Additionally, the Court states in its judgment that there is an "absence of a uniform European conception" of blasphemy laws, seemingly ignoring the 2013 Resolution and Guidelines on the Promotion and Protection of Religion or Belief adopted by the European Parliament which shows evidence of a growing hostility to blasphemy laws.[53] Again, countries which overly restrict freedom of expression in the name of religious feelings should be regarded as the exception, not the rule, and a narrow margin of appreciation should be applied accordingly. This begs the question of why the Court continues to be deferential to countries

[50] Stijn Smet, 'Free Speech versus Religious Feelings, the Sequel: Defamation of the Prophet Muhammad in *E.S. v Austria*' (2019) 15 *European Constitutional Law Review* 158, 165–66.

[51] Stijn Smet, 'E.S. v Austria: Freedom of Expression Versus Religious Feelings, the Sequel' (Strasbourg Observers, 7 November 2018) https://strasbourgobservers.com/2018/11/07/e-s-v-austria-freedom-of-expression-versus-religious-feelings-the-sequel/ accessed 1 May 2026.

[52] *E.S. v Austria* (n 46) paras 47-48.

[53] ibid 44.

DOI: 10.14324/111.444.2052-1871.2184

in cases of blasphemy, and particularly why it considers sexualised blasphemy to warrant an especially wide margin.

In contending with blasphemy cases on the whole, references to the right not to be offended in one's belief has proven the willingness of the ECtHR to extend the text of the ECHR, going beyond the rights it is supposed to be interpreting.[54] This allows its excessive deference to domestic authorities, which it justifies by declaring them better-suited to decide on what would cause offence in their territory, with some critics proposing this results in an "illusionary clash" as freedom of religion is not in itself prevented by transgressive expression; believers continue to enjoy their full right to believe and manifest their beliefs.[55]

VI. Compound Deference

As observed in each of the sexualised blasphemy cases, the Court avoids explaining why the sexual element aggravates the religious offence. This is not an oversight: it reflects the fact that any explanation would require the Court to take a position on what constitutes appropriate sexual conduct in a religious context, which would in turn require it to evaluate the content of religious doctrine, precisely what the religious question doctrine prohibits. This type of reflection would require delving into the private, a realm the Strasbourg Court does not seek to regulate as a human rights court.[56] The result is a double bind from which the Court escapes only by maximising deference to national authorities.

VII. The Public/Private Distinction and Its Theoretical Foundations

This private/public distinction has direct implications for how human rights adjudication works in practice. For Rawls, the justification of restrictions on liberty in a pluralist society must be capable of being defended by appeal to public reasons accessible to all citizens regardless of their comprehensive moral or religious views.[57] For Habermas, constitutional principles' legitimacy depends on them being grounded in a shared political culture that brackets comprehensive moral doctrines, producing what he calls constitutional patriotism

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[54] Abdou (n 37).

[55] Smet (n 50) 142.

[56] For a critique of the public/private divide in human rights, see Andrew Clapham, *Human Rights in the Private Sphere* (Oxford University Press 1993).

[57] John Rawls,, *The Law of Peoples: With "The Idea of Public Reason Revisited"* (Harvard University Press 2001).

DOI: 10.14324/111.444.2052-1871.2184

(*Verfassungspatriotismus*).[58] These concepts clearly apply in the European context where EU member states act as a multicultural democratic society held together by a shared political culture founded in constitutional principles, instead of nationality or ethnicity. According to Habermas, this will result in a form of patriotism more compatible with diverse societies.[59] If this is the underlying aim of the Court as Habermas theorises, then having to define what should be 'religion' or 'sexuality' would contradict the liberal ideals – namely pluralism, tolerance, diverse social inclusion, and mutual respect – underscoring the ECtHR's foundation.[60] On either account, a restriction on freedom of expression that is justified solely by reference to the offence it causes to the religious sensibilities of one group of citizens is problematic because it privileges a particular comprehensive doctrine over the rights of others.

Sexualised blasphemy is doubly problematic in this regard because it implicates both religion and sexuality, two domains that liberal theory insists belong to the private sphere and which state institutions should not regulate or rank. The ECtHR, as a court committed to liberal democratic principles, faces an acute difficulty. To explain why sexualised depictions of religious figures are more offensive than non-sexualised ones, it would have to appeal either to the religious doctrine that regards certain sexual behaviour as sinful or to a general moral claim that sexual imagery is inherently more harmful. The first requires adjudicating on religious doctrine; the second requires defining acceptable sexual morality. Both move the Court away from the public reasons it bases its judgments on and, according to liberal legal theory, on which its authority is based. The solution, expanding the margin of appreciation until the problem disappears into state deference, is expedient but doctrinally corrosive.

This deference has forced the Strasbourg Court to turn away from the traditional justifications for limiting freedom of expression, as laid out earlier, and take on novel approaches presented by the Member States. Most notably, this involves the connection between the sexualised blasphemy cases and the Court's broader 'living together' jurisprudence.

VIII. 'Living Together' as Doctrinal Evasion

[58] Jürgen Habermas, *Europe: The Faltering Project* (Polity Press 2009) 66–70.

[59] Jürgen Habermas, 'Citizenship and National Identity: Some Reflections on the Future of Europe' (1992) 12(1) *Praxis International* 1.

[60] Trispiotis (n 13) 595.

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An important development in the ECtHR's stronger approach to freedom of religion was seen in *Eweida v United Kingdom* (henceforth *Eweida*).[61] Although this case concerned freedom of religious expression at work and not blasphemy laws, analysing the Court's approach to Article 9 rights is useful to understand the evolution of its attitude towards interferences with other ECHR rights. In *Eweida*, the Court distanced itself from the previous case law where the right to resign was held as a feasible solution for problems with manifesting religion at work.[62] This is now not a constitutive reason in itself and must be paired with other factors when considering the proportionality of the restriction imposed.[63] In its consideration that restrictions on wearing religious symbols at work constitute *prima facie* violations of manifestation of religion rights (Article 9 ECHR), the scope of freedom of religion was greatly expanded by the ECtHR.[64]

In line with this stronger protection of Article 9 rights, the Court expanded what could constitute a restriction 'necessary in a democratic society' in *SAS v France*.[65] After rejecting the gender equality argument proposed by the French government to justify banning veiling, the Court cited a novel human right: the right to living together. This right was developed as being necessary as "under certain conditions the 'respect for the minimum requirements of life in society' referred to by the Government, or of 'living together', can be linked to the legitimate aim of the 'protection of the rights and freedoms of others'."[66] This was justified by the importance of being able to see people's faces, which "plays an important role in social interaction", although there is no right under the ECHR to see another person's face and the Court rejected France's security argument regarding this.[67]

However dubious it may be, the majority accepted the 'living together' argument and ruled that France's Law no. 2010-1192 banning face coverings in public, also known as the 'French burqa-ban', did not violate Articles 8 (right to respect for private and family life), 9

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61 *Eweida and Others v United Kingdom* (2013) 57 EHRR 8.

62 *Stedman v United Kingdom* (1997) 23 EHRR CD 168.

63 Michelle Biddulph and Dwight Newman, 'Eweida v United Kingdom' (2013) 20 *Australian International Law Journal* 183.

64 ibid.

65 *SAS v France* App no 43835/11 (ECtHR, 1 July 2014) 38 BHRC 475.

66 ibid para 121.

67 ibid para 122.

(freedom of thought, conscience and religion) or 14 (prohibition of discrimination) of the ECHR. This may come as no surprise considering the Court has yet to find a violation of the right to manifest one's religion or belief, bar the case of *Ahmet Arslan v Turkey*, wherein it found a violation of Article 9 rights where ordinary citizens had been convicted for wearing religious clothing in public under a law intended for persons in official roles.[68] Nonetheless, it would be reasonable to consider that the definitive prohibition on face coverings infringed on ordinary citizens' Article 9 rights to freedom of religion. The 'living together' justification was considered weak by the dissenting judges, who questioned how this abstract concept could justify finding that the veil violates "the rights and freedoms of others."[69] Of particular concern was what rights were being infringed, the dissenting judgment stating that "[t]he very general concept of 'living together' does not fall directly under any of the rights and freedoms guaranteed within the convention" and that even if it did, the concept was too "vague".[70] The dissent also references the fact that the Court confused manifestation of religion and practice of religion, noting it is not the veil which may be "perceived as aggressive per se, but [...] the philosophy presumed to be linked to it."[71] This is an important distinction to make as it affects the application of Article 9 religious rights, with manifestation not being an absolute right, and applies equally to the sexualised blasphemy cases: the blasphemy in itself does not create real harm for believers; it is what the blasphemous expression represents in terms of both casting doubt on religious tenets and the potential of inspiring hostility in those opposed to religion. If the Strasbourg Court took this stance, it would be more reasonable for states to be afforded a narrower margin of appreciation as the 'harm' being done to religious feelings would be (and arguably is indeed) a symbolic one.

According to Berry, 'living together' pursues a distinctly assimilationist agenda, risking that minorities will be asked to submit to the rule of the majority rather than pursuing the more integrationist aims of 'pluralism, tolerance and broadmindedness' that the Strasbourg Court

[68] *Ahmet Arslan and others v. Turkey* App no 41135/98 (ECtHR 23/02/2010).

[69] *SAS v France* (n 65) para 121.

[70] ibid joint partly dissenting opinion of Judges Nussberger and Jäderblom, para 5.

[71] ibid para 6.

cites when conducting proportionality tests.[72] Vickers similarly contends that 'living together' is “one of the weakest legitimate aims” in the interpretation of the ECHR.[73] The problem with the idea of 'living together' is that the Government must necessarily have an interest in requiring that citizens share certain values, such as national fraternity and the “minimum requirements of civility facilitating social interaction in their individual decisions”,[74] which is difficult to align with the concept of the atomistic liberal individual that modern human rights law is based upon.[75]

The critical argument, which the original cases do not make explicit, is this: 'living together' is particularly damaging as a justificatory device in sexualised blasphemy cases because it requires prioritising the emotional comfort of religious believers over the expressive freedom of those who critique religion in sexual terms. In such cases, the 'living together' rationale effectively requires the Court to rank religious sensibilities above other forms of expression, creating an asymmetry the Convention does not authorise. As McCrea observes, “the symbolic status granted to religion by the state or previously largely symbolic laws relating to matters such as blasphemy have come to be seen in a new light as the cultural consensus that limited their impact breaks down.”[76] This argument is clearly aligned with France’s approach to multiculturalism, which Gill and Engeland describe as prioritising Republican values whilst being integrationist, treating “requests to be treated differently as a result of religion, culture or tradition [...] as threats to the Republic”.[77] It is arguably not so much the value of ‘living together’ that the face veil ban aims to achieve, but of ‘continuing to live the French way’.

[72] Stephanie Berry, ‘S.A.S. v France: Does Anything Remain of the Right to Manifest Religion?’ (*EJIL: Talk!*, (2 July 2014) https://www.ejiltalk.org/sas-v-france-does-anything-remain-of-the-right-to-manifest-religion/ accessed 17 April 2026.

[73] Lucy Vickers, ‘Conform or Be Confined: *S.A.S. v France*’ (Oxford Human Rights Hub, 8 July 2014) https://ohrh.law.ox.ac.uk/conform-or-be-confined-s-a-s-v-france/ accessed 17 April 2026.

[74] *SAS v France* (n 65) para 153.

[75] Trispiotis (n 13) 599.

[76] McCrea (n 2) 262.

[77] Aisha Gill and Ineke van Engeland, 'Criminalisation or "Multiculturalism without Culture"? Comparing British and French Approaches to Tackling Forced Marriage' (2014) 36 *Journal of Social Welfare and Family Law* 241, 248.

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It follows that if 'living together' justifies suppressing sexualised critiques of religion, the Court risks prioritising emotional comfort over resilient democratic principles, including the very pluralism it seeks to protect. Reorienting the purpose of Article 10 away from principles of democracy to preserving social peace both affords religion special rights not given to non-religious belief (contrary to the ECtHR's commitment to equality) and privileges majoritarian moral sensibilities. Bending to the tyranny of the religious majority transforms the margin of appreciation from a doctrine of sovereignty and subsidiarity into a mechanism for insulating dominant moral orthodoxies from critique.

IX. *Wingrove* and the Rule of Law Problem

The same issue arose in *Wingrove v UK*, one of the last cases before blasphemy was removed as a criminal offence in England and Wales by the Criminal Justice and Immigration Act 2008. Blasphemy was governed by the conditions in the Obscene Publications Acts 1959 and 1964 and the Public Order Act 1986, defining the elements of blasphemy as publication and causing distress, which were, on any fair reading, incredibly vague. The judicial definition of blasphemy identified in *R v Lemon*,[78] quoted in the Court's judgment, is as follows: "any 'contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ or the Bible' [where t]he question is not of the matter expressed, but of its manner, i.e. 'tone, style and spirit' in which it is presented."[79] This also provides no concrete answer as to what kind of conduct constitutes blasphemy or what kind of spirit must be presented. This was one of the issues raised by the applicant, who specifically cited that "there is no uniform law of blasphemy in Britain", which could easily be applied both to the fact that each British jurisdiction had their own blasphemy law and the irregular application of blasphemy laws before the British courts.[80] Whether the legislation was sufficiently clear to satisfy the rule of law should have been one of the key factors the ECtHR considered when interpreting the blasphemy law, as it is with any other legislation. For example, the Strasbourg Court ruled in *Cumhuriyet Halk Partisi v Turkey* that the relevant Turkish law was too vague to satisfy the 'prescribed by law' element required by Article 11(1), the right to peaceful protest, which is equally a requirement for justifying interferences with Article 10 rights.[81] Based on the issues raised by the applicant, the Court's

[78] *R v Lemon* [1979] AC 617.

[79] *Wingrove v United Kingdom* App no 17419/90 (ECtHR, 25 November 1996) para 13.

[80] ibid para 16.

[81] *Cumhuriyet Halk Partisi v Turkey* App no 19920/13 (ECtHR, 26 April 2016); ECHR, article 10(2).

analysis of the rule of law in *Wingrove* is therefore unsatisfying but this precedent has been followed in subsequent cases nonetheless.

Wingrove concerned a short film depicting Saint Teresa of Ávila experiencing erotic visions of Jesus Christ; the sexual element was central to the impugned expression. The Court upheld the conviction, reasoning that given the vague nature of blasphemy as an offence, the law regulating it necessitates a certain degree of flexibility, which it reasoned should not be an issue as long as its scope and exercise are laid out with sufficient clarity.[82] Viewed through the comparative lens developed in this essay, *Wingrove* occupies the same category as *Otto-Preminger* and *E.S.*: sexualised blasphemy cases where the Court's reasoning is at its least transparent and the margin at its widest. The sexual element is present, the doctrinal engagement is minimal, and the formal reasoning relies on deference that the Court's own rule of law standards should have precluded.

Case 5 – Non-Sexual Blasphemy: Rabczewska and the Possibility of a Narrower Margin

The more recent case of *Rabczewska v Poland* demonstrates the difference in the Court's approach to non-sexual blasphemy in comparison to sexualised speech. In *Rabczewska*, the Court found a violation of Article 10 where a Polish pop singer had been convicted under Article 196 of the Polish Criminal Code for claiming the Bible was written by people under the influence of drugs and alcohol.[83] The ECtHR found that while Article 196 was sufficiently clear to be 'prescribed by law', and that the aim of protecting the religious rights of others was legitimate, the Polish courts had failed to assess whether the applicant's statements were factual claims or value judgements, and had not proportionately balanced her rights with believers' rights.[84] The Court made specific reference to the disproportionate fine imposed, which was the maximum fine in this context. *Rabczewska* suggests the Court is indeed capable of scrutinising blasphemy restrictions more closely, and of narrowing the margin of appreciation where expression does not have a sexual element. However, it is noteworthy that the dissenting judgment still considered that "religiophobic speech constitutes an indirect incitement to more serious offenses against religious groups or their members" and advocated for the Court to

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[82] *Wingrove v United Kingdom* (n 79) para 40.

[83] *Rabczewska v Poland*, app no 8257/13 (ECtHR, 15 September 2022).

[84] ibid para 60.

DOI: 10.14324/111.444.2052-1871.2184

adopt a wider margin of appreciation, while implying that the Court was more protective towards Islam than other religions.[85] Evidently, the shift in the application of the margin of appreciation, if it occurs, will be incremental, not instantaneous, and not without its own critiques.

As the case did not have a sexual element its significance for the argument of this essay is double-edged. On the one hand, it shows that the Court can and will scrutinise blasphemy restrictions more carefully and find violations, which suggests the margin in non-sexual blasphemy cases may be narrowing. This is consistent with the claim that non-sexual blasphemy cases attract more searching review than sexualised ones. On the other hand, it does not directly test whether a sexual element would have changed the outcome in *Rabczewska*. The absence of a sexual element leaves open the question of whether the Court's greater willingness to find violations in cases like *Rabczewska* will ever extend to cases involving sexual content, or whether the compound deference identified in this essay will persist regardless of other doctrinal developments.

One case does not change an approach, but *Rabczewska* does suggest that there is a coherent and principled basis on which the Court could apply a narrower margin in blasphemy cases generally. The extension of that narrower margin to sexualised blasphemy cases would require the Court to be more transparent about the role of the sexual element in its reasoning. It must explain, rather than assume, why the sexual element aggravates the offence, and to test whether that explanation can be sustained on grounds of public reason rather than majoritarian religious sensibility.

X. Concluding Remarks

When looking at the overall picture, it is clear that the ECtHR is gradually adjusting its approach to balancing rights, moving away from the traditional legitimate aims for interference allowed by the Convention. The Strasbourg court’s treatment of blasphemy cases concerning a sexual element is evidence of a wider pattern of applying a wide margin of appreciation, justified by ‘living together’ or ‘cultural sensitivity’, a concept not enshrined in the ECHR but which has been increasingly adopted by the Court.

[85] ibid, Dissenting Opinion of Judge Wojtyczek.

This is democratically defensible in one narrow sense: it respects the diversity of moral views across Member States on matters the Convention does not explicitly resolve. But it is doctrinally weak. The Court's silence on the sexual element in cases like *Otto-Preminger* and *E.S.* leaves much to be inferred from case law rather than decided from concrete decisions, producing an inconsistent and unpredictable body of jurisprudence. This is particularly pertinent considering that the ‘lack of uniform conception’ of blasphemy in European legal systems cited so often by the Court is no longer truly the case; the 2013 Resolution and Guidelines on the Promotion and Protection of Religion or Belief showcase this. More fundamentally, granting a wide margin of appreciation risks transforming it from a doctrine of subsidiarity into a shield for dominant moral orthodoxies, insulating them from the very critical and symbolic challenge that Article 10 was designed to protect.

The conclusion of *Handyside*, that freedom of speech protects that which 'offends, shocks or disturbs', cannot be overlooked. It should not simply be used as an incantation the Court recites before delivering judgments on freedom of expression without truly considering its doctrinal basis. If the Strasbourg Court is to take seriously its commitment to freedom of expression, a freedom it has repeatedly stressed is essential for liberal democracy, it must be prepared to explain why sexualised depictions of religious figures fall outside that protection. The case for doing so on principled grounds, rather than by reference to an increasingly vague conception of 'living together', grows more pressing as Europe's religious demographics continue to diversify and the cultural consensus that once underwrote these restrictions continues to erode.

Europe’s changing religious demographic increasingly causes issues for the ECtHR, as religion is not being phased out as many scholars during the twentieth century theorised it would be.[86] The ECtHR’s struggle to balance states’ internal religious regulation and the expression of human rights is symptomatic of the Court’s requirement to rely on the ECHR, a rights-focused text, which cannot on its own provide the solution to the regulation of the relationship between religion, law and state powers. As the ECHR is a ‘living instrument’, following novel legal concepts is not totally outwith the Strasbourg Court’s remit, however,

[86] Ronan McCrea (n 11) 118.

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the Court should be more transparent about the fact that it is drawing on alternative sources when ruling on the relationship between religion and the state. To invoke 'living together' without explaining whose way of living is being protected, and at whose expressive cost, is not judicial restraint; it is judicial evasion, and it is in tension with the fundamental rights the Convention was designed to guarantee.

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Shari'ah and the State: Reassessing Legal Pluralism in Malaysia through the Kelantan Controversy

Saumya Verma*

Abstract: This article deliberates over the Malaysian case as an intriguing illustration of robust legal pluralism. It offers an opportunity to reconsider and debate the relationship between state and religious practices, particularly the incorporation of Shari'ah law, in a diverse democratic constitutional state like Malaysia. Malaysia as a state is a significant example of multiculturalism, pluralism, and modern Islamic society. The reforms in Malaysian Shari'ah law since the 1980s indicate that the understanding of Islamic legal practices is highly influenced by the context. The expression of form and substance in Islamic legal practices is a result of politico-legal and judicial struggles, influenced by power configurations that shape Islam into different streams of thought, ranging from democratic-egalitarian to authoritarian-orthodox, which are not mutually exclusive. This article further examines the tension between the primacy of Islam and the supremacy of the Federal Constitution (FC) as they arise in Malaysian courts, with a special focus on a recent case from Kelantan. It discusses the FC's constitutional primacy idea and how Islam and Shari'ah authority fit within it. It also analyses the attitude of civil courts towards the legitimacy of contentious laws passed under the guise of Shari'ah (i.e., claiming divine authority) and highlights the significant divide that emerged between constitutional theory and judicial practice in the 1990s followed by the Kelantan case, in which the Malaysian apex court struck down 16 Shari'ah provisions as unconstitutional. This landmark ruling has significant implications for the country's legal framework. The concluding section discusses the extent of legal pluralism in Malaysia and proposes suggestions to deal with the present legal deadlock.

Keywords: *Legal Pluralism; Malay Muslims; Shari'ah Courts; Federal Constitution; Kelantan Shari'ah Law*.

I. Introduction

* Assistant Professor of Law, Soundarya Group of Institutions, Bengaluru, India; Ph.D. Candidate, Rajiv Gandhi National University of Law, Punjab, India.

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On 9 February, 2024, the Malaysian Federal Court ruled that several Kelantan state *Shari'ah* laws were unconstitutional.[1] This decision received appreciation from various people and organisations, including petitioner Nik Elin Zurina Nik Abdul Rashid and Sisters in Islam (SIS), who regarded it as a validation of the supremacy of the Federal Constitution (FC).[2] However, this verdict faced backlash from *Kelantan*'s ruling party Parti Islam Se Malaysia (PAS)[3] and its factions, with PAS secretary-general, Takiyuddin Hassan, labeling the day as a 'Black Friday'.[4] This ruling has once again sparked the debate about the complex relationship between civil courts and Shari'ah courts, the jurisdiction of both courts, and the role of Islam in the FC.

Whether Malaysia is an Islamic theocracy or a secular state has been the subject of heated debate for the past thirty years. A drug law's constitutionality was contested in *Che Omar bin Che Soh v. Public Prosecutor* on the ground that as Islam is official religion of Malaysia, all laws must respect Islam's core principles.[5] Since subversion is covered under Article 149 of the FC, the Federal Court maintained the legality of the contested provisions. It was further held that the assertion of 'Islam' as the official religion of the Federation under Article 3(1) was essentially ceremonial and did not establish the Shari'ah as the yardstick by which legislation is judged to be legitimate.[6] Malaysia exhibits legal diversity stemming from its colonial heritage, characterised by the coexistence of common law and Shari'ah law. The modern Federation of Malaysia, consisting of 13 states and three federal territories, officially

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[1] 'Malaysia's top court rules some Islamic laws in Kelantan unconstitutional' *Al Jazeera* (9 February 2024) <https://www.aljazeera.com/news/2024/2/9/malaysias-top-court-rules-some-islamic-laws-in-kelantan-unconstitutional> accessed 26 April 2026; In accordance with the Library of Congress (ALA-LC) transliteration method, which keeps the apostrophe to represent the Arabic letter `ayn (ʿ), the spelling '*Shari'ah*' is used uniformly throughout this paper. Due to the lack of standardised transliteration norms for Arabic script, alternative spellings such as 'Sharia', 'Shari'ah', and 'Syariah' (the latter prominent in Malaysian legal contexts) are frequently seen in English-language sources.

[2] Kenneth Tee, 'Nik Elin: Federal Court's Ruling in Kelantan Shariah Criminal Provisions a Testament to Federal Constitution's Supremacy' (*Malay Mail*, 9 February 2024). Kenneth Tee, 'Nik Elin: Federal Court's Ruling in Kelantan Shariah Criminal Provisions a Testament to Federal Constitution's Supremacy' (Malay Mail, 9 February 2024) <https://www.malaymail.com/news/malaysia/2024/02/09/nik-elin-federal-courts-ruling-in-kelantan-shariah-criminal-provisions-a-testament-to-federal-constitutions-supremacy/117204> accessed 28 April 2026.

[3] PAS is a political party in Malaysia with an Islamist ideology. PAS has consistently advocated for the interests of the Malay Muslim community in Malaysia over the years. PAS strongly supports the implementation of Sharia law and promotes a specific Malay and Islamic Malaysian identity.

[4] Salma Ben Souissi, 'Malaysia federal court declares Kelantan state Shariah laws unconstitutional' (*JURIST,* 2024) <https://www.jurist.org/news/2024/02/malaysia-federal-court-declares-kelantan-state-shariah-laws-unconstitutional/> accessed 26 April 2026.

[5] *Che Omar bin Che Soh v. Public Prosecutor* [1988] 2 MLJ 55; Tamir Moustafa, 'The Judicialization of Religion' (2018) 52(3) *Law & Society Review* 685, 708.

[6] ibid.

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upholds doctrines of a democratic constitutional state, including democracy, checks and balances, rights and freedoms, and rule of law.[7] The FC of Malaysia which was enacted in 1957 is based on Western liberal constitutional framework, especially the British Westminster form of parliamentary democracy. However, it also recognises that there are varied groups of people in Malaysia.[8] It recognises the group-specific rights and implements the affirmative action programmes for Malays.[9]

Malaysia is neither a secular nor an Islamic state, as per Article 3 of the FC, that designates Islam as the official religion of Malaysia.[10] However, the Federal Court has declared that Shari'ah was not a dominant law of nation in the *Che Omar* decision of 1988. According to Article 3(2) of the FC, the Sultan of each Malay state serves as the Head of the Religion of Islam in his state.[11] In most secular states, the positions of Head of State and Head of Religion are not combined. Islamic personal laws are recognised, and laws that contradict or run counter to the FC may be enforced by the government. However, if a state law is inconsistent with a federal law, then federal law is preferred, with the extent of the inconsistency.

This article argues that there exists a continual constitutional uncertainty about the demarcation between federal and state power, resulting in frequent intrusions by state legislatures into domains designated for federal authority. The constraints established by the Syariah Courts (Criminal Jurisdiction) Act 1965 impose a lasting limitation on the enforcement of Shari'ah law, complicating the states' aspirations for comprehensive implementation of Shari'ah law and inadvertently fostering legislation that challenges these boundaries.[12] The lack of institutional linkages between the civil and Shari'ah court systems, such as referral

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[7] Dian AH Shah, '"Constitution-Building and Constitutional Culture: The Case of Malaysia"' (*Melbourne Forum on Constitution- Building*) <https://law.unimelb.edu.au/__data/assets/pdf_file/0007/2987953/Malaysia-DianShah.pdf> accessed 12 September 2024.

[8] Fariza Milaqurshiah Mahmud, 'A Review of the Malaysian Jurisprudence of Constitutional Interpretation' (2023) 31(1) *International Islamic University Malaysia (IIUM) Law Journal* 203, 234.

[9] *Ibid*; art 153 of the Federal Constitution of Malaysia grants the Yang di-Pertuan Agong the duty to protect the special status of the Malays and the indigenous peoples of Sabah and Sarawak, and empowers the execution of affirmative action initiatives for these demographics.

[10] Mohamed Azam Mohamed Adil, 'The Federal Constitution: Is Malaysia a Secular State?' (2015) *ICR Journal* 121, 123.

[11] Tamir Moustafa, 'The Judicialization of Religion' (2018) 52(3) *Law & Society Review* 685, 708.

[12] 'Syariah' is an Arabic loanword in Malay language used to refer to Sharia law in Malaysia. The spelling 'Syariah' appears here as it is the official spelling used in Malaysian legislation and the Malaysian legal system, including the Federal Constitution and the Syariah Courts (Criminal Jurisdiction) Act 1965 itself. This differs from the transliteration 'Shari'ah' used elsewhere in this paper, which follows the Library of Congress (ALA-LC) system for Arabic script.

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procedures, pre-enforcement certification, or pathways for addressing potential conflicts, constitutes substantial obstacles to successful legal proceedings.

II. The Three Structural Failures Revealed by the Kelantan Ruling

The Federal Court's long-anticipated decision in *Nik Elin Zurina Nik Abdul Rashid & Anor v. Kerajaan Negeri Kelantan* that addressed a constitutional challenge by two Muslim women against Kelantan Shari'ah state laws has recently been issued, where 16 Shari'ah provisions were held unconstitutional.[13] The question is not whether Islam is the state religion which is already settled by Article 3(1) of the FC. Nor is the question whether Shari'ah (as divine ideal) is better than the FC. The whole controversy actually revolves around the interpretation of the FC, particularly whether the Shari'ah law, which is the human, positive law codification of certain rules derived from Shari'ah, enacted by the state legislative assemblies is outside their powers. The Court reiterated that there is no controversy regarding Islam being official religion and it is only on the foundation of interpretation of FC.[14] The petition was filed on 25 May, 2022, by Nik Elin Zurina Nik Abdul Rashid and Tengku Yasmin Nastasha Tengku Abdul Rahman in the Federal Court under Article 4(4) of FC. The Kelantan state government was the respondent.[15] The petitioners argued that the state legislative assembly had violated the FC by passing certain sections of the 'Kelantan Syariah Criminal Code (I) Enactment 2019'. They further argued that the separation of powers among the Federal List (List I) and the State List (List II) limits the power of a state to legislate Shari'ah criminal offences, prohibiting encroachment into federally reserved jurisdictions.[16]

For the 18 provisions, the petitioners argued that Article 75 of FC required federal legislation to predominate over laws established by Parliament and state legislatures. Article 75 states, 'If any state law is inconsistent with a federal law, the federal law shall prevail and

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[13] *Nik Elin Zurina Nik Abdul Rashid & Anor v Kerajaan Negeri Kelantan* [2024] 3 MLRA; Rozanna Latiff and Danial Azhar, 'Malaysia's top court strikes out some Islamic laws in landmark case' (*Reuters*, 9 February 2024) <https://www.reuters.com/world/asia-pacific/malaysias-top-court-declares-16-islamic-laws-kelantan-state-unconstitutional-2024-02-09/> accessed 26 April 2026.
[14] ibid.
[15] Tee (n 2).
[16] *Nik Elin* (n 13) [121]; The Federal Constitution of Malaysia, Ninth Schedule, List I and List II.

DOI: 10.14324/111.444.2052-1871.2157

the state law shall, to the extent of the inconsistency, be void'.[17] They also claimed that the FC specifically requires Parliament to supervise the state legislatures' ability to pass Islamic offences. A 2021 Federal Court ruling with a nine-judge panel universally declared a Selangor state legislation that rendered unnatural sex a Shari'ah offense illegal.[18]

For the respondents, the Kelantan state government maintained that Nik Elin and her daughter had no standing to contest the provisions since they were self-interested.[19] They contended that their concerns were premature and mere assumptions. The state administration further claimed that the challenged regulations were established to protect all Muslims in the state and keep them Muslim. As per Syariah Courts (Criminal Jurisdiction) Act 1965, state legislature may enact Shari'ah offences, hence the challenged provisions are legal.[20] The main legal issue at hand concerns division of powers among federal and state governments. This case prompts considerations regarding elucidation and execution of Shari'ah in a contemporary legal framework, particularly concerning enforcing punishments under Shari'ah.

The Federal Court applied the Ninth Schedule which delimits the state legislative authority, and Article 75 nullifies conflicting state legislation. Interpreting the ruling merely as a reaffirmation of federal primacy overlooks its profound implications. The decision reveals the inadequacy of the Malaysian constitutional system to effectively control, rather than just rectify, ongoing state legislative overreach. There are three structural failures arise from the case, each indicating issues outside the scope of legal remedy:

A. Recurrence without Deterrence:

The structural constraint stated by the *Kelantan* verdict is more pronounced when considered in the context of the recent constitutional history that preceded it. In *Iki Putra Mubarrak v Kerajaan Negeri Selangor*, a nine-judge Federal Court bench unanimously declared a Selangor Shari'ah provision criminalising 'unnatural sex' invalid, asserting that the matter resided firmly within the purview of federal criminal law as delineated in the Penal

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[17] The Federal Constitution, art 75; *Nik Elin* (n 13).
[18] Khairah N Karim, 'Federal Court declares Selangor syariah law criminalising unnatural sex unconstitutional' NST Online (*New Straits Time*, 2021) <https://www.nst.com.my/news/crime-courts/2021/02/668825/federal-court-declares-selangor-syariah-law-criminalising-unnatural> accessed 26 April 2026.
[19] Tee (n 2).
[20] *Nik Elin* (n 13) [1].

DOI: 10.14324/111.444.2052-1871.2157

Code, thereby indicating that the state legislature had surpassed its constitutional authority.[21] The decision was definitive, clear, and obligatory for all state legislatures within the Federation. Subsequent actions exhibited neither acquiescence nor contemplation. The Kelantan state legislature approved the Syariah Criminal Code (I) Enactment 2019, which had mostly similar provisions, while the Selangor challenge remained unresolved before the court that subsequently invalidated it.[22] The legislature did not await the Federal Court's conclusion. Instead, it proceeded to enact the legislation under legal ambiguity.

The sequence was not coincidental but indicative of a broader institutional approach. The possibility of future court nullification does not effectively serve as a significant legislative deterrent in practice. A state legislature that enacts a legally flawed provision faces no institutional repercussions beyond the nullification of that provision; there are no penalties or procedural obligations, and no responsibility to address the intentional recurrence of a recognised constitutional error. The Federal Court, as recognised in paragraphs 240 to 241 of the *Nik Elin* verdict, operates as a reactive adjudicative entity.[23] It can rectify unconstitutional laws retroactively. It cannot avert the implementation of an unconstitutional law. Even after receiving a caution, a legislature cannot be restrained or penalised for its continued actions. Every new incursion necessitates new legal actions, new petitions, new arguments, and additional years of litigation, imposing the whole burden on private litigants and the complete expense on the court system and those subjected to provisions that were never constitutionally legitimate.

The Federal Court's rationale in both instances was robust, meticulously articulated, and constitutionally valid. However, it reveals a cycle of constitutional conflict, characterised by the persistent contestation, adjudication, and structural preservation of the same jurisdictional limit for subsequent challenges. This does not constitute a doctrinal failure. This constitutes a failure in institutional design. A legal structure that permits the diagnosis of the same pathology twice within three years, administers the identical cure on both occasions, and lacks a mechanism to avert a third occurrence is failing to uphold its constitutional limits. It is

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[21] *Iki Putra bin Mubarrak v. Kerajaan Negeri Selangor* [2020] 4 MLJ 213 (Federal Court, Malaysia); Zheng Hong See, 'The Federal Court of Malaysia Held State Syariah Law Criminalising "Unnatural Sex" Void and Unconstitutional' (*Oxford Human Rights Hub*, 2021) <https://ohrh.law.ox.ac.uk/the-federal-court-of-malaysia-held-state-syariah-law-criminalising-unnatural-sex-void-and-unconstitutional/> accessed 28 April 2024.
[22] Kelantan Shariah Criminal Code (I) Enactment 2019.
[23] *Nik Elin* (n 13) [240-241].

addressing its constitutional issues sequentially, incurring increasing costs, with no resolution in view.

B. The 3/5/6 Ceiling as Permanent Frustration

The second failure is in the structural disjunction between the doctrinal ambitions of states pursuing comprehensive application of Islamic criminal law and the jurisdictional limitations established by federal statute. The Syariah Courts (Criminal Jurisdiction) Act 1965 limits punishments in Shari'ah courts to three years of jail, a fine of RM 5,000, and six lashes, known as the 3/5/6 formula.[24] This ceiling is applicable irrespective of the severity of the offence in ancient Shari'ah law, thereby rendering the distinction between *hudud* offences, which entail set Quranic punishments, and *ta'zir* offences, which are subject to judicial discretion, constitutionally theoretical.[25] No state Shari'ah court may impose a *hudud* punishment without surpassing federal legislative boundaries.

The *hudud* legislation of 1993 and the 2015 parliamentary initiative by PAS to bypass the limitations were both immediate reactions to an anticipated federal obstruction.[26] The 2019 Code, albeit articulated in *ta'zir* terminology, was motivated by a similar frustration: a state assembly constitutionally authorised to implement Shari'ah criminal law yet legally restricted from enforcing punishments that its own religious belief considers divinely ordained.[27] States seeking to enforce *hudud* sanctions, as prescribed by ancient Islamic jurisprudence for offences like theft, apostasy, and illicit sexual activity, cannot do so legally under the 3/5/6 ceiling. The limitation does not, however, preclude governments from implementing *ta'zir* measures that criminalise identical conduct while imposing penalties within the statutory limit. The outcome

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[24] Syariah Courts (Criminal Jurisdiction) Act 1965 (Act 355) s 2.

[25] Karen Meerschaut and Werner de Saeger, 'Contextualising Malaysia's Islamic Law: A Nuanced Perspective' *Legal Pluralism in Muslim Contexts* (Brill 2019) <https://brill.com/display/book/edcoll/9789004398269/BP000016.xml>.

[26] The Kelantan Syariah Criminal Code (II) Enactment 1993 was enacted by the Kelantan State Legislative Assembly but remains unenforceable owing to constitutional limitations. See Nur Al Farhain Binti Kamaruzaman, 'Reconstructing the Theory of Ḥudūd and Its Application within the Malaysian Legal Framework: A Case Study of the Syariah Criminal Code (II) 1993, State of Kelantan' (Doctoral Thesis, The University of Leeds 2020).

[27] Department of Syariah Judiciary Malaysia (JKSM) confirmed that the impugned provisions of the Kelantan Syariah Criminal Code (I) Enactment 2019 were ta'zir offences. See 'Shariah Judiciary Dept: Federal Court's decision solely because provisions exceeded jurisdiction granted to state legislative body' (*Malay Mail, Kuala Lumpur*, 12 February 2024)<https://www.malaymail.com/news/malaysia/2024/02/11/shariah-judiciary-dept-federal-courts-decision-solely-because-provisions-exceeded-jurisdiction-granted-to-state-legislative-body/117486> accessed 28 April, 2026.

is a systematic motivation to formulate rules that are officially classified as *ta'zir* (discretionary, limited) yet substantively equivalent to hudud offences, thereby challenging the constitutional limits between federal and state criminal jurisdiction.

The Kelantan Code enacted in 2019 served as a weapon that criminalised behaviors previously addressed by the Penal Code, articulated as Shari'ah offences, with penalties meticulously designed to adhere to the 3/5/6 limit. The 3/5/6 ceiling fails to address the dispute between federal and state interpretations of Islamic criminal law; it only transfers the problem from punishment to legislative formulation. The *Kelantan* ruling illustrates that relocation.

C. Article 121(1A) as a Shadow Problem

The third failure is not explicitly stated in the *Kelantan* verdict. It emerges subtly yet undeniably in the procedural trajectory mandated by the case, as well as in the institutional gap that this trajectory reveals. Article 121(1A) of the FC stipulates that the civil High Courts lack jurisdiction over situations falling within the purview of the Shari'ah courts.[28] When Parliament enacted this provision through constitutional amendment in 1988, the objective was unequivocal and legitimate: to terminate a growing jurisdictional dispute between the civil and Shari'ah judiciaries, and to establish a safeguarded domain of authority for the Shari'ah courts that civil courts could not encroach upon.[29] The aim was fulfilled. However, an additional element was forfeited along the procedure. The constitutional amendment established a barrier against civil court overreach, so precluding organised discussion between the two legal systems. The two systems were distinctly segregated and lacked any formal method of communication with one other. The institutional silence was inconsequential to the decision in the *Kelantan* litigation. The disputed sections were invalidated due to legislative incompetence, as Article 75 of the FC nullifies state laws that contradict federal legislation, regardless of their subject matter.

Article 121(1A), which establishes the authority of Shari'ah courts from that of civil courts, was not applicable to the facts; its application would constitute a categorical mistake.

[28] The Federal Constitution, art 121(1A).

[29] Malaysia, Parliamentary Debates, Dewan Rakyat, Vol III, Nos 26 and 27 (17–18 March 1988); Yvonne Tew, 'The Malaysian Legal System: A Tale of Two Courts' (2011) 19 Commonwealth Judicial. Journal., Georgetown Law Library 3.

The Federal Court possessed jurisdiction, used established doctrine, and rendered a sound decision.[30] The most pressing issue, however, is not to the resolution of the *Kelantan* case but to the developments preceding the initiation of the subsequent litigation. When a state legislative assembly convenes to formulate a new Shari'ah criminal provision that does not replicate an existing federal offence but relates to subject matter potentially claimed by either the Federal List or the State List, it encounters a constitutional dilemma lacking a definitive institutional resolution. The proposed provision cannot be referred to any entity possessing the ability, skill, and constitutional standing to determine, with binding or persuasive effect, whether it lies within the legislative competence of the state assembly (or the jurisdictional competence of the Shari'ah courts). No statutory, constitutional, or procedural mechanism exists that permits a state legislative assembly, civil court, or Shari'ah court to get future direction on the delineation of federal and state Shari'ah court's jurisdiction in a specific instance.

The ramifications of this disparity are evident. Presently, the tangible costs are borne by the individuals. A Shari'ah criminal law that surpasses the legislative authority of the state does not inherently render itself illegal upon its implementation. It imposes duties and hazards on the Muslim populace of the respective state. It stays effective, often for years, until a plaintiff with the resources, resolve, and proper legal representation opts to contest it in the Federal Court. The petitioners in the *Kelantan* case submitted their petition in May 2022. The Federal Court issued its decision in early 2024. Almost two years passed between the challenge and its conclusion, during which the contested sections remained in the legal code. This is not meant to criticise the Court's efficiency; rather, it illustrates the intrinsic requirements of constitutional litigation at the highest level. However, it is a criticism of a system that lacks a mechanism for addressing these issues more promptly, economically, and without imposing the full responsibility of constitutional enforcement on private plaintiffs.

The pattern is, nevertheless, not novel. The *Kelantan* ruling is the most significant in a series of rulings extending from the 2021 Selangor unnatural sex case to prior challenges against state Shari'ah legislation in the 1990s and 2000s. Each judgement has rectified the immediate issue.[31] The decisions of the Federal Court are authoritative yet retrospective. They

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[30] Halsbury's Laws of Malaysia (LexisNexis, 1999) vol 2 discussing reference procedure under art 128 of the Federal Constitution.
[31] *Nik Elin Zurina bt Nik Abdul Rashid & Anor v Kerajaan Negeri* Kelantan (n 13); *Iki Putra Bin Mubarrak v. Kerajaan Negeri Selangor* (n 21) 323.

inform a legislature of its prohibitions post facto. They do not inform a legislature, before to the event, with any institutional assurance, of its capabilities. This does not constitute a failure of Article 121(1A) when correctly interpreted. The clause fulfills its intended function, and there are valid constitutional justifications for preserving the jurisdictional split it creates. The problem is in the lack of an institutional structure functioning upstream of both legal pathways, which can address border issues prior to their escalation into conflicts.

3. Why Existing Mechanisms are Structurally Inadequate

A. The Dual Track System

Malaysia's dual-track legal system represents a complex and dynamic interplay between Shari'ah and civil law.[32] It highlights the diversity of legal traditions and demands of constitutionalism in a plural society. In Malaysia, the relationship between Shari'ah and civil law is particularly complex because of historical, political, and social factors.[33] The roots of the Malay legal system may be traced to its colonial past, when it was operating under a common law framework instituted by British rule. After Malaysia became independent, its legal system evolved to function more effectively for its large Muslim population.[34] For example, Shari'ah was integrated into family law. The FC established the idea of legal plurality by recognising Islam as the Federation's religion while also protecting the religious freedom of non-Muslims. In Malaysia, a separate system of Shari'ah courts exists that deals with issues like marriage, divorce, inheritance, and some offences that apply solely to Muslims.[35] The federal government has constituted Shari'ah courts in each state, and each of such states has their own set of Shari'ah laws.

[32] Michael G. Peletz, 'A Tale of Two Courts: Judicial Transformation and the Rise of a Corporate Islamic Governmentality in Malaysia' (2015) 42 *American Ethnologist* 144 <https://anthrosource.onlinelibrary.wiley.com/doi/abs/10.1111/amet.12122>.
[33] David J Banks, 'Islam and Inheritance in Malaya: Culture Conflict or Islamic Revolution?' (1976) 3(4) *American Ethnologist* 573, 586.
[34] Wan Norhasniah Wan Husin and Haslina Ibrahim, 'Religious Freedom, The Malaysian Constitution and Islam: A Critical Analysis' (2016) 217 *Procedia - Social and Behavioral Sciences* 1216, 1224.
[35] Raihanah Abdullah and Soraya Khairuddin, 'The Malaysian Sharī 'ah Courts: Polygamy, Divorce and the Administration of Justice' (2009) 25(1) *Asian Women* 21, 54.

The FC stipulates that their authority shall not infringe upon federal civil legislation. Tensions often emerge between Shari'ah and civil law, especially in regions where their domains intersect or when the enforcement of Shari'ah law faces opposition from the secular legal framework.[36] Recent events have highlighted the dynamic character of Malaysia's dual-track legal system, as the historic ruling by the nation's top court nullifying certain Kelantan Islamic regulations represents a pivotal point in the continuous interplay amongst Shari'ah and civil law.[37] The ambiguity in the Federation of Malaya Constitutional Proposals 1957, commonly referred to as the 'White Paper', is identified to be the main cause behind the lack of clarity surrounding Article 3 of the FC.[38] According to Article 3(1), Islam is the religion of the federation.[39] Nevertheless, it becomes rather ambiguous when the Federal Court surprisingly invalidates 16 provisions of Shari'ah Criminal law.'.[40] However, the FC lacks checks and balances on the legislative power of Malaysian Parliament and the judicial supremacy of the Federal Court. Malaysia identifies itself as a federal country, but the current ruling raises doubts about status of Malaysia as a federal nation. The absence of substantive limits on Parliament's legislative authority under the FC suggests that Islam's status as the official religion is largely symbolic rather than legally determinative. Furthermore, the term 'secular' is not found in the FC. According to Abdul Rashid Moten, the FC does not explicitly state that Shari'ah is the law of the land.[41] However, the FC also does not explicitly state that the country is a secular state.

Article 121(1A) of the FC stipulates that civil courts lack jurisdiction over matters within the purview of the Shari'ah courts. The authority of the Shari'ah court is derived separately from state legislation enacted under Paragraph 1, List II of the Ninth Schedule. Article 121(1A) functions only as an ouster clause: if a subject is appropriately categorised within Shari'ah jurisdiction, the civil courts are constitutionally barred from intervening. The

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[36] Zaleha Kamaruddin, 'The Islamic Legal System in Malaysia and the Quest for Transformation in the 21st Century' (2012) 6(11) *Australian Journal of Basic and Applied Sciences* 74, 82.
[37] Al Jazeera, 'Malaysia's Top Court Rules Some Islamic Laws in Kelantan Unconstitutional' (n 1).
[38] Joseph M Fernando, 'The Position of Islam in the Constitution of Malaysia' (2006) 37 (2) *Journal of Southeast Asian Studies* 249, 266.
[39] The Federal Constitution, art 3(1). The recognition of Islam as the Federation's religion is a symbolic measure rather than the foundation of a theocratic legal system. The Supreme Court, in *Che Omar bin Che Soh v. Public Prosecutor* [1988] 2 MLJ 55, elucidated that the phrase 'Islam' in art 3(1) pertains to rites and ceremonies rather than a comprehensive way of life that supersedes other laws. Thus, although Islam holds a privileged position, the Constitution prevails as the ultimate law under art 4(1), allowing for the peaceful and harmonious practice of various religions in the Federation.
[40] Patricia A Martinez, 'The Islamic State or the State of Islam in Malaysia' (2001) 23 (3) *Contemporary Southeast Asia* 474, 503.
[41] Khairudin Aljunied, *Shapers of Islam in Southeast Asia* (Oxford University Press 2022).

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amendment carried out in 1988 was enacted during a time of significant constitutional strain, with Prime Minister Mahathir Mohamad highlighting explicit discontent within the Muslim community regarding the civil courts' perceived ability to supersede Shari'ah court rulings, a concern the amendment aimed, at least in part, to rectify.[42] The Federal Court in *Nik Elin Zurina bt Nik Abdul Rashid & Anor v. Kerajaan Negeri Kelantan* annulled 16 sections of the Kelantan Syariah Criminal Code (I) Enactment 2019.[43] The court did not supersede Article 121(1A) in this regard. The court determined that the Kelantan state legislative assembly had acted supra vires, since the invalidated laws pertained to the Federal List (Criminal Code) in the Ninth Schedule, rather than the State List. This argument reveals a core conflict within Malaysian legal pluralism. Article 121(1A) safeguards Shari'ah courts exclusively in areas where state legislative assemblies possess constitutional authority to legislate.[44] In instances where such competence is lacking, particularly for the majority of criminal offences addressed by the federal penal law, the ouster provision provides no safeguard. The *Nik Elin* ruling thus poses a disconcerting inquiry about legal pluralism in Malaysia: if the bulk of state Shari'ah criminal offences coincide with federal law, what persists of the 'safeguarded realm' that Article 121(1A) aimed to establish in 1988?

The Reid Commission Report stated that original Constitution makers envisioned for Muslim and Malay concerns to be within state jurisdiction.[45] A Federal Court may use its advisory authority under Articles 128 and 130 of the FC to resolve disputes of jurisdiction without constitutional amendment.[46] However, these provisions were rarely implemented.[47] The growth of Shari'ah law in Malaysia is hindered by its restricted applicability to personal laws. Although Islam is considered as the religion of the state, the implementation of Shari'ah law is confined to Muslims. As the High Court stated in *Subashini A/P Rajasingam v. Saravanan A/L Thangathoray*, the Shari'ah courts do not have any jurisdiction over non-

[42] The Constitution of the Federation of Malaya (1957); National Evangelical Christian Fellowship Malaysia, 'Report on the Parliamentary Roundtable on art 121 (1A) in Parliament (Committee Room 1)' (*NECF Malaysia*, 5 January 2006) <https://www.necf.org.my/newsmaster.cfm?&menuid=43&action=view&retrieveid=676> accessed 29 April 2026.
[43] *Nik Elin* (n 31) [121].
[44] ibid.
[45] Fernando, 'The Position of Islam in the Constitution of Malaysia' (n 38) 266.
[46] Halsbury's Laws of Malaysia (LexisNexis, 1999) vol 2 discussing reference procedure under art 128 of the Federal Constitution.
[47] Constance Chevallier-Govers, 'The rule of law and legal pluralism in Malaysia' (2010) 2 (1) *Islam and Civilisational Renewal* 90.

Muslims.[48] The question of whether a matter falls under Shari'ah jurisdiction is a threshold issue for civil courts to determine. This was confirmed by Tun Abu Talib (the Attorney General when Amendment of 1988 came into existence).[49] He stated that Article 121(A) was never meant to oust the jurisdiction of the High Court to review the decisions of the Shari'ah courts on jurisdictional disputes.

B. Article 75 of the FC and Shari'ah

The constitutional framework delineating power sharing between state and federal legislatures in Malaysia is apparent: Shari'ah law falls within the jurisdiction of the states.[50] However, differences exist among FC and provincial Shari'ah Laws. Article 74 delineates the allocation of legislative authority among federation and states, according to the lists in the Ninth Schedule.[51] The Ninth Schedule delineates the issues on which 'Federal (List I)' and 'State (List II)' governments are authorised to legislate. The State List (List II) specifies 13 domains over which state assemblies possess exclusive authority.[52] The initial paragraph stipulates that, with the exclusion of Kuala Lumpur and Labuan, jurisdiction lies with states: Shari'ah law and family law pertaining to individuals practising Islam fall under state authority, encompassing Shari'ah law related to succession, marriage, adoption, divorce, and the establishment and penalisation of offences committed by adherents of Islam against its tenets, except for issues enumerated in Federal list.[53]

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[48] *Subashini A/P Rajasingam v. Saravanan A/L Thangathoray* [2007] 2 MLJ; Schedule 9, List II, para 1 of the Federal Constitution states that Syariah courts "shall have jurisdiction only over persons professing the religion of Islam".

[49] Lim Kit Siang, 'Moorthy case - letter to PM and query for AG' (*DAP Malaysia*, 9 January 2006) <http://dap-malaysia.com/archive/2006/jan06/lks3765.htm> accessed 29 April 2026.

[50] ibid.

[51] The Federal Constitution, art 74.

[52] ibid.

[53] Federal Constitution of Malaysia, Ninth Schedule, List II, Item 1; See also 'Press Release | Hudud Is Unconstitutional, Discriminatory and Divisive' (*Malaysian Bar*, 2015) <https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-hudud-is-unconstitutional-discriminatory-and-divisive> accessed 29 April 2026 (Recognizing that criminal law is categorised within the Federal List, so limiting State legislative authority).

Irregularities amongst the FC and state Shari'ah Laws manifest in the absence of consistency in implementation of Shari'ah in Malaysia.[54] Individual states may establish Shari'ah criminal offences if four requirements are satisfied:

i. The offence must relate to Shari'ah law and apply solely to Muslims.[55]
ii. The issue must be fall outside the scope of federal criminal law.
iii. The provision must not contradict any current federal statute.
iv. The statute must adhere to the boundaries of state legislative authority.

Article 75 of FC explicitly says that if a state law is inconsistent with a federal law, the federal law shall prevail, rendering provincial law invalid to the extent of discrepancy.[56] Federal Court in Malaysia has power to examine federal and state laws for unconstitutionality, as articulated in Article 4(1) of FC.[57] It is also conferred exclusive jurisdiction to resolve disputes between states or between the Federation and any states, specifically regarding legitimacy of a law enacted by Parliament or a state legislature on the basis that it addresses a subject for which Parliament or state legislature lacks legislative authority. The courts are constitutionally obligated to ensure that both state and federal governments adhere to the supremacy of the FC, as empowered by Articles 4(3) and 4(4).[58] As a mechanism for averting jurisdictional intrusion, it is largely ineffective. Article 75 is only invoked subsequent to the occurrence of inconsistency, the enactment of a state statute, and the initiation of a judicial proceeding to declare it void.[59] The provision therefore lacks any meaningful preventive or anticipatory function.

In the *Kelantan* case, Article 75 executed its job precisely, the contested clauses were deemed unlawful. The law was passed in 2019, the petition was submitted in 2022, and the verdict was issued in 2024. For five years, clauses that were consistently unlawful persisted in the statute books, creating legal ambiguity and political advantage for their proponents. Article

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[54] Ahmad Fauzi Abdul Hamid, 'Syariahization of Intra-Muslim Religious Freedom and Human Rights Practice in Malaysia: The Case of Darul Arqam' (2016) 38(1) *Contemporary Southeast Asia* 28, 54.
[55] The Federal Constitution, Ninth Schedule, List II, Item 1; see also Norbani Mohamed Nazeri, 'Criminal Law Codification and Reform in Malaysia: An Overview' [2010] *Singapore Journal of Legal Studies* 375, 399.
[56] The Federal Constitution, art 75; See also *Iki Putra bin Mubarak v. Kerajaan Negeri Selangor* (n 21) 384, FC (holding that the power of state legislative assembly to legislate Islamic criminal offences is neither exclusive nor comprehensive and that state laws overlapping with federal criminal law are void); *Nik Elin Zurina bt Nik Abdul Rashid & Anor v. Kerajaan Negeri Kelantan* (n 13), FC (invalidating 16 provisions of Kelantan's Syariah Criminal Code on the basis that state legislatures cannot enact laws on matters already covered by the Federal List).
[57] ibid, art 4.
[58] ibid.
[59] *Nik Elin* (n 13).

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75 functions as a post-facto remedy which means it applies after the state law has been enacted and the inconsistency has materialised. A constitution that depends solely on reactive supremacy is not a mechanism for border management; it is an emergency provision.

The FC does not explicitly codify a basic structural concept, which comprises fundamental elements that are immune from legislative alteration due to their paramount constitutional importance. The omission indicates that Parliament even maintains the power to amend elements deemed fundamental to the constitutional framework, constrained solely by the procedural stipulations outlined in Article 159.[60] Additionally, as discussed above, the 3/5/6 ceiling does not resolve the underlying dispute between federal and state interpretations of Islamic criminal law. However, the *Kelantan* ruling instead exemplifies that relocation.

III. Reassessing Legal Pluralism: What the Kelantan Ruling Clarifies

The dispute in Kelantan has exacerbated the continuing discourse over legal diversity in Malaysia, which functions within a framework of various legal systems: civil law, Shari'ah law, and customary law.[61] The Kelantan Syariah Criminal Code Enactment 1993 enacted under the rule of Pan-Malaysian Islamic Party (PAS), sought to enforce *hudud* rules, including penalties such as amputation for theft and stoning for adultery.[62] The federal authorities obstructed the implementation, alleging constitutional limitations. In 2015, PAS reintroduced the matter by presenting a private member's bill in Parliament to enable Kelantan to enforce *hudud*.[63] The Kelantan dispute has highlighted constitutional problems, examined the role of Shari'ah law, contested secular ideals, strained inter-ethnic and inter-religious relations, generated legal confusion, and impacted political dynamics. The dispute has generated ambiguity over the future trajectory of Malaysian legal system, possibly influencing investor confidence and global impressions of the country. The prevailing interpretation of legal

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[60] Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis* (First Edition, Bloomsbury 2012). Harry E Groves, 'Equal Protection of the Laws in Malaysia and India' (1963) 12(3) *The American Journal of Comparative Law* 385, 396.
[61] Al Jazeera, 'Malaysia's top court rules some Islamic laws in Kelantan unconstitutional' (n 1).
[62] Jaclyn L. Neo and Dian A. H. Shah, 'Hudud and the Struggle for Malaysia's Constitutional Soul' (*ConstitutionNet*, 25 June 2015) <https://constitutionnet.org/news/hudud-and-struggle-malaysias-constitutional-soul> accessed 12 September 2024. *Hudud* (plural of hadd, meaning 'boundary' or 'limit') refers to fixed punishments prescribed in the Qur'an and Sunnah for specific offences.
[63] Mohd Faizal Musa, *Post-Islamism Battles Political Islam in Malaysia* (ISEAS – Yusof Ishak Institute, Singapore 2023) <https://www.iseas.edu.sg/wp-content/uploads/2023/10/TRS17_23.pdf> accessed 28 April 2026.

plurality in Malaysia, as seen in judicial writings, constitutional studies, and political discourse, is structured around a parallel systems concept.[64] According to this perspective, civil courts and Shari'ah courts function as autonomous, co-equal jurisdictions, each sovereign within its respective domain.[65] Article 121(1A) is interpreted as the constitutional assurance of non-interference: civil courts lack jurisdiction over issues within the purview of Shari'ah courts, and conversely, Shari'ah courts must not intrude onto civil jurisdiction. The two tracks are parallel and autonomous within its domain.

The *Kelantan* instance illustrates that this approach is descriptively deficient and normatively insufficient.[66] The concept fails to elucidate why state legislators consistently implement measures that overtly infringe upon federal criminal law, a phenomenon that the parallel systems model presumes is mitigated by distinct jurisdictional borders.[67] The model provides no normative direction for addressing collisions, except from asserting that they should not occur. It offers no potential tool for border delineation, no referral process for unclear cases, and no institutional platform for collaboration between the two judicial hierarchies. Parallelism devoid of coordination does not constitute pluralism; it represents jurisdictional anarchy characterised by litigation.

An improved understanding of legal plurality within a federal system such as Malaysia is institutionalised boundary management. The coexistence of different legal regimes is facilitated, not jeopardised, by coordinating systems.[68] Authentic pluralism necessitates institutional connections, platforms where representatives of each legal system may proactively address border conflicts, rather than allowing them to be resolved reactively by a singular court inside one system. The objective of these processes is not to subordinate one legal system to another, but to provide operational significance to the constitutional differentiation between federal and state legislative authority. The FC explicitly delineates the border. It lacks an institution capable of imposing such boundary on proposed law before to enactment, so

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[64] Shad Saleem Faruqi, 'The Power of Different Courts' (*Malaysian Bar*, 2015) <https://www.malaysianbar.org.my/article/news/legal-and-general-news/legal-news/the-power-of-different-courts> accessed 29 April 2026.

[65] 'USCIRF Annual Report 2015 - Tier 2: Malaysia' (*United States Commission on International Religious Freedom*, 1 May 2015) <https://www.refworld.org/reference/annualreport/uscirf/2015/en/104862> accessed 29 April 2026.

[66] *Nik Elin* (n 13); Chief Justice Tun Tengku Maimun Tuan Mat, 'Syariah Court, Islamic Laws Will Not Fade into Oblivion' (*Bernama*, 9 February 2024) <https://bernama.com/en/news.php?id=2269198> accessed 29 April 2026.

[67] Shad Saleem Faruqi (n 64).

[68] The Federal Constitution, arts 75, 128; *SIS Forum (M) & Anor v. Jawatankuasa Fatwa Negeri Selangor & Ors* [2025] 4 MLJ 625.

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protecting litigants, courts, and the polity from the expenses associated with post-hoc nullification.

Further, a strong legal plurality neither necessitates the elimination of the Shari'ah courts (a politically unfeasible proposition) nor subjugates Shari'ah to civil law in all respects (a constitutional misinterpretation of Article 121(1A)).[69] It necessitates the intentional establishment of bridges, including a permanent jurisdictional entity authorised to certify if a proposed state Shari'ah legislation aligns with the State List and adheres to the 3/5/6 limit. This entity would not supplant the supervisory role of the Federal Court. It would function as a pre-enforcement filter, converting a system of reactive nullification into one of anticipatory coordination. The *Kelantan* verdict has elicited varied reactions from the public and political figures. Advocates argue that it strengthens the constitutional framework and ensures that state laws do not violate federal principles.[70] Critics assert that the verdict infringes upon the religious freedoms of Muslims and represents a setback in the implementation of Shari'ah principles.

However, all parties recognise the foundational parallel systems paradigm. They dispute the delineation of the border, not the sufficiency of the existing reactive, litigation-dependent method of boundary enforcement. The issue is not that the Federal Court delineated the boundary inaccurately in Kelantan. The issue is that the constitutional framework lacks a means to establish such boundaries in advance. The verdict signifies not a resolution but a symptom, indicating the necessity for institutional transformation. The Kelantan controversy signifies a critical turning point in Malaysia's continuous debate between Shari'ah law and civil law. The verdict reinforces the supremacy of the FC while also underscoring the challenges and complexities of managing a dual-track judicial system in a diverse and multicultural nation.[71]

IV. Conclusion

[69] Tun Pehin Sri Dr Wan Junaidi Tuanku Jaafar, 'Understanding Governance through the Lens of Law and History' (Statesman's Lecture, University of Technology Sarawak, 30 August 2025).
[70] Shad Saleem Faruqi, 'Legal Pluralism in Malaysia: Navigating the Civil and Shariah Systems' (*FULCRUM*, 2025) <https://fulcrum.sg/legal-pluralism-in-malaysia-navigating-the-civil-and-shariah-systems/> accessed 29 April 2026.
[71] ibid.

The *Kelantan* case serves as a stress test that the Federal Court successfully navigated. The system consistently fails the stress test as a whole. Repeated judicial corrections, incurring increasing political and financial burdens, on a framework with unaddressed fundamental design faults, do not constitute constitutional government. It constitutes constitutional upkeep and maintenance, regardless of diligence, and differs from repair. What is necessary is not the abrogation of Article 121(1A), but the establishment of a permanent referral body capable of receiving submissions from state legislative assemblies, civil courts, and Shari'ah courts. This body should be staffed by jurists from both legal traditions and endowed with the authority to provide guidance, either binding or advisory, on the constitutional boundaries of state Shari'ah legislative competence prior to the enactment, enforcement, or contestation of a provision. Such an entity would not undermine the Federal Court's supervisory authority under Article 4(4). It would operate upstream as a constitutional filter that mitigates avoidable disputes at their origin instead of allowing them to escalate into litigation. The Syariah Courts (Criminal Jurisdiction) Act 1965 should be amended to require federal certification of any proposed increase, thereby ensuring that the 3/5/6 limit remains the genuine ceiling rather than a floor that invites incremental expansion.

Legal pluralism in Malaysia is not only a qualitative aspect of the constitutional framework; it represents a structural commitment to the coexistence of diverse legal traditions that mirror the nation's historical, theological, and cultural intricacies. Article 3(1), Article 75 and the Ninth Schedule do not only allow for this plurality; they constitutionally enshrine it. A homogenised legal system would not streamline governance; it would obliterate the differences that the FC was intended to safeguard. However, diversity without institutional coordination does not yield freedom; it results in conflict. The Kelantan issue exemplifies this: when jurisdictional borders are disputed and no systematic resolution mechanism is available, the courts must address a structural flaw that the FC did not equip with pre-enforcement mechanisms. The aim, consequently, is not to eliminate legal pluralism but to establish principled delineation and institutional governance of its limits

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Is Everything Under Control? Strategic Invocation of Extraterritorial Human Rights Obligations of Troop Contributing Countries for Sexual Exploitation and Abuse by UN Peacekeepers

Isabella Barrett Gannon*

Abstract: This article addresses an age-old haunt of UN peacekeeping missions which has largely been unmet by legal redress. In looking back, it highlights the prevalence of sexual exploitation and abuse (SEA) by UN peacekeepers, which has pervaded almost every mission since the end of the Cold War. In looking ahead, it analyses the reach and restraints of strategic litigation against troop contributing countries (TCCs) by invoking their extraterritorial human rights obligations (ETOs) under the established tests for ETOs in regional jurisprudence. It considers the challenges of trying to squeeze the factual nature of instances of SEA into the traditional tests for establishing ETOs, particularly in cases of transactional or survival sex. In light of those challenges, it argues for such tests to be viewed through a gender, child and rights-based lens by engaging with feminist and contextual considerations of the conflict-affected environments in which SEA thrives. Because transactional sex engages rights under the International Covenant on Economic, Social and Cultural Rights directly as basic rights (such as the rights to food and health) are made conditional on sex, this article will also outline that this Covenant may be relied upon as a complementary avenue to the former control-based approach in litigating SEA. This Covenant, along with the Convention on the Elimination of All Forms of Discrimination against Women and the African human rights instruments may provide a promising avenue to invoke ETOs of TCCs for SEA by peacekeepers as they do not contain a 'jurisdiction' clause limiting obligations to within a state's own territory. As such, they do not appear to require exclusive reliance on the traditional tests for ETOs to be applied to extend those obligations abroad. This approach has been explored in detail by Professor Ralph Wilde. Where strict control over individual victims of SEA by UN peacekeepers might be difficult to establish given the varying modes in which SEA can occur, this complementary

* Judicial Assistant to the Superior Courts of Ireland; LLM in International Law (University College London); BCL in Law and Human Rights (University of Galway, Ireland).

avenue may not require the satisfaction of the traditional power/control tests in the same manner and thus provides an increased likelihood for victims to obtain an effective remedy.

Keywords: *Extraterritorial; International Human Rights Law; Extraterritorial Human Rights Obligations; Troop Contributing Countries; Sexual Exploitation and Abuse*

Introduction

A 14 year old girl was walking by a base of United Nations (UN) peacekeepers at the airport in the Central African Republic (CAR), where she was dragged off the path and raped by UN peacekeepers.[1] A 29 year old woman was washing herself in her hut when a UN peacekeeper broke in and raped her: "I said, 'What are you doing here?' and I told him to leave. But he forced himself on me and as he was stronger I had no choice."[2] An 18 year old woman, while visiting the base of Democratic Republic of Congo (DRC) troops to seek food or money, was forced into a bush where she was gang-raped by armed UN peacekeepers.[3] In the months before, she had engaged in sex with UN peacekeepers at this base in exchange for food: "It was always after sex that they gave us things."[4]

These cases exemplify the widespread sexual exploitation and abuse (SEA) by UN peacekeepers of local women and children. It is prevalent against boys as well as girls, and there is also some limited evidence of SEA against men by peacekeepers.[5] SEA has arisen in almost all UN peacekeeping missions since the end of the Cold War.[6]

Instances of SEA range from violations of both the host state's criminal law and widely recognised human rights if unchecked,[7] to simply exploitative conduct if not specifically

[1] 'Central African Republic: Rape by Peacekeepers UN, Troop-Contributing Countries Should Hold Abusers Accountable' (*Human Rights Watch*, 4 February 2016) <www.hrw.org/news/2016/02/04/central-african-republic-rape-peacekeepers> accessed 2 June 2025.
[2] ibid.
[3] ibid.
[4] ibid.
[5] Cassandra Mudgway, *Sexual Exploitation and Abuse by UN Peacekeepers: Towards a Hybrid Solution* (Routledge Research in Human Rights Law 2019) 9.
[6] Jasmine-Kim Westendorf, *Violating Peace: Sex, Aid, and Peacekeeping* (Cornell University Press 2020) 1.
[7] United Nations, *Policy on Integrating a Human Rights-Based Approach to United Nations Efforts to Prevent and Respond to Sexual Exploitation and Abuse* (UN 2021) <https://www.un.org/preventing-sexual-exploitation-and-abuse/sites/www.un.org.preventing-sexual-exploitation-

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regulated by law.[8] Troop contributing countries (TCCs) directly employ peacekeepers and have sole criminal and disciplinary jurisdiction over misconduct on missions abroad.[9] The legal basis for this is found in Status of Forces Agreements (SOFAs) and in Memoranda of Understanding (MOUs). While criminal investigations and prosecutions by the TCCs are necessary, they are insufficient alone: TCCs generally fail to report the outcomes of cases to the UN or the host state, which undermines the role of reporting as a deterrent when the offending conduct of SEA is exposed, and as a catalyst for change when it has been left unaddressed.[10] A study in 2005 recommended that prosecutions be complemented by other measures, such as the provision of effective remedies.[11] Such remedies might include civil reparations or dedicated victim support mechanisms as non-adversarial forms of remedy for victims. They may also include judicial remedies through litigating against SEA by UN peacekeepers, in a criminal *or* human rights context. An independent panel to review SEA allegations has recommended treating SEA by UN peacekeepers as human rights violating conduct to be addressed within the UN framework; through both its SEA and human rights policy frameworks to ensure the UN and TCC have an obligation to respond to allegations of SEA in a meaningful way.[12]

For TCCs, this approach would have to be premised on an acceptance that they owe extraterritorial human rights obligations (ETOs) to victims of SEA when the perpetrators are UN peacekeepers abroad. The activities of any given state through their policies and practices have an impact on human rights within their own territory but also abroad where a sufficient level of control over individuals or territory is exercised by state agents, for instance, in cases of extraterritorial detention or foreign occupation.[13] This requires state accountability for their actions abroad when human rights have been breached through their agents. Current literature identifies the invocation of ETOs of TCCs as a legal avenue for victims of SEA by UN peacekeepers to seek redress where other avenues are not feasible, such as the UN being

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andabuse/files/policy_on_integrating_a_human_rights-based_approach_to_un_efforts_to_prevent_and_respond_to_sea.pdf> accessed 9 April 2026.

[8] Westendorf (n 6) ch 1, 26, 28, 31, 32.

[9] Rosa Freedman, 'UNaccountable: A New Approach to Peacekeepers and Sexual Abuse' (2018) 29 EJIL 968.

[10] Sofia Sutera 'Sexual Exploitation and Abuse in Peacekeeping: Making Human Rights Obligations Universal', (2020) PHRG 4(2) 161, 178; Mudgway (n 5) 10.

[11] Sutera (n 10).

[12] ibid; UNGA, 'Report of an independent review on sexual exploitation and abuse by international peacekeeping forces in the Central African Republic' (2016) UN Doc A/71/99.

[13] Ralph Wilde, 'The Extraterritorial Application of International Human Rights Law on Civil and Political Rights' in Sheeran S and Rodley N (eds), *Routledge Handbook of International Human Rights Law* (Taylor & Francis 2013) ch 35.

immune from the jurisdiction of courts.[14] However, such literature is limited to finding a general possibility of establishing ETOs for SEA.[15] This literature does not delve into the practical reach or restraints of this approach if a claim is actually brought to the regional court or human rights body to whose jurisdiction a TCC is subject, particularly in relation to cases concerning transactional SEA, which may not itself be criminal. In such cases, establishing 'control' over a victim where they might have willingly engaged in sex in exchange for commodities is more difficult than in the factual scenarios that arise in the current ETO jurisprudence where control has been established for example over a person detained and tortured by foreign state agents. It is the non-criminal instances of SEA such as transactional sex which produce a grey area for ETO litigation to succeed based on the traditional ETO jurisprudence as it stands. In this article, I will show that there readily exists an avenue to work around that grey area if international human rights law (IHRL) is applied strategically.

This article will establish that, while the ETO route provides a possibility for victims to seek a remedy in IHRL, the likelihood of regional human rights courts recognising ETOs for SEA by applying the current tests for ETOs is uncertain and requires strategic litigation. A primary focus will be given to the 'uncertain' cases of non-criminal SEA, namely transactional and survival sex, in arguing that a broader reading of the current ETO tests should be taken if such a case were to be taken to a regional human rights court in light of feminist and contextual considerations. There will also be a focus on the extraterritorial invocation of economic, social and cultural (ESC) rights (which are arguably directly engaged by transactional sex) under the International Covenant on Economic, Social and Cultural Rights (ICESCR) and under treaties without a 'jurisdiction' clause. Because obligations under such treaties are not expressly limited by a jurisdiction clause, the traditional control-based tests for ETOs under treaties that *do* contain such a clause may not be required in the same manner, therefore a broader approach to establishing ETOs that is more suited to the SEA context may be taken.[16] Throughout the article, greater weight is given to the African system for two reasons: (1) African states

[14] Róisín Burke, 'Shaming the State: Sexual Offences by UN Military Peacekeepers and the Rhetoric of Zero Tolerance' in Gina Heathcote (eds), *Rethinking Peacekeeping, Gender Equality and Collective Security* (Palgrave Macmillan, a division of Macmillan Publishers Limited 2014) 86.
[15] Since roughly 2015, there has been ample jurisprudence on the application on ETOs from the European Court of Human Rights.
[16] Wilde (n 13).

currently make up the majority of the top 20 TCCs,[17] and (2) missions with the highest allegations of SEA in 2023 were based in the DRC and CAR.[18]

To establish this thesis, I will first outline the general legal framework governing UN peacekeeping, the types of SEA, and the treaties relevant to SEA before outlining the treaty ratification status of the top 20 TCCs and their corresponding obligations. This is a necessary step to identify which treaties the top TCCs are actually bound by for ETOs arising from those treaties to be established in the first place. Second, I will outline the extraterritorial applicability of the relevant treaties and attempt to reconcile the regional jurisprudence of Latin America, Europe and Africa on ETOs with potential SEA litigation in the UN peacekeeping context. Where such reconciliation presents uncertainties, I will argue first that using feminist, child-centric and rights-based arguments in the context in which SEA in peacekeeping occurs allows control over individuals in instances of SEA to be inferred. Second, I will outline that there is potentially a ready-made path to establishing ETOs for transactional sex under the ICESCR and similar treaties without a 'jurisdiction' clause to invoke ETOs. While current jurisprudence establishes ETOs based on control over individuals and/or over territory,[19] and while various UN peacekeeping missions indeed exercise a level of governance over local populations which may well be argued to consist of control over territory,[20] in the interest of clarity and concision and given the varying and individualised manner in which SEA takes place, this article will primarily focus on control over individuals.

I. Definitions and Frameworks Governing UN Peacekeeping

A. Sexual Exploitation and Abuse

SEA encompasses related but distinct forms of conduct. The UN Zero Tolerance Policy (ZTP) of 2003 on SEA defines sexual exploitation as "any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another", and the

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[17] United Nations Peacekeeping, Troop And Police Contributors <https://peacekeeping.un.org/en/troop-and-police-contributors> accessed 28 May 2025.
[18] UN Affairs, 'Sexual exploitation and abuse: UN intensifying efforts to uphold victims' rights' (*UN News*, 26 March 2024) <https://news.un.org/en/story/2024/03/1148016> accessed 9 June 2025.
[19] Wilde (n 13).
[20] ibid.

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term "sexual abuse" is defined as "the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions."[21] Crucially, this demonstrates that not all instances of SEA will activate the same obligations of TCCs (discussed in section II). This is because not all SEA is criminal in nature.[22] For instance, rape is criminal, but sexual exploitation may not be (except when it involves minors), as it may involve agency and negotiation, blurring the issue of consent, albeit in circumstances of deprivation and insecurity.[23]

Transactional sex encompasses the vast majority of allegations of SEA investigated by the UN, where sex is given in exchange for money, food, or jobs, and is not inherently criminal.[24] However, the majority of transactional sex reported in the literature relates to children, which is criminal.[25] Nonetheless, non-criminal instances of transactional sex (against adults) can amount to a rights violation, which is particularly clear in transactional cases of survival sex where sex is exchanged for aid or assistance (something already owed to the local population) to survive.[26] In relation to criminal instances of SEA other than SEA against children, there have been many documented instances of both opportunistic and planned rape by peacekeepers.[27] However, male victims of rape receive less recognition in law than female victims.[28] Due to the distinct forms SEA can take generally, distinct legal consequences arise in terms of obligations and in establishing a sufficient level of control over individuals to establish ETOs.

B. The Legal Framework

UN peacekeeping operations are deployed by mandate from the UN Security Council (UNSC), under its primary responsibility for the maintenance of international peace and security under

[21] Secretary-General's Bulletin, 'Special measures for protection from sexual exploitation and sexual abuse, UN Secretariat' (9 October 2003) UN Doc ST/SBG/2003/13 [1].
[22] Jasmine-Kim Westendorf and Louise Searle, 'Sexual exploitation and abuse in peace operations: trends, policy responses and future directions' (2017) 93(2) IA 365, 368.
[23] ibid 371; Westendorf (n 6) ch 2, 37.
[24] Westendorf (n 6) ch 2, 32.
[25] ibid 34.
[26] Cassandra Mudgway, 'Sexual exploitation by UN peacekeepers: the 'survival sex' gap in international human rights law' (2017) 21 IJHR 1453, 1453.
[27] Westendorf (n 6) ch 2, 29.
[28] Lara Stemple, 'Male Rape and Human Rights' (2009) 60(3) HLJ 605, 610, 644.

the UN Charter.[29] UN peacekeeping operations are multidimensional: as well as being called upon for the maintenance of peace and security, they facilitate the political process, protect civilians and human rights, assist in the disarmament of former combatants and support the organisation of elections and the restoration of the rule of law.[30]

IHRL forms an integral part of the normative framework for UN peacekeeping operations.[31] The principles and guidelines for UN peacekeeping state that UN peacekeeping operations should be conducted in full respect of human rights and should seek to advance human rights through the implementation of their mandates.[32] They further provide that most UN multi-dimensional peacekeeping operations are mandated to promote and protect human rights by monitoring and helping to investigate human rights violations and/or developing the capacity of national actors and institutions to do so on their own.[33]

The MOUs are the bilateral agreements between the TCC and the UN that establish "the maintenance of discipline and good order among such personnel and the investigation of, and accountability for, violations", vesting criminal and disciplinary jurisdiction over peacekeepers exclusively in the TCC.[34] They prohibit SEA, stating such acts "violate universally recognised international legal norms and standards."[35] The MOUs refer to the code of personal conduct for peacekeepers, which prohibits "immoral acts of sexual, physical or psychological abuse or exploitation of the local population…especially women and children."[36] Notably, the word "especially"[37] may indicate that this does not exclude men.

The legal relationship between the UN peacekeeping operation and the host state is governed by the bilateral SOFAs which also maintain that exclusive responsibility to discipline

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[29] 'Mandates and the Legal Basis for Peacekeeping' (*United Nations Peacekeeping*) <https://peacekeeping.un.org/en/mandates-and-legal-basis-peacekeeping> accessed 9 June 2025.
[30] United Nations, 'What is peacekeeping?' <https://peacekeeping.un.org/en/what-is-peacekeeping > accessed on 17 May 2026.
[31] Westendorf (n 6) 14.
[32] ibid.
[33] ibid 27.
[34] UNGA 'Revised draft model memorandum of understanding between the United Nations and [participating State] contributing resources to [the United Nations Peacekeeping Operation]', (3 October 2006) UN Doc A/61/494 art 3 ('MOU').
[35] ibid Annex H.
[36] 'Ten Rules: Code of Personal Conduct for Blue Helmets' (*United Nations Police*, 1999) para 4. <https://police.un.org/en/ten-rules-code-of-personal-conduct-blue-helmets-1999> accessed on 9 June 2025.
[37] ibid.

DOI: 10.14324/111.444.2052-1871.2183

and criminally sanction military contingents rests with TCCs.[38] This operates as an absolute immunity of the troops from the jurisdiction of the host state.[39]

These instruments distinguish UN peacekeeping troops from ordinary military troops and explicitly lay out the precise responsibilities of TCCs in respect of the former, including the prohibition of SEA in peacekeeping. They create a distinct network of agreements between the UN, host states and TCCs. They provide that the TCC is obligated to investigate and prosecute crimes, with the UN being limited to administrative investigations if the TCC fails to undertake its own investigations within ten days of an allegation being made to its authorities.[40] In reality, the TCC and the UN frequently ignore these obligations.[41] As a result, the UNSC Resolution 2272 requests that the UN Secretary General repatriate entire units if the TCC fails to prosecute alleged perpetrators of sexual misconduct within six months.[42] In many instances, it is not apparent that even after repatriation, any action is taken by the TCC against the alleged perpetrators of SEA.[43]

Indeed, even where specific conduct is not expressly covered by the MOUs and SOFAs, due diligence obligations of TCCs are still in force. The applicable human rights treaties give rise to general positive obligations of TCCs (subject to their ratification) to prevent and respond to human rights violations through SEA by its peacekeepers as state agents.[44] IHRL guarantees the special protection of women and children, who are disproportionately affected by SEA, in reading the International Covenant on Civil and Political Rights[45] (ICCPR) and the International Covenant on Economic, Social and Cultural Rights[46] (ICESCR).[47] Broadly, these treaties also contain provisions which may be breached by SEA, such as freedom from discrimination, the right to life and private and family life (in ICCPR) and the rights to health

[38] REDRESS and CRIN, *Litigating Child Peacekeeper Sexual Abuse* (2020) 14 <https://redress.org/wp-content/uploads/2020/01/LitigatingPeacekeeperChildSexualAbuseReport.pdf> last accessed 9 June 2025; UNGA, 'Model status-of-forces agreement for peace-keeping operations' (9 October 1990) UN Doc A/45/594 ('SOFA').
[39] REDRESS and CRIN (n 38) 14.
[40] MOU (n 34); SOFA (n 38); Freedman (n 9).
[41] Freedman (n 9).
[42] UNSC Res 2272 (11 March 2016) UN Doc S/RES/2272.
[43] Róisín Burke, *Sexual Exploitation and Abuse by UN Military Contingents: Moving Beyond the Current Status Quo and Responsibility under International Law* (IHLS 42, Brill Nijhoff 2012) 8; See also: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Committee Against Torture) 'Concluding Observations: Sri Lanka' (25 November 2011) UN Doc CAT/C/LKA/CO/3-4 [23].
[44] Burke (n 43) 316.
[45] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ('ICCPR').
[46] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 ('ICESCR').
[47] Sutera (n 10) 165.

and an adequate standard of living (including food, water and sanitation, in ICESCR).[48] The requirement to protect women and children from SEA is stipulated both directly and indirectly in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[49] and the Convention on the Rights of the Child (CRC).[50] It is important to note that there are no equivalent specialised treaty protections for male victims of SEA comparable to those provided for women and children under CEDAW and the CRC,[51] but the relevant rights under the ICCPR and ICESCR apply to men as well. In cases of transactional or survival sex, the ICESCR rights are arguably in breach where such rights are made conditional on sex (discussed further in section II), with such rights complementing the right to life by recognising the socio-economic conditions necessary to live a life in dignity.[52]

The rights relevant to SEA enshrined in these treaties are reflected in substance in the African Charter on Human and Peoples Rights (African Charter),[53] the American Convention on Human Rights (ACHR),[54] and the European Convention on Human Rights (ECHR)[55] with variations. In the African system, the African Charter builds upon the International Bill of Rights.[56] It encompasses both civil and political and ESC rights.[57] Two African counterparts to the CRC and CEDAW are the African Charter on the Rights and Welfare of the Child (ACRWC), including an explicit provision on the protection of children from SEA, and the Maputo Protocol.[58] This reinforces the importance of protecting women and children from abuse in the African system, and provides a strong basis for SEA litigation there. The ECHR is

[48] United Nations (n 7) para 10; ICCPR arts 6, 17 ; ICESCR arts 11, 12.
[49] Convention on the Elimination of All Forms of Discrimination against Women, New York (adopted 18 December 1979) 1249 UNTS 13 ('CEDAW').
[50] Convention on the Rights of the Child (adopted 20 November 1989) UNGA Res 44/25 ('CRC').
[51] Stemple (n 28) 618.
[52] Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (2nd edn, OUP 2019) ch 9, pt III.
[53] African Charter on Human and Peoples' Rights, Nairobi, (adopted 27 June 1981, entered into force 21 October 1986) ('African Charter').
[54] American Convention on Human Rights, San Jose (adopted 22 November 1969, entered into force 18 July 1978), 1144 UNTS 123 ('ACHR').
[55] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) ('ECHR') .
[56] African Charter (n 53); Başak Çalı, 'Regional Protection' in Daniel Moeckli and others (eds), *International Human Rights Law* (OUP 2022);433, Başak Çalı, 'Regional Protection' in Daniel Moeckli and others (eds), *International Human Rights Law* (OUP 2022) Thomas M Antkowiak 'The Americas' in Daniel Moeckli and others (eds), *International Human Rights Law* (OUP 2022) 447.
[57] ibid.
[58] African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) OAU Doc CAB/LEG/24.9/49 (1990) ('ACRWC') art 27; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) ('Maputo Protocol').

DOI: 10.14324/111.444.2052-1871.2183

limited to the protection of civil and political rights.[59] Both the Inter-American and European system have counterparts to the CEDAW: the American Convention of Belém do Pará[60] and the European Istanbul Convention.[61] Therefore, there is a wide set of treaties which SEA may breach both internationally and regionally.

Moreover, these treaties are widely ratified by the top 20 TCCs. The top 20 TCCs are, in the following order: Nepal, Rwanda, Bangladesh, India, Indonesia, Ghana, Pakistan, China, Morocco, the United Republic of Tanzania, Ethiopia, Senegal, Egypt, South Africa, Cameroon, Zambia, Italy, Tunisia, Uruguay and Mongolia.[62] Each of these countries also operate a separate military justice system to try crimes committed by its military, including troops contributed to peacekeeping missions.[63] The IHRL obligations of the top 20 TCCs arise from their treaty ratification status. All top TCCs are legally bound by the ICCPR except China, and all have accepted its individual complaints procedure except Rwanda, Bangladesh, India, Indonesia, Pakistan, China, the United Republic of Tanzania, Ethiopia, and Egypt.[64] All top 20 TCCs are legally bound by the ICESCR.[65] All TCCs are legally bound by CEDAW, and all except for India, Indonesia, Pakistan, China, Ethiopia, Egypt, and Zambia have accepted its individual complaints procedure.[66] All top TCCs are legally bound by the CRC.[67] The African TCCs are bound by the African Charter, save for Morocco; Italy is bound by the ECHR; and Uruguay by the ACHR.[68] All top TCCs, save for Morocco, are subject to the jurisdiction of their respective

[59] Çalı (n 56) 432.
[60] Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (adopted 9 June 1994, entered into force 5 March 1995) (‘Convention of Belém do Pará’).
[61] Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (adopted 11 May 2011, entered into force 1 August 2014) CETS No 210 (‘Istanbul Convention’).
[62] United Nations Peacekeeping (n 17).
[63] Sutera (n 10) 171-174.
[64] UN Treaty Body Database, Ratification Status for CCPR - International Covenant on Civil and Political Rights <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en> accessed 9 June 2025.
[65] UN Treaty Body Database, Ratification Status for CESCR - International Covenant on Economic, Social and Cultural Rights <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CESCR&Lang=en> accessed 8 July 2026..
[66] UN Treaty Body Database, Ratification Status for CEDAW - Convention on the Elimination of All Forms of Discrimination against Women <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CEDAW&Lang=en> accessed 8 July 2026..
[67] UN Treaty Body Database, Ratification Status for CRC - Convention on the Rights of the Child <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en> accessed 8 July 2026..
[68] African Union, African Charter on Human and Peoples' Rights <https://au.int/en/treaties/african-charter-human-and-peoples-rights> accessed 8 July 2026; Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=005> accessed 8 July 2026; Organization of American States, American Convention on

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regional human rights court. This is to the exclusion of the other TCCs not subject to any regional human rights court, and thus they can only be considered in relation to the complaints mechanisms they are subject to.

In the context of SEA, prospective obligations to prevent violations provide that all states must exercise due diligence to protect persons from acts of SEA that amount to sexual violence.[69] This may include criminalisation of all forms of sexual violence, establishing effective mechanisms for investigating and prosecuting, ensuring the penalties against those found responsible reflect the gravity of the offence, and providing reparations for victims.[70] It is recommended that states extend their jurisdiction to acts of sexual violence committed by their nationals abroad.[71] This is supported by the CEDAW Committee and the CRC.[72] When violations of human rights arise from SEA by peacekeepers, TCCs are required to fulfil their retroactive obligations to investigate and, where necessary, prosecute their nationals accused of SEA in its criminal form abroad where states have extraterritorial jurisdiction.[73] This is also supported by the CEDAW Committee and the CRC.[74] The ICCPR at Article 2(3) requires states to provide an effective remedy for rights violations and to ensure that individuals have their complaints properly determined by competent judicial authorities.[75]

In general, the obligations on states arising from these treaties are tripartite: to *respect*, which involves negative or preventive obligations to prohibit rights breaching conduct; and to *protect* and *fulfil*, which are positive obligations to adopt measures to protect from rights breaching conduct and to take steps to control threats of these breaches to fulfil such obligations.[76] For instance, under the ICESCR, greater weight is placed on fulfilment components and the progressive realisation of rights due to resource limitations to fulfil the right to food and water.[77] Conventions such as the ICCPR and CEDAW provide for 'instant realisation' and the obligation to respect rights therein have immediate effect.[78] Article 2 of the

Human Rights "Pact Of San Jose, Costa Rica" <https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights.htm> accessed 8 July 2026.

[69] United Nations (n 7) para 6.

[70] ibid.

[71] ibid.

[72] CEDAW, 'General recommendation No.19 on Violence against women' (1992) A/47/38, para 9; CRC (n 50) arts 34, 19(1), 19(2).

[73] United Nations (n 7) para 4.

[74] CEDAW); CRC arts 19(1), 19(2).

[75] ICCPR.

[76] Kälin and Künzli (n 52) chs 1–5.

[77] ibid ch 3, pt III, s 6.

[78] HRC GC No. 31 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) CCPR/C/21/Rev.1/Add. 13 para 5.

DOI: 10.14324/111.444.2052-1871.2183

CEDAW provides that "States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women." The CEDAW Committee states that States may also be responsible under general international law and specific human rights covenants for private acts if they fail to act with due diligence to prevent violations of rights.[79] Under Article 34 of the CRC, State Parties must take all appropriate national, bilateral, and multilateral measures to prevent inducing or coercing children to engage in any unlawful sexual activity.[80]

Given the disciplinary authority and criminal jurisdiction retained by the TCCs over their peacekeeping troops, state responsibility may arise for their acts or omissions in relation to SEA committed during peacekeeping missions. TCC responsibility is most likely to arise through omission, such as the failure to exercise due diligence to prevent SEA at the outset, failure to investigate and, where necessary, prosecute, rather than for the act of SEA itself.[81] Importantly, establishing human rights obligations of TCCs extraterritorially is distinct from the question of state responsibility where questions of attribution arise – that is, where a peacekeeper or peacekeeping troop is acting as an organ of the state, and thus the wrongful conduct is considered an act of the state.[82] The invocation of ETOs of TCCs is distinct, and the key question is whether the TCC had sufficient authority, power or control over a victim through its agents to bring them within their extraterritorial jurisdiction and trigger its human rights obligations abroad. Even if the actions of UN peacekeeping troops are attributable to the TCC under the law of state responsibility, a claim under a regional human rights treaty may still fail unless the victim can be shown to fall within the TCC's extraterritorial jurisdiction through which rights obligations are owed to them.

What of the traction of these obligations in the extraterritorial context? Section II discusses the extraterritorial application of these treaties before analysing whether the varying modes of SEA fit or can be interpreted as fitting into the established tests for ETOs.

II. Invoking ETOs of TCCs for SEA by UN Peacekeepers

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[79] CEDAW, 'General recommendation No.19 on Violence against women' (1992) A/47/38, para 9.
[80] CRC art 34.
[81] Burke (n 14) 86.
[82] See Responsibility of States for Internationally Wrongful Acts (2001) (ARSIWA); James Crawford and Simon Olleson, 'The Character and Forms of International Responsibility' in Malcolm Evans (ed), International Law (5th edn, OUP 2018) ch 14.

This section begins by outlining the extraterritorial applicability of the relevant treaties and the jurisprudence of the Human Rights Committee and CEDAW Committee on ETOs. These Committees make up a body of independent experts to monitor the implementation of the ICCPR and CEDAW by state parties. It then assesses African jurisprudence to evaluate its potential position on SEA-related ETOs under the African Charter. Given its limited case law, the Inter-American and European jurisprudence are also examined. As the European Court of Human Rights (ECtHR) has the most extensive ETO jurisprudence, the African and Inter-American systems often follow its approach.[83]

A. 'Jurisdiction' Clauses and the Jurisdictional Extent of Obligations

The table below seeks to concisely encapsulate the complexity of the jurisdictional extent of the relevant IHRL treaties.

Table Figure 1: Scope of Jurisdiction in Relevant IHRL Treaties

Treaty	**Jurisdiction Clause**	**Interpretation**
ICCPR	Art 2(1): "within its territory and subject to its jurisdiction"	Interpreted to apply extraterritorially by power or effective control over individuals.[84]
CRC	Art 2(1): "within their jurisdiction"	International Court of Justice (ICJ) has interpreted as operating by control over territory in the occupation context.[85]
ECHR	Art 1: "within their jurisdiction"	Interpreted to apply extraterritorially by control over territory and individuals.[86]

[83] *Mohamed Abdullah Saleh Al-Asad v Djibouti* (2015) Communication No 383/10, ACmHPR; REDRESS and CRIN (n 38) 74.
[84] HRC GC No. 31 (n 79) para 10.
[85] Ralph Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties' (2007) 40 ICLQ 503, 508.
[86] Case law explored below.

DOI: 10.14324/111.444.2052-1871.2183

ACHR	Art 1(1): "subject to their jurisdiction"	Interpreted to apply extraterritorially by control over territory and individuals.[87]
ICESCR	No clause	Interpreted as applying extraterritorially.[88]
CEDAW	No clause	ICJ has interpreted it as if it contains jurisdiction clause.[89] CEDAW Committee interpreted as applying to those under effective control even if outside the territory of the state party and in situations of extraterritorial administration or occupation.[90]
African Charter	No clause	Operates by control over territory and individuals.[91]
ACRWC	No clause	ACRWC Committee appears to envisage that it operates by control over territory.[92]
Maputo Protocol	No clause	Not yet interpreted.

As shown in this table, most treaties have been interpreted as having the capacity to apply extraterritorially, even for those with a "jurisdiction" clause, which generally presumes territoriality in the sense that the treaty will generally be assumed to apply only to acts or omissions within the state.[93] For a human rights claim to be made against the TCC, it must be established that the omissions of that state are within the jurisdictional limits stipulated by the relevant treaty.[94] This jurisdiction will need to be extraterritorial, or interpreted in this way, given that the victims of SEA by peacekeepers are located outside the territory of the TCC.[95]

[87] *Coard et al v United States* (1999) Case 10.951, Report No 109/99; *Brothers to the Rescue (Alejandre et al v Cuba)* (1999) Case 11.589, Report No 86/99, IACmHR.
[88] Ralph Wilde, 'Pursuing Global Socio-Economic, Colonial and Environmental Justice through Economic Redistribution: The Potential Significance of Human Rights Treaty Obligations' in Christina Binder and others (eds), Research Handbook on International Law and Social Rights (Edward Elgar 2020) ch 4, 74.
[89] Ralph Wilde, 'The Extraterritorial Application of International Human Rights Law on Civil and Political Rights' in Scott Sheeran and Sir Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law* (Taylor & Francis 2013) ch 35, 635, 637, 639.
[90] CEDAW General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations (18 October 2013) CEDAW/C/GC/30 paras 8-10.
[91] *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2003) Communication No 227/99, ACmHPR; *Al-Asad* (n 84).
[92] Anne Oloo and Wouter Vandenhole, 'Enforcement of extraterritorial human rights obligations in the African human rights system' in Mark Gibney and others (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Taylor & Francis Group 2021) ch 10, 144.
[93] Wilde (n 90) ch 35, 635.
[94] REDRESS and CRIN (n 38) 73.
[95] ibid.

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This can be done by establishing state control over individuals, or by a broader interpretation of treaties without a jurisdiction clause, explored in section II part (C).

As previously stated, the primary focus of this analysis of the jurisprudence will fall under the individual control model rather than the territorial control model (also referred to as the spatial model) of extraterritorial jurisdiction for concision and as SEA cases against individuals map on to the individual model more clearly. This is not to say that peacekeeping forces do not exercise public powers on territory which can lead to territorial control and arguments for ETOs under the territorial model may indeed be plausible.[96] The individual control model triggers extraterritorial jurisdiction in scenarios where the state or its agents exercise control, power or authority over individuals, for example in a detention setting.[97] The territorial model conceives obligations as flowing from effective or effective overall control over territory more broadly.[98] This binary is more distinctively an ECtHR based framework that is not uniformly replicated across other systems; for example, the Human Rights Committee adopts a "power or effective control" formulation which does not neatly map on to such a distinction, and it has also been described as adopting a 'cause and effect' model.[99] Nonetheless, cases involving control over individuals will be prioritised in this analysis, which will apply the jurisprudence to cases of SEA perpetrated against individuals where troops are sent to protect people extraterritorially.[100]

The individual control test depends on the level of control over individuals, which encompasses a personal or state-agent-authority connection.[101] This connection has been understood as control, power or authority.[102] In cases of SEA by peacekeepers deployed abroad, ETOs of a TCC will be triggered where the TCC acting through its peacekeepers exercises a sufficient level of control, power or authority over the victim.[103] However, most regional jurisprudence on individual control relates to detention, targeted killings and shooting which

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[96] For instance, see CEDAW Committee (n 91) para 9.
[97] Wilde (n 90) ch 35, 644.
[98] ibid 641-644; see *Loizidou v Turkey* (Preliminary Objections) App No 15318/89 (ECtHR, 23 March 1995), *Cyprus v Turkey* App No 25781/94 (ECtHR, 10 May 2001), *Bankovic v Belgium* (Admissibility) App No 52207/99 (ECtHR, 12 December 2001), and *Al-Skeini v United Kingdom* App No 55721/07 (ECtHR, 7 July 2011), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168.
[99] HRC GC No. 31 (n 79) para 10; see also Oloo and Vandenhole (n 93) in respect of the Human Rights Committee and inter-American monitoring bodies applying the cause and effect model at 145.
[100] Siobhán Wills, *Protecting Civilians: The Obligations of Peacekeepers* (OUP 2009) 20.
[101] Wilde (n 90) 644.
[102] ibid.
[103] ibid.

DOI: 10.14324/111.444.2052-1871.2183

does not directly correlate to SEA.[104] A broader feminist, child-centric and rights-based argument is thus required to extend the control test to encompass SEA in peacekeeping. This approach presents a combination of both a normative claim about how courts should interpret the test for establishing ETOs in such circumstances, as well as an interpretive argument drawing on existing law. The control test as it exists and is applied may well apply to SEA in peacekeeping, only if it takes account of the nuances inherent in such conduct, which requires feminist, child and rights-based considerations. This can firstly be supported by the positions of the ICCPR and CEDAW Committees on control relevant to UN peacekeeping. Where cases of SEA do not neatly fit within the established tests as currently applied, there is a complementary route by way of the free-standing nature of treaties without a jurisdiction clause, such as the ICESCR, discussed below.

(i) The Jurisprudence of the Human Rights Committee and CEDAW Committee

The Human Rights Committee has stipulated that states have the obligation to ensure the rights of individuals "within the power or effective control of that State Party" abroad, "regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to a national peacekeeping or peace enforcement operation."[105] The Human Rights Committee has also elaborated on the obligations of Belgium in relation to the sexual abuse of a Somali girl by Belgian peacekeepers.[106] On the basis of "power or effective control" over individuals, it stated that State Parties should respect the covenant when they exercise jurisdiction abroad, "as for example in the case of peacekeeping missions."[107] This strongly suggests the application of extraterritorial jurisdiction in a way applicable to SEA in peacekeeping, where victims fall under the power or control of peacekeepers. This is in line with ICCPR General Comment No. 31, which states that the ICCPR applies "to those within the power or effective control of the forces of a State Party acting outside its territory…such as forces…assigned to an international

[104] *Coard* (n 88); *Isaak v Turkey* App. No. 44587/98, 28 Sept 2006, Admissibility; *Al-Skeini and Others v United Kingdom* App No 55721/07 (ECtHR, 7 July 2011); *Brothers to the Rescue (Alejandre et al v Cuba)* (1999) Case 11.589, Report No 86/99, IACmHR; *Al-Asad* (n 84).
[105] HRC GC No. 31 (n 79) para 10.
[106] Human Rights Committee, Concluding Observations: Belgium, UN Doc CCPR/CO/81/BEL (12 August 2004), para 6.
[107] ibid.

peace-keeping or peace-enforcement operation."[108] However, it is notable that the case against the Somali girl involved sexual abuse against her as a minor. SEA in peacekeeping entails a broad range of conduct, including conduct that may not be criminal or involve the same level of control that might be exercised over a minor. Therefore, this case and the statements of the Human Rights Committee in relation to it may be limited in so far as they apply to the existence of ETOs in one specific context in which SEA arises in peacekeeping missions, that is, the sexual abuse of children. Despite that, the Human Rights Committee did seem to go further than that in its general statement that state parties should respect the Covenant when exercising their jurisdiction abroad in peacekeeping missions.

The CEDAW Committee has reiterated the applicability of ETOs in peacekeeping so as to encompass SEA in a broader fashion. In General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, the CEDAW Committee reiterated that obligations of state parties also apply extraterritorially to persons within their effective control and that states are responsible for all their actions which affect human rights.[109] It further stressed that state parties are bound to apply the CEDAW and other international human rights and humanitarian law while exercising "territorial or extraterritorial jurisdiction, whether individually, for example in unilateral military action, or as members of international or intergovernmental organizations and coalitions, for example as part of an international peacekeeping force."[110] It further stated that the Convention applies wherever a state exercises jurisdiction, including foreign territory administration (such as UN territorial administration), and national contingents in peacekeeping operations. The application of both the individual and territorial model is apparent here. The positions of both ICCPR and CEDAW provide a normative basis for extending ETOs in peacekeeping where effective control is exercised over individuals, and also under the territorial model. This may also influence regional legal systems' approaches in proceedings involving SEA.

(ii) African Jurisprudence

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[108] HRC GC No. 31 (n 79) para 10.
[109] CEDAW Committee (n 91) paras 3, 8.
[110] ibid para 9.

The African Commission on Human and Peoples' Rights (ACmHPR) and African Court on Human and Peoples' Rights (ACtHPR) are the default bodies at the regional level in Africa in which to have SEA cases relating to African TCCs adjudicated provided the TCCsin question have accepted the jurisdiction of the ACtHPR. Implementation of the African Charter is monitored by the ACmHPR and the ACtHPR.[111] The literature on extraterritorial jurisdiction in the African system has not yet reached consensus, with some arguing for a territorial approach, and others to follow the approach of the ECtHR, partly because neither the ACHPR nor the ACRWC contain a reference to 'jurisdiction' (discussed further later).[112] As for the ACtHPR, it has only adjudicated on territorial jurisdiction to date.[113]

The Committee to the ACRWC has argued that African states have ETOs which extend to civil and political and ESC rights.[114] This suggests an openness of the Committee to extend the scope of this Convention abroad, but it does not yet appear to engage directly with the individual model.

The ACmHPR has recognised the extraterritorial jurisdiction of states under the individual and territorial models.[115] In the *Burundi Embargo* case, although the ACmHPR absolved the various African states of wrongdoing for imposition of economic sanctions, it acknowledged its future preparedness to find states responsible for violations of the rights of residents of foreign states.[116] This highlights the ACmHPR's willingness to extend ETOs in relation to individuals.[117] The absence of application the effective control test in this case may signal that the ACmHPR may accept that states have jurisdiction "whenever their actions have the effect of jeopardising human rights in the third states."[118] Moreover, African states have tended not to argue against extraterritorial application of the African Charter, suggesting their acceptance to the imposition of ETOs.[119] This is positive for the prospect of extraterritorial litigation on ETOs for SEA by peacekeepers at the ACmHPR.

[111] Oloo and Vandenhole (n 93) 140.
[112] ibid 141.
[113] ibid 144.
[114] ibid 147.
[115] ibid 142.
[116] Sarah Joseph and Barrie Sander, 'Scope of Application' in Daniel Moeckli and others (eds), *International Human Rights Law* (OUP 2022) 121; *Burundi Embargo Case* (n 92).
[117] ibid 121.
[118] ibid.
[119] Oloo and Vandenhole (n 93) 143; *DRC invasion* case (n 99); *Union Interafricaine des Droits de l'Homme and Others v Angola* (1997) Communication No 159/96, African Commission on Human and Peoples' Rights.

DOI: 10.14324/111.444.2052-1871.2183

The ACmHPR aligned with the approach of the ECtHR in *Al-Asad*.[120] To assume ETOs, it stated there must be a sufficient connection between the alleged violation and the respondent state, proven by the individual being under the effective control or authority of that state at the time of the alleged violation.[121] The ACmHPR referenced ECtHR decisions adopting the same meaning of effective control.[122] This case involved detention of the complainant and the question of control in the context of detention, however it was held to be inadmissible as the individual had failed to demonstrate that he was under the territorial jurisdiction or indeed effective control or authority of the Republic of Djibouti.[123] This approach appears to be narrower than that adopted in the *Burundi Embargo* case, but nonetheless, given its limited jurisprudence, the future development of the ETO jurisprudence in the African system is left open; a positive prospect for the strategic invocation of ETOs of TCCs.

(iii) Inter-American Jurisprudence

The Inter-American Commission on Human Rights (IACmHR) has relied upon the threshold of effective control over a person in its case law on ETOs towards individuals.[124] In *Coard*,[125] (though relating to the American Declaration of Human Rights) the IACmHR focused on whether the state observed the rights of a person subject to its authority and control in a detention context.[126] In *Alejandre v Cuba*, the IACmHR found jurisdiction over four deceased passengers of unarmed civilian airplanes shot down in international airspace.[127] The only basis for jurisdiction was in "the relationship between the agents of Cuba and the victims in the circumstances at the time of the incident."[128] The relationship between UN peacekeepers as agents of the TCC and the victims in the host state is arguably closer than that in *Alejandre,* which culminated out of a singular act that killed.[129] In SEA, while not an immediate instance of control as in the context of shooting, the relationship between peacekeepers and victims can

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[120] *Al-Asad* (n 84) at para 134.
[121] ibid paras 125, 134, 136.
[122] Oloo andVandenhole (n 93) 145.
[123] ibid 145, 146.
[124] Joseph and Sander (n 117) 119.
[125] *Coard* (n 88).
[126] Joseph and Sander (n 117) 119.
[127] ibid 120.
[128] ibid.
[129] ibid.

DOI: 10.14324/111.444.2052-1871.2183

be ongoing, as transactional sex may create a situation of dependency whereby those exploited seek out further transactional encounters.[130]

The IACtHR has clarified the scope of extraterritorial jurisdiction under the ACHR, stating that the word "jurisdiction" in Article 1(1) ACHR provides that the state's obligation to respect and ensure human rights apply to every person "in any way subject to its authority, responsibility or control".[131] Arguably, peacekeepers are responsible for the safety of civilians of host states in peacekeeping operations to the extent that they are "sent to protect" them.[132]

Indeed, two recent Advisory Opinions of the IACtHR suggest that the Court is moving away from just a territorial/personal model binary to include jurisdiction over activities with extraterritorial effects in the context of climate change, indicating its openness to broadening the modes in which extraterritorial human rights obligations generally apply.[133]

(iv) European Jurisprudence

It is significant to note the peacekeeping-related case of *Behrami/Saramati*, where the ECtHR avoided ruling on ETOs of TCCs to instead focus on attribution of conduct.[134] It held that the UN had ultimate authority and control over the peacekeeping forces, thereby attributing the impugned conduct to the UN.[135] While the focus here is on ETOs, not the responsibility of international organisations, this case is relevant in so far as it signals a risk that the ECtHR may avoid addressing TCC ETOs in a peacekeeping-related case. However, this risk may be rebutted in relation to SEA. These cases involved actions and omissions over conduct mandated by UNSC Resolution 1244.[136] The court held the impugned conduct to be attributable to the UN, not the TCCs, and thus, this fell outside the ECHR system. It held that it could not judge

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[130] Westendorf (n 6) ch 1, 35, 36.
[131] Joseph and Sander (n 117) 120.
[132] Siobhán Wills, *Protecting Civilians: The Obligations of Peacekeepers* (OUP 2009) 20.
[133] See IACtHR, Advisory Opinion AO-32/25 on the Climate Emergency and Human Rights, 29th May 2025; and IACtHR, Advisory Opinion OC-23/17 on the Environment and Human Rights, 15th November 2017.
[134] Marko Milanovic and Tatjana Papic, 'As Bad as It Gets: The European Court of Human Rights's Behrami and Saramati Decision and General International Law' (2008) 58 ICLQ 1, 1.
[135] *Behrami and Behrami v. France, Saramati v. France, Germany and Norway*, App Nos 71412/01 and 78166/01 (GC, 2 May 2007).
[136] ibid.

DOI: 10.14324/111.444.2052-1871.2183

the actions or failures of states following a UNSC resolution.[137] However, SEA falls outside the UNSC peacekeeping mandate.[138] A TCC is endowed with the competencies relevant to preventing *ultra vires* abuses, like SEA.[139] It has long been accepted between the UN and TCCs that the responsibility to exercise criminal and disciplinary jurisdiction over SEA rests with the TCC, not the UN.[140] For these reasons, the reasoning of the court in *Behrami/Saramati* is distinguishable on the facts, and has in any event been substantially qualified by the case of *Al-Jedda,* where the ECtHR found the detention remained attributable to the UK despite the UNSC framework in operation.[141]

The individual model of extraterritorial jurisdiction was developed in the case of *Al-Skeini v UK*, concerning the deaths of six Iraqi civilians by British troops in Iraq, where five were shot and one detained.[142] The court held that where a state exercises control and authority over an individual through its agents, it is obligated to secure the rights and freedoms "relevant to the situation of that individual", implying circumstantial flexibility.[143] It developed a hybrid jurisdictional test, one step of which is relevant to the individual control model: through the use of force by a state's agents against a person over whom the state is exercising "physical power and control".[144] This test is arguably broad enough to encompass control in SEA, particularly in criminal instances where physical power is exercised over individuals to the extent that they cannot escape.

In *Isaak v Turkey*, the individual model was still applied even though the victims were not under the direct control of Turkey.[145] The ECtHR recognised that state-agent-authority can arise even without direct custody or arrest, and can be isolated and specific with proximity, rather than large-scale armed operations.[146] This case is highly relevant to SEA as it involved lethal physical violence by public agents leading to death, and "being surrounded by at least ten persons, he could hardly have escaped the control of the security forces."[147] This strongly

[137] ibid.
[138] SC Res 1244 (10 June 1999) S/RES/1244.
[139] Tom Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers' (2010) 51 HILJ 1 114, 158.
[140] MOU (n 34), SOFA (n 38).
[141] *Al-Jedda v The United Kingdom*, App No 27021/08 (ECtHR, 7 July 2011) [86].
[142] *Al-Skeini v United Kingdom* (n 105).
[143] ibid para 137.
[144] ibid para 136.
[145] Kamran Khalilov, 'Extraterritorial Jurisdiction of the ECHR in the Context of Analysis of Relevant Cases: Which Model Is Effective?' (2021) 10 BSULR 83, 104.
[146] *Isaak* (n 105).
[147] ibid para 115.

relates to SEA, particularly where there are several perpetrators and the victim cannot escape, or escaping might entail a risk to life. An example of this is starkly reflected by one victim recalling her abuse: "[T]here were three of them on me. They were armed. They said if I resisted they would kill me."[148]

In sum, the main approaches to individual control under these cases most relevant to SEA cases are, broadly, physical power and effective control over individuals (for ease, hereafter referred to as the power/control test).[149]

B. Reconciling Established Tests for ETOs with Control in SEA: The Issue of Transactional Sex

A key question for analysis is whether SEA can meet the control tests established in situations of detention, shooting, or targeted physical violence. Such a specific factual analysis on SEA has not yet been addressed in current literature in a sustained way. This section establishes the challenges of applying the power/control test in its current forms to SEA, and that some types of SEA will be less likely to meet the test than others.

Criminal cases of SEA meet the power/control test quite convincingly. In criminal instances of "sexual abuse", the circumstances are similar to the physical use of force identified in *Isaak*, where the individual has no real means to escape.[150] For example, in Haiti, a girl was raped by a peacekeeper when she was 14: "[H]e held me down by the arms and held both my wrists, twisting them back, and we struggled together. And then he raped me."[151] In CAR, an 18-year-old woman and a 14-year-old girl were dragged into a bush and gang-raped by armed peacekeepers.[152] The woman had been seeking food and/or money and was threatened with death if she resisted, and the girl was merely walking by.[153] These instances plainly demonstrate a significant level of physical power and control that prevent escape, like in detention settings and in cases such as *Isaak*. Moreover, all SEA against children (individuals under 18 years of

[148] Human Rights Watch (n 1).
[149] HRC GC No. 31 (n 79) para 8; CEDAW (n 72) paras 3, 8.
[150] *Isaak* (n 105) para 115.
[151] Westendorf (n 6) ch 1, 29.
[152] ibid.
[153] ibid.

age) is criminal, and the power/control test in any case against children can easily be met given their particular vulnerability.[154]

In relation to criminal SEA against men, there is little to no factual evidence of how power/control might play out. Courts may indeed be less readily persuaded by arguments establishing power/control against men than in cases involving women and children, notwithstanding the obvious power imbalance between armed peacekeepers and unarmed civilians.

As previously discussed, transactional sex as a form of sexual exploitation is an empirical preponderance of cases of SEA by peacekeepers.[155] Meeting the general jurisprudential threshold of the power/control test is less likely here, as victims may willingly decide to engage in sex in exchange for money or other aid.[156] This challenges the general factual circumstances of the inability to escape, as in situations of detention and physical beating. However, this supposed unlikelihood arguably also accounts for a feminist approach, as feminists critique the blanket prohibition of transactional sex in the ZTP as disregarding that in certain countries where peacekeepers are deployed, transactional sex is culturally acceptable.[157] They critique that it disregards sex work, relationships and the motivations to engage in transactional sex, which can include love or excitement,[158] blurring the existence of a lack of meaningful choice inherent in exploitation, and thus countering any argument that this involves sufficient control over individuals. Nonetheless, there may be differing degrees of agency and consent resulting in a grey area which the Secretary General Bulletin's definition of "sexual exploitation" ignores.[159]

An example of this is where transactional sex culminates in survival sex, where the reality of deciding to exchange sex for aid is made in circumstances of severe deprivation and insecurity, with a lack of meaningful choice.[160] Peacekeepers abuse the context of desperation to coercively control individuals into sex, knowing it might be their only escape from starvation and threat to life.[161] This argument could be interpreted in line with the inability-to-escape realities inherent in e.g. detention contexts, where transactional sex involves a choice between

[154] CRC (n 50) art 34.
[155] Westendorf (n 6) ch 1, 25.
[156] Mudgway (n 26) 1457.
[157] ibid 1456.
[158] ibid.
[159] ibid 1457.
[160] ibid 1456.
[161] ibid.

sex and an inherent risk to life and health. This lack of a safe alternative choice arguably reflects power/control insofar as individuals depend on peacekeepers to sustain their life, engaging in sex to access basic ESC rights.[162] These arguments can apply equally to men if they are victims of survival sex, although without the support of gender and child-specific IHRL protections which add weight to cases against women and children.

However, feminist critiques also apply in the survival sex context. Feminist legal theorists such as Dianne Otto and Jena McGill have argued that the ZTP fails to consider the legitimacy of 'survival sex' given that the socio-economic pressures in conflict and post-conflict states lead women and girls to look for pecuniary opportunities.[163] Despite these considerations, Mudgway has argued that such arguments can overestimate the ability of some local women to actually negotiate the terms of an exchange or exercise true agency.[164] She has stated that in the post-conflict context, it is difficult to argue that all women have the legitimate freedom of choice; she noted that survival sex can range from involving a starving young woman being forced to exchange sex for humanitarian aid or assistance which she is already owed, to a local woman who independently approaches peacekeepers to exchange sex for money.[165] It is the former that encapsulates a lack of meaningful choice that fits closer within the power/control paradigm.

Regardless of whether the current control tests can be met in a particular SEA case, because SEA affects women and children disproportionately and its factual nature is distinct from detention and physical beating, it is deserving of separate treatment as a systemic, gender and child-based issue that is ever more prevalent in conflict-affected areas.[166] This warrants more than simply trying to squeeze instances of control in SEA into distinct circumstances, as IHRL already provides a strong normative basis for the protection of women and children from SEA.[167]

Given that normative basis, if an SEA case in the UN peacekeeping context were to make its way to a regional human rights court, the court ought to consider that SEA

[162] Westendorf (n 6) ch 1, 36; UN Policy (n 7) 42, para 18.
[163] Mudgway (n 26) 1456.
[164] ibid.
[165] ibid 1457.
[166] UN Regional Information Centre for Western Europe, 'Women and girls are disproportionately affected by conflict-related sexual violence' (2024) < https://unric.org/en/women-and-girls-are-disproportionately-affected-by-conflict-related-sexual-violence/> accessed 9 June 2025
[167] As shown in in CEDAW ,CRC, Maputo Protocol,ACRWC, Convention of Belém do Pará(Inter-American), and theIstanbul Convention (European).

disproportionately affects women and girls in terms of frequency, the possibility of pregnancy and the subsequent cycles of poverty.[168] Sexual interactions with peacekeepers, in their criminal, exploitative or consensual forms, do not occur in a vacuum.[169] The wider sociological factors in conflict which lead to poverty create an environment where peacekeepers can abuse their position and transactional sex can thrive.[170] The expectation of resources in exchange for sex leads to a perpetuation of dominant-subordinate relationships that are at the root of gender imbalances.[171] The environment creates a situation of dependency and leads to the potential for SEA to go unreported, as locals may depend on the continued deployment of peacekeepers to receive income or because they fear the fathers of their children will be repatriated.[172] There is evidence of victim dependency whereby those abused seek further transactional encounters.[173] The sociological context involves distorted power dynamics between men and women exacerbated by conflict, meaning any expression of agency can mask how that context removes the ability to make real choices.[174] It is necessary to account for the cultural context in which SEA in peacekeeping occurs: gender based violence operates within a legacy of brutal colonial rule, severe poverty and instability, foreign intervention and human rights violations, where it becomes normalised.[175] To consider the engagement of women in transactional sex as an exercise of agency may oversimplify the reality of such relationships. As Mudgway has argued, it is not about agency but survival.[176] These factors must be considered when applying the power/control test to such cases.

The overwhelming evidence as to SEA in peacekeeping against children, both girls and boys, is self-explanatory in demonstrating their inherent vulnerability to be subjected to power/control. One factor contributing to their vulnerability to SEA arises from an assumption that children are unaware of their rights and reporting is an inherently more difficult process for children.[177] Another is that child victims of SEA also experience "accommodation syndrome", which involves delayed or unconvincing disclosure due to the secondary trauma

[168] Luissa Vahedi and others, 'Gender-Stratified Analysis of Haitian Perceptions Related to Sexual Abuse and Exploitation Perpetrated by UN Peacekeepers during MINUSTAH' (2021) 2 Sexes 218, 232.
[169] ibid 218.
[170] Sabrina Karim and Kyle Beardsley, "Peacekeeping and the Problem of Sexual and Gender-Based Violence," in Han Dorussen (eds), *Handbook on Peacekeeping and International Relations* (Edward Elgar 2022) 260.
[171] ibid.
[172] ibid.
[173] Westendorf (n 6) ch 1, 36.
[174] ibid 37.
[175] Vahedi and others (n 169) 218.
[176] Mudgway (n 26) 6, 7.
[177] Audrey L. Comstock, 'Child Victims and the Punishment of UN Peacekeepers for Sexual Exploitation and Abuse', (2024) 68(2) ISQ 1, 4.

of children retelling their experience of SEA, which could lead to the abuse never being reported at all.[178] The power/control test, then, must be interpreted through a child-centric lens when cases have been reported but have been left unaddressed by the TCC.

It is against this backdrop that the power/control test should be interpreted in any SEA case before regional courts, or where the factual circumstances of an SEA case appear less convincing than in detention and other contexts. This lens is normatively grounded in specialised treaties such as CEDAW, CRC, the Maputo Protocol and the ACRWC. SEA in peacekeeping is a systemic, cultural and post-conflict problem distinct from one-off acts like detention, shooting or brutal beatings. Nonetheless, SEA cases can involve comparable physical control to those cases, but even where it does not, there is a feminist lens through which to view control, where women are left without true choice.

C. A Non-Gender or Child-Specific Workaround: Economic, Social and Cultural Rights

Where the territorial and individual models of power or control present uncertainties when faced with the varying forms of SEA which may take place, particularly in transactional sex and survival sex, an alternative avenue readily exists. This can be taken through the ICESCR, rights of which are also enshrined in the African Charter, the ACRWC and the Maputo Protocol. There is no case law yet establishing the effective control over individuals relating to ICESCR rights, but its extraterritorial applicability can be inferred by its lack of a "jurisdiction" clause.[179] This is an avenue identified by Ralph Wilde, which he has referred to as a "free-standing" model of jurisdiction, where there is no express stipulation as to how and where the obligations in the treaty should apply.[180] This makes for a broader possibility of extraterritorial applicability, as effective control can be complementary to, rather than a substitute for, the "free-standing" model.[181] This presents an additional, parallel avenue to invoking ETOs other than by application of the control tests discussed above. A basis for this approach readily exists in the fact that the ICESCR is without a "jurisdiction" clause. Notably, CEDAW, as well as all

[178] ibid.
[179] Wilde (n 89) 72.
[180] ibid 69.
[181] ibid 82.

relevant African instruments have this model (see Table Figure 1 above).[182] This further highlights that the African system is a promising route for SEA litigation. This model arguably negates a strict need to establish effective control,[183] opening up the possibility of a new approach to establishing ETOs where the control model is unsuitable. In the ICESCR, the model is also reflected in the requirements to take steps to realise ESC rights, and to do this within the framework of cooperation and assistance.[184] Moreover, SEA also engages civil and political rights under the ICCPR which contains a jurisdiction clause and therefore the need to establish control, so the ICESCR free-standing clause serves to supplement, rather than circumvent, the existing framework.

Moreover, the ICESCR Committee has interpreted the obligations to respect, protect, and fulfil as extending extraterritorially.[185] It has stated that it involves states taking "steps to respect the enjoyment of the right to food in other countries" and "to respect the enjoyment of the right to health in other countries."[186] These present broad indications of extraterritorial applicability beyond the control-based tests. States also have 'minimum core' obligations under ICESCR, including those in respect of the right to food, health and shelter, regardless of resource constraints.[187] To the extent then, that TCC troops make access to food or humanitarian assistance conditional upon sex, the TCC arguably violates its ETOs to respect, protect and fulfil those rights through its agents. Where such conduct is foreseeable and not addressed by prevention, investigation or prosecution or by disciplinary action, this may provide a basis upon which to argue that the TCC is in breach of its ETOs under the ICESCR. This would provide an additional avenue for women and children to seek redress in relation to transactional sex, and a rights-based avenue for men to seek redress for the same under ICESCR.

By withholding aid from the host population in exchange for sex, this could be argued to consist of 'retrogressive steps', an idea as discussed by Kälin and Künzli.[188] They have considered that, while not absolutely prohibited due to the principle of progressive realisation

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[182] See Table Figure 1.
[183] Wilde (n 89) 82.
[184] ibid.
[185] CESCR, 'General Comment No. 12 on the Right to Adequate Food' (12 May 1999) UN Doc E/C.12/1999/5, para 36; CESCR, 'General Comment No. 14 on the Right to the Highest Attainable Standard of Health' (11 August 2000) UN Doc E/C.12/2000/4 para 39.
[186] ibid.
[187] UN Economic and Social Council 'General Comment No. 3 on The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)' (14 December 1990) UN Doc E/1991/23.
[188] Kälin and Künzli (n 52) ch 3, pt III, s 6.

of obligations under ICESCR and the obligation to take steps in respect of international assistance and cooperation to the 'maximum of available resources', steps deliberately taken that lead to a lower level of realisation of an ESC right are highly concerning and would require the "most careful consideration" and must be "fully justified by reference to the totality of the rights provided for in ICESCR and in the context of the full use of the maximum available resources."[189] In applying this reading to cases of transactional sex in extraterritorial UN peacekeeping missions, it is difficult to justify such conduct on this basis where the local population is owed basic ESC rights and then basic aid to protect those rights is withheld by UN peacekeepers for sex. In such cases, this may amount to retrogressive interference with the enjoyment of ESC rights, and the failure of a TCC to prevent, investigate or remedy such conduct adds weight to the argument that it is in violation of its ETOs under the ICESCR.

Suppose a peacekeeper from African TCC 'X' engages in transactional sex with a starving woman at a displacement camp in an African host state, offering food or access to humanitarian supplies in exchange for sex. Although this transaction appears formally consensual, the claimant may argue before the ACtHPR that the extreme inequality of power between the claimant and the peacekeeper and the circumstances of starvation and economic dependency rendered the transaction coercive and left her in a position without free choice where she needed the aid to survive. Now there are two ways in which the claimant may argue her case before the ACtHPR: first, via the power/control test interpreted through a gender and child-sensitive lens in light of the context in which SEA occurs in UN peacekeeping missions; and second, that making access to essential aid conditional upon sex constitutes a breach of ESC rights and the extraterritorial human rights obligations of the TCC, regardless of whether the power/control test is otherwise satisfied. The TCC may be in violation of its ETOs in respect of ESC rights where it has failed to exercise due diligence to prevent, investigate and remedy that conduct. The second step stands as a mechanism through which to fill any gap in the former approach where SEA may not be considered to meet the power/control test. However, even on its own, the free-standing nature of the African instruments and the ICESCR provides a strong basis for arguing that ETOs may arise without requiring the traditional power/control test to be satisfied in the same manner.

From a practical viewpoint, the Court would first have to establish that State X's African Charter obligations operated extraterritorially. Since the African Charter does not contain a

[189] ibid.

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jurisdiction clause limiting its obligations to within its own territory, the claimant could argue that its free-standing nature means that such obligations may operate extraterritorially, regardless of whether effective control was exercised over her during the incident of transactional or survival sex. The Court could adopt this approach in complement to acknowledging that where a TCC deploys armed UN peacekeeping personnel, they retain sole disciplinary and criminal jurisdiction over them as per the SOFAs and MOUs, and therefore the TCC must at least prevent and respond to foreseeable rights violations arising where its personnel make basic rights conditional upon sex. In this regard, the Court might assess the extent to which the TCC exercised its due diligence obligations under the UN peacekeeping framework as per the SOFAs and MOUs but also under treaties applicable to SEA.

Similar claims concerning breaches of ESC rights may be advanced in the same way via the free-standing model if a case is brought under the ICESCR before the ICESCR Committee or a domestic court in a monist jurisdiction, which may apply the ICESCR directly. In terms of remedying such breaches, as highlighted in ICESCR Committee General Comment No. 14, all victims of violations of the right to health are entitled to an effective remedy in the form of restitution, compensation, satisfaction or guarantees of non-repetition.[190]

While significant barriers to admissibility still exist, particularly the requirement to exhaust domestic remedies in the extraterritorial context where a victim may have to try and exhaust remedies in the TCC rather than in their own state,[191] this section has established that strategic litigation could proceed through both the power/control-based model of extraterritorial jurisdiction and also through a complementary argument grounded in the 'free-standing' nature of treaties without a jurisdiction clause such as the ICESCR and African human rights instruments.

Conclusion

It is clear that the ETO approach to SEA is not without merit. This is evident from the legal framework governing UN peacekeeping, the extraterritorial applicability of relevant treaties

[190] CESCR GC No. 14 (n 186) para 59.

[191] The ICESCR Committee, along with the other relevant treaty bodies and regional courts, make the exhaustion of domestic remedies a prerequisite before a case will be admissible before it, see: REDRESS and CRIN (n 38) 63-71.

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ratified by the top TCCs, the analysis of power/control in SEA cases in light of regional jurisprudence, and the free-standing nature of the ICESCR and other treaties. That said, it is not without constraints. This is clear in transactional sex, where control might be more difficult to establish relative to detention contexts involving an inability to escape. Therefore, on a conservative reading of relevant control tests, it is uncertain whether courts would establish ETOs for SEA in peacekeeping. However, the analysis has demonstrated that those tests should not be divorced from the gendered, child-specific and socio-economic realities in which such conduct occurs. Viewed in this way, the control-based model may be interpreted so as to encompass many instances of SEA that do not neatly resemble the factual scenarios that arise in existing jurisprudence. Moreover, the complementary avenue through the 'free-standing' jurisdictional nature of the ICESCR and the African instruments provide a promising basis for invoking ETOs where effective control, in the way it has been applied to the distinct factual scenarios in existing jurisprudence, is difficult to establish in the SEA context. While acknowledging the ETO approach will not solve SEA by peacekeepers, my hope is that this analysis will inform SEA litigators and NGOs as to the importance of strategic, context-informed litigation when invoking a TCC's ETOs for SEA if such cases are pursued and make their way to a regional court. Even if that day never comes, the nature of this analysis demonstrates that ETOs for SEA by UN peacekeepers can plausibly be invoked and ought to be seriously considered. On that basis, TCCs should take effective action to prevent SEA, take appropriate action where it has occurred, and provide victims with an effective remedy.[192]

[192] Burke (n 14).

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The Impact of Juryless Trials: A Comparative Look at the Diplock Courts of Northern Ireland and Jury Trial Provisions in the Leveson Review of Criminal Justice in England and Wales

Joel Hames[*]

Abstract: This article examines proposals in Sir Brian Leveson's *Independent Review of the Criminal Courts* (2025) to expand juryless criminal trials in England and Wales. Using the experience of Northern Ireland's Diplock Courts as a comparative case study, it evaluates the implications of removing juries for trial dynamics, evidential assessment and fair-trial guarantees. The analysis considers how judge-alone trials, even when formally grounded in a defendant's "jury waiver", may operate in conditions of structural or tacit pressure and thereby affect the quality of consent. It further assesses the potential impact of an expanded non-jury jurisdiction on perceptions of legitimacy and public participation in criminal justice. The article concludes by exploring alternative reform pathways, including greater use of Magistrates' courts, aimed at addressing current systemic pressures while preserving the centrality of jury trial within the common law tradition.

Keywords: *Juryless trials; Diplock Courts; Leveson Review; Criminal Reform; Common Law; Constitution.*

[*] Student of the Inn of Court of Northern Ireland and studying on the Bar Practice Course at the Institute of Professional Legal Studies, Queen's University Belfast. I would like to thank the anonymous reviewers for their help, feedback, and guidance. I would also like to thank Emma Jane-Faulkner for her assistance with case law research and her willingness to talk through the article with me during the writing stage. Thanks are also due to Seamus Mullholland BL, with whom I had many discussions about this work, and whose insight and encouragement were invaluable.

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I. Introduction

Sir Brian Leveson's highly anticipated review (*Independent Review of the Criminal Courts: Part 1*) into the criminal courts in England and Wales was published on the 9th of July 2025. Its publication has attracted much commentary, particularly with respect to Sir Brian Leveson's recommendations outlined in Chapter 9 of his review, titled "Trial by Judge Alone", in which he forwards a case for the increased use of Juryless criminal trials.[1] The reception of Leveson's recommendations has been varied and passionate, and once one has parsed the more salacious elements of reporting, has inspired much dialogue around the philosophical and moral roots of the jury system.

Potential reforms to the jury system in England and Wales as well as Scotland have been floated at different points in time previously. For example, contained within Part 6, section 65 of the Victims, Witnesses, and Justice Reform (Scotland) Bill the Scottish government outlines a trial scheme titled, "Pilot of single judge rape trials" under which Scottish Ministers would have been empowered to introduce regulations allowing rape and attempted rape trials on indictment to proceed before a single judge without a jury.[2] This provision was subsequently walked back by the Scottish government citing that there was not enough parliamentary support at that time to continue with the pilot.[3] Such attempts to amend jury trials in this way garner robust rejoinder in their defence from both the lawyer and the lay person.[4]

However, as it pertains to Northern Ireland, juryless or judge alone trials are not a novel concept. In fact, juryless trials have been, and remain, in place in Northern Ireland since 1973 following the recommendations of Lord Diplock contained in his 1972 report. Albeit initiated with differing concerns to those motivating the Leveson review, the Diplock courts, as they have come to be known colloquially, ultimately result in a defendant standing trial without the benefit of a jury. It is true that both the nature of and extent of use of Diplock courts has changed

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[1] Sir Brian Leveson, Independent Review of the Criminal Courts: Part 1 (Ministry of Justice 2025) <https://www.gov.uk/government/publications/independent-review-of-the-criminal-courts-part-1\> accessed 24 October 2025 (thereinafter "Leveson Review").

[2] Victims, Witnesses, and Justice Reform (Scotland) Bill, pt 6, s65.

[3] Kirsteen Paterson, 'Scottish Government scraps pilot for juryless rape trials' (*Holyrood*, 30 October 2024) <https://www.holyrood.com/news/view,scottish-government-scraps-pilot-for-juryless-rape-trials> accessed 12 May 2026.

[4] David Cowan and Jonathan Geddes, ''Juryless rape trials pilot to be axed by Scottish government' (*BBC News*, 31 October 2024) <https://www.bbc.co.uk/news/articles/c20n3rjp7v9o> accessed 12 May 2026.'

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since their introduction, and modern usage of such proceedings is consistently reviewed bi-annually, with the next review scheduled for July 2027.

It is clear therefore, in light of the Leveson review, that a comparative look at juryless criminal trials in Northern Ireland can illicit answers as to how, or indeed whether, England and Wales should implement some, or all, of the Leveson recommendations effectively, appropriately and, crucially, justly. Northern Ireland is a jurisdiction with innumerable similarities to England and Wales yet maintains a clear jurisprudential independence. Northern Ireland provides an example grounded in practical reality. Juryless criminal trials are not academic or theoretical in this jurisdiction; there is a long legacy of their use and thus this provides us with a pertinent window through which to view the legacy and impact of juryless criminal proceedings. Given the closeness of the two jurisdictions, it is the hope that academic and practical insights from one can go a long way to informing conduct in the other, both in the positive and indeed the negative.

This article aims to examine the legacy of Diplock courts in respect of the recent proposals contained within the Leveson review, in the hope of providing a critique of juryless trials, their efficacy, legitimacy and propensity to administer justice as well as bring some practical insight from an outside, albeit adjacent perspective to England and Wales.

In their book *Abolishing the Diplock Courts: The Case for Restoring Jury Trial to Scheduled Offences in Northern Ireland*, Stephen Greer and Anthony White forward several reasons as to why the jury should be restored, some are specific to the context of Northern Ireland and have been omitted, whereas others are universally applicable.[5] It is these universally applicable observations of the jury, and the jury trial that inform this articles thesis. Namely that:

1. *Jury trial bestows upon the ordinary people the democratic right and public duty of direct participation in decision making which often gravely affects the lives of others;*
2. *It maintains contact between the criminal justice process and ordinary people, and sustained their confidence in it, a service which no other component of the legal system can duplicate;*

[5] Steven Greer and Antony White, '*Abolishing the Diplock Courts: The Case for Restoring Jury Trial to Scheduled Offences in Northern Ireland'* (Cobden Trust 1986) 56.

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3. *In trial by jury alone the vital distinction between the admissibility of evidence and the weight which should be attributed to it is all but lost;*
4. *The separation of functions between judge and jury is particularly valuable with respect to the testing of credibility of witnesses in general;*
5. *Trial by jury provides a means by which each case is heard on its individual merits by a fresh tribunal thereby avoiding the danger of case hardening to which judges sitting alone are prone*

It is with these five components in mind that this piece seeks to demonstrate why judge-alone trials are insufficient to tackle the current backlog in the criminal courts in England and Wales, and why it is wholly inappropriate to introduce such measures in the context and circumstances (ordinary and peacetime) which presently persist.

This article will begin by first providing a background on the Diplock courts, their origin, amendments and current trajectory in Northern Ireland. Additionally, this article will devote a brief section to outlining the specific recommendations of the Leveson review, looking at the factors Sir Brian Levson considers in his recommendations, and the extent to which those recommendations are shaped by the present pressures on the criminal courts, concerns of proportionality, and the need for greater procedural efficiency. It will then go on to look at the objections to Diplock style juryless trials both historic and contemporary, looking at how juryless trials interact with Article 6 (Right to a Fair Trial) of the European Convention on Human Rights, and then proceed to apply this to the Leveson review where applicable. The article will of course examine some of the key provisions outlined by Leveson and provide some comparative commentary as to their application. Finally, this article will conclude with an evaluation of the Leveson recommendations, their practicability not only materially but philosophically within the common law framework.

II. The Origins and Legacy of Diplock Courts

"The idea of trying serious criminal cases without a jury is anathema to many educated within the common law tradition".[6] Yet the consensus in Northern Ireland has been for some time now that this is an undesirable, but necessary, provision given the historic circumstances of the

[6] John Jackson and Sean Doran, *Judge without Jury: Diplock Trials in the Adversary System* (OUP 1995) 15.

DOI: 10.14324/111.444.2052-1871.2161

jurisdiction. Diplock trials were originally established as a response to internment without trial, jury intimidation and jury bias in cases related to the 'Troubles'.[7] They came into effect through the Emergency Provisions Act 1973. The Belfast 'Good Friday' Agreement was signed in 1998 and marked the end of 'The Troubles' in Northern Ireland,[8] however Diplock Courts endured and were not formally abolished until the Justice and Security (Northern Ireland) Act 2007.

However, at present the Director of Public Prosecutions (DPP) for Northern Ireland can still certify that a trial should be held without a jury, conducted in the manner of, and thereby maintaining Diplock courts as a feature of Northern Irish justice.[9] The current provisions for non-jury trials in Northern Ireland under the Justice and Security (Northern Ireland) Act 2007 were most recently extended on the 31st July 2025.[10] This decision put in place a ninth two-year extension, from 31st of July 2025 to be reviewed again on the 31st of July 2027. The Northern Ireland Office stated that these provisions are "regrettable", but that they remain necessary because of continued paramilitary activity, despite the reduction in the Northen Ireland terrorism threat level from "Severe" to "Substantial" in March 2024.[11]

There were 12 such cases as of the last reported year (2023).[12] Section 9(1) of the Justice and Security (Northern Ireland) Act 2007 provides that sections 1-8 and Schedule 1 of that Act, the non-jury trial provisions, shall expire at the end of the period of two years beginning with the day on which section 1 comes into force. Section 1 came into force on 1st August 2007. Further, section 9(2) provides for the Secretary of State by Order to extend or (on one or more occasions) further extend the effective period. The Secretary of State has extended the non-jury trial provisions with successive orders.[13]

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[7] '*The Troubles'* refers to the violent sectarian conflict in Northern Ireland from the late 1960s to 1998, rooted in political and constitutional disputes between mainly Protestant unionists, who wished to remain part of the United Kingdom, and mainly Catholic nationalists, who sought a united Ireland.
[8] The Belfast 'Good Friday' Agreement 1998.
[9] Justice and Security (Northern Ireland) Act 2007, s 1.
[10] NIO, 'Northern Ireland Office launches consultation on the use of non-jury trials in Northern Ireland' (GOV.UK, 9 December 2024) <https://www.gov.uk/government/consultations/northern-ireland-office-launches-consultation-on-the-use-of-non-jury-trials-in-northern-ireland> accessed 12 May 2026.
[11] House of Lords, Secondary Legislation Scrutiny Committee, *Twenty Sixth Report* (HL 2020–21, 129). <https://publications.parliament.uk/pa/ld5901/ldselect/ldsecleg/129/12904.htm> accessed 12 May 2026.
[12] HM Government, *Consultation: Non-Jury Trials, Justice and Security (Northern Ireland) Act* 2007 (Gov.uk, December 2024) <https://assets.publishing.service.gov.uk/media/6756bccdf96f5424a4b87768/241209_NJT_Consultation_Document.pdf> accessed 24 October 2025.
[13] The effective period was extended by S.I. 2009/2090 so as to end on 31st July 2011. And the effective period was further extended by S.I. 2011/1720 so as to end on 31st July 2013. Most recently this was extended to 2027 by the (Extension of Duration of Non-jury Trial Provisions) Order 2025.

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Jackson and Doran note how in Diplock courts, the absence of a jury, fundamentally changed the working and atmosphere of Crown court trials, transforming them into something closer to an appellate court.[14] Judges in Diplock trials wrote full and reasoned verdicts unlike a jury; these reasoned judgments were closer to appellate judgments in kind.[15] Judges were required to become much more interventionist as the sole decision maker and often wrote full and reasoned verdicts unlike a jury. Jackson and Doran say that this created an 'adversarial deficit', one that removed the public buffer between the defendant and the state.[16] Describing this they write, "this deficit occurs because many of the procedural devices built into the trial process - particularly those designed to provide the defendant with a meaningful opportunity to contest the case against him and to ensure that any determination of guilt is based solely on the evidence adduced in the courtroom – are predicated on the existence of a decision-making body that comes 'cold' to the contest, devoid of extraneous knowledge concerning the facts of the case or the relevant principles of law."[17] In light of this deficit, defence counsel pivoted to a focus on technical law rather than the pathotic concerns a jury may have.[18]

T=his deficit will be discussed further and in greater depth subsequently, however one thing to note is that the nature of the courts had a material effect on the outcomes of proceedings, for instance, from 1973-79 the acquittal rate dropped from 15% to 6% and saw the number of guilty pleas climb from 59% to 75%.[19] The system became geared towards securing convictions rather than guaranteeing reliability or 'safe' convictions.[20] The Diplock Commission recommended a number of changes to the conduct of a trial to reduce the risk of acquittal of significant numbers of persons guilty of terrorist crimes.[21] It is important to acknowledge that these figures cannot, by themselves, establish a direct causal link between the structural features of Diplock trials and the observed fall in acquittals or rise in guilty pleas. Any such relationship should be viewed alongside a range of confounding factors, including

[14] Hannah Quirke, '*Covid-19 and jury-less trials?'*, (2020) 7 Crim LR 569, 569-71.
[15] *The King v Soldier F* (Crown Court) [2025] NICC 30 is a Troubles legacy case whereas, *The King v James Bryson, Thomas O'Hara and Daithi McKay* [2025] NICC 19 is a non-Troubles related use of Diplock. *R v Crossan* [1989] 2 NIJB 72 is an example of Diplock courts used during the Troubles.
[16] Jackson and Doran (n6) 15.
[17] Sean Doran, John D Jackson and Michael L Seigel, 'Rethinking Adversariness in Nonjury Criminal Trials' (1995) 23 American Journal of Criminal Law 1 <https://scholarship.law.ufl.edu/facultypub/309/> accessed 12 May 2026.
[18] Lorraine Toolan, 'Administration of justice in Northern Ireland: the operation of the Diplock courts from 1973 to 1988' M.Soc.Sci in Irish Political Studies, Faculty of Law at Queen's University Belfast 1988) ch 2, 42.
[19] Kevin Boyle, Tom Hadden, and Paddy Hillyard, '*10 years on in Northern Ireland*' (Cobden Trust 1980).
[20] Pieter Van Dijk, Preface to 'The Diplock Courts in Northern Ireland: A Fair Trial?' (Amnesty International & Netherlands Institute of Human Rights 1983) [7] <https://www.amnesty.org/ar/wp-content/uploads/2021/06/eur450041983en.pdf> accessed 24 October 2025.
[21] David Bonner, '*Emergency Powers in Peacetime'* (Sweet & Maxwell, 1985) 138.

changes in policing and intelligence practices, prosecutorial decision-making, charging criteria, and the wider security and political context in which the courts operated. The statistics therefore should be understood to augment the critique advanced by Jackson and Doran: that the non-jury model, and the 'adversarial deficit' they adduce, risks tilting the process away from maximising adversarial challenge and towards a greater emphasis on the efficient conviction of scheduled offenders.[22]

As will be discussed in greater detail subsequently only scheduled offences are tried in the Diplock courts. They are listed in parts I and III of schedule 4 of the 1978 Northern Ireland (Emergency Provisions) Act, and can be added to or reduced by the Secretary of State by order.[23] They cover all the offences which the authorities associate with terrorism, such as the common law offences of murder, manslaughter or false imprisonment and many of the statutory offences contained in the Offences Against the Person Act 1861 among others.[24] Crucially many of these offences are also commonly committed by ordinary criminals and so special provision had to be made in order to safeguard the ordinary criminal from being processed through the emergency system.[25]

III. The Leveson Review: Recommendations, Reform and Jury Waivers

Sir Brian Leveson's Independent Review of the Criminal Courts was commissioned to tackle the crippling backlog in England and Wales' Crown Courts, standing at over 73,000 cases,[26] and to drive systemic reform for efficiency and proportionality. Its core aims extend beyond funding to procedural overhaul, with Chapter 9 proposing judge-alone trials via defendant 'jury waivers' in specified cases, aiming to cut delays and costs while safeguarding Article 6 ECHR fair trial rights.

Key provisions in Sir Brian Leveson's review beyond jury waivers include establishing a new 'Crown Court Bench Division' where a judge sits with two magistrates (without jury)

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[22] A scheduled offence is a specific criminal act listed within a schedule to a statute (an act of parliament or legislation). These are often serious offenses, such as terrorism-related acts, severe violence, or sexual offences against children, which are categorized together to trigger specific legal procedures or penalties.
[23] Dermot Walsh, *Use and Abuse of Emergency Legislation*, (Cobden Trust 1993) 99.
[24] Ibid 59.
[25] Ibid.
[26] Leveson (n 1).

for cases anticipating up to three years' custody, removal of Crown Court election rights for low-level offences, and reclassification of certain either-way offences as summary-only triable in magistrates' courts.[27] Additional reforms encompass expanded out-of-court resolutions (OOCRs), abolition of 'release under investigation' in favour of improved bail, enhanced disclosure processes via AI tools and removal of pre-charge police redaction, national AI-assisted listing frameworks, greater remote participation for preliminary hearings and certain witnesses, and a unified governance structure with a 'Prime Minister's Criminal Justice Adviser' for cross-agency coordination.[28] These seek to ensure proportionality, efficiency, and resilience amid chronic underfunding and backlogs.

Geoffrey Rivlin KC, whose article on the Leveson proposals is scathing, does however note that "Sir Brian has been given a very difficult task. His review makes a number of important recommendations, and some of them, if implemented, should result in a significant contribution to easing the pressures."[29] Crucially, as it relates to the jury recommendations, the subject of this article, the Four Jurisdictions Conference, (a professional group that comprises of practitioners in the legal systems of England and Wales, Scotland, Northern Ireland, and the Republic of Ireland) issued a Joint statement of the Four Bars on Jury Trial in May 2026 outlined the professions shared objections to the government's post-Leveson proposals.[30]

IV. Juryless Trials: Critiques and Human Rights Concerns

The use of Diplock courts gives rise to a number of procedural obstacles. Jennings notes the evidential issues at play when the judge must 'double hat' as both the arbiter of law and fact.[31] In standard jury trials questions of admissibility are decided in the absence of the jury. The judge cannot decide a question of admissibility without first hearing, or at least being aware of, the evidence upon which they must rule.[32] Should the evidence be ruled as inadmissible the Judge must then 'put it out' of their mind. Jennings says of this, it would be very difficult for a

[27] Leveson (n 1).
[28] Leveson (n 1).
[29] Geoffrey Rivlin KC, 'Leveson and judge-only trials in serious fraud' Criminal Law Review, 2025, 10, 604
[30] 'Joint statement of the Four Bars on Jury Trial' (Faculty of Advocates, 8 May 2024) <https://www.advocates.org.uk/news-and-responses/news/2024/may/joint-statement-of-the-four-bars-on-jury-trial> accessed 12 May 2026.
[31] Anthony Jennings, *Justice Under Fire: The Abuse of Civil Liberties in Northern Ireland* (Pluto Press 1988).
[32] Toolan (n 18).

judge genuinely not to be influenced by a confession, even if, for example, that confession was garnered through circumstances that render it inadmissible.[33] Another concern is that of 'case-hardening'. Boyle, Hadden and Hillyard speak of how there is a danger of judges developing a 'hardened' stance on proceedings when they sit and hear cases of a similar nature, similar facts and where a defendant relies on similar evidence and facts.[34] They suggest that a jury prevents this 'hardening'.[35]

Furthermore Professor Walsh identifies another area of concern, he cites 'scheduling and descheduling' of offences as an area that Diplock fails to hold up to scrutiny.[36] In the context of Diplock courts as touched on above, a scheduled offence is a grave offence often of a terrorist nature,[37] as compared to an 'ordinary offence', and prosecutions for these types of offences can only be instituted by or with the consent of the DPP for Northen Ireland.[38] Notes 1 and 2 to schedule 4 of the Northern Ireland (Emergency Provisions) Act 1978 state that a number of scheduled offences are not to be treated as scheduled in any case in which the attorney general for Northern Ireland certifies that it is not to be treated as such, therefore the attorney general has a discretion to deschedule the offence in a case where a scheduled offence has been committed by an ordinary criminal or, indeed, for any other reason.[39] The power to deschedule serves as an important safeguard, ostensibly preventing the Diplock regime from extending beyond the exceptional security rationale that its usage is grounded in. Save for that safeguard, ordinary criminal cases risk being drawn into a procedure for which it was never designed.

However, there are a number of statutes that do not/did not permit the Attorney General to deshedule an offence,[40] and so gives rise to the possibility and, indeed, the probability, of ordinary criminal cases being processed through the Diplock courts.[41] Walsh speaks of how the scheduling of offences, apropos of Diplock, casts too wide a net and that having it done in this way draws in 'ordinary criminal cases' rather than those for which Diplock was designed.[42]

[33] Jennings (n 31) 52.
[34] Boyle, Hatton and Hillyard (n19).
[35] Ibid.
[36] Walsh (n 23) 59.
[37] Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Pree, 2006) 188.
[38] Bonner (n 21) 107.
[39] Walsh (n 23) 59.
[40] Section 17 of The Firearms Act (Northern Ireland) 1969 by way of example.
[41] Walsh (n 23) 59.
[42] Ibid 99.

This sentiment is shared by Professor Aoláin who writes about the prosecution of 'ordinary criminals' in closed Diplock courts due to the rigidity of scheduled offences.[43]

Amnesty International wrote extensively on the Diplock courts, and their commentary and research is still relevant and useful today. Amnesty's report titled 'The Diplock Courts in Northern Ireland: A Fair Trial' principally looks at the significant departure from ordinary criminal procedure, and the serious concerns regarding human rights and fair trial standards that this raises.[44] Amnesty's conclusions are indeed quite condemnatory. They say, the effect of the 'emergency legislation' meant, in many respects, a departure from minimum requirements of the English system of criminal justice and, in some areas, a departure from international standards for a fair trial.[45] The report by Amnesty is wide ranging and identifies Human Rights issues throughout the whole trial process, seeing the genesis of the issue begin at the pre-trial stage. However, for the purposes under discussion it is their writing on the abolition of the jury that is of concern.

Similar to others Amnesty stress the power, position and importance of a jury. Their review states:

In constitutional terms, the participation of ordinary citizens in the administration of justice is regarded as an important expression of the democratic nature of the state; and the abolition of the jury consequently as a diminution of democracy. In criminal legal terms, the right to a trial by jury is considered an important safeguard in guaranteeing accused persons a fair trial. It shields the accused from abuse of the criminal justice system by the state, in that it takes away the ultimate decision on guilt or innocence from officers of the state, and places it in the hands of "peers" of the accused.[46]

Of course, the Diplock courts were instituted long before modern human rights laws were implemented. But Amnesty are right to probe at the concerns around the fairness of a trial. Since 1953, under Article 6 of the European Convention on Human Rights (ECHR) all persons have the right to a fair trial.[47] Now it is true that the absence of a jury does not preclude one from having a fair trial, as there are a number of components that go into making a trial fair (as

[43] Oren Gross and Fionnuala Ní Aoláin (n 37) 188.
[44] Douwe Korff, 'The Diplock Courts in Northern Ireland: A Fair Trial?' (Amnesty International & Netherlands Institute of Human Rights 1983) <https://www.amnesty.org/ar/wp-content/uploads/2021/06/eur450041983en.pdf> accessed 24 October 2025.
[45] Ibid.
[46] Ibid, ch 5.
[47] European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, ETS No 5) art 6.

per *R v Twomey* and associated appeals to that case).[48] The right to have one's case heard by a jury is not absolute, and furthermore unpracticable given the sheer volume of cases and variance in kind.[49]

R v Twomey presented the Court of Appeal of England and Wales, with the question of whether a Crown Court trial on indictment before a judge alone, ordered under section 44 of the Criminal Justice Act 2003, in light of compelling evidence of a sustained and serious risk of jury tampering, was compatible with the defendants' right to a fair trial under Article 6.[50] The Court upheld the order, emphasising that the statutory scheme was tightly drawn, required a high evidential threshold, and was directed to preserving, rather than undermining, the integrity of the criminal process.[51] This case was referred to The European Court of Human Rights (ECtHR) in *Twomey, Cameron and Guthrie v United Kingdom*. The ECtHR reiterated that Article 6 does not confer a right to trial by jury and that both judge-alone and jury trials are, in principle, compatible with the Convention.[52] However, the ECtHR's reasoning is tightly conditioned, stressing the exceptional nature of the risk, the detailed domestic assessment required before displacing a jury, and the availability of full judicial guarantees, including a public, reasoned judgment and the possibility of appeal.[53] Read together with Auld LJ's review, *Twomey* underscores the claim made in this article that any putative 'right' to jury trial is contingent and qualified, but crucially asserts that departures from the conventional jury model demand a particularly strong justification and careful Article 6 considerations.

To sideline juries in the way done by Diplock, and (as will be discussed) along the lines of Leveson is to row back on the national and cultural understanding of justice, and how it is administered. The concept of jury trial stretches back into the national history; Medley writes how in a proto form it was applied in the time of Henry II.[54] With this in mind any departure from standard practice is truly radical given the level of its entrenchment. Yet Parliament's ability and flexibility to derogate from standard practice is also legitimate given the uncodified constitutional settlement. This fact sees Leveson write in his review "I make clear my position

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48 *R v Twomey* [2011] 1 Cr App Rep 29 (Court of Appeal) .
Twomey, Cameron and Guthrie v the United Kingdom (2013) 57 EHRR SE10.
49 Robin Auld, Review of the Criminal Courts of England and Wales (The Auld Review) (Stationery Office, 2001) ch5, 8.
Alex Benn, 'In Crisis: the 'Constitutional' Right to Jury Trial' UK Constitutional Law Association (18 July 2025) <https://ukconstitutionallaw.org/> accessed 24 October 2025.
50 R v Twomey [2011] 1 Cr App Rep 29.
51 Ibid.
52 Twomey, Cameron and Guthrie v the United Kingdom (n 48).
53 Ibid.
54 Dudley Julius Medley, *English Constitutional History* (B.H Blackwell 1894) 269.

that there exists no such constitutional or common law right to a trial by jury"[55] The merits and demerits of this assessment will be dealt with forthcoming but crucially this is not the common perception. Many people perceive trial by jury to be a bedrock right. Attempts to tinker with and or the wholesale removal of juries profoundly compromises public trust in the process and administration of the courts and the criminal law.

Jennings rightly comments that "within Western democracies, however, the charge of injustice is more grave, not least because it is levelled at a part of the UK, a country which prides itself on maintaining the highest standards of justice."[56] English Common law has long been one of the UK's most visible legal exports, with courts and practitioners abroad continuing to treat it as authoritative and commercially important.[57] Yet a charge of injustice, as Jennings says, is grave and in this instance legitimate. The sweeping curtailment of jury trials has been criticised as undermining the democratic character of criminal justice as well as public confidence in the courts, and has attracted concern from international human rights bodies in relation to Northern Ireland's non-jury regimes.[58]

V. Leveson Review: Reforming Jury Trials in England and Wales

Jackson and Doran helpfully describe an innate tension of the Diplock arrangement, it is one that would apply to the Leveson recommendation if they were implemented. That tension is this, that Diplock style juryless trials are at once extraordinary, a departure from the realm of normal criminal procedure yet they are cloaked in legal normality and orthodoxy.[59]

Most people who engage with criminal proceedings never see a jury, and there exists no automatic right or obligation for them to see a jury. In a House of Commons debate *Trial by*

[55] Leveson (n1) ch 5.
[56] Jennings (n 31) 18.
[57] Ben Rigby, 'Value of UK legal services exports surged in 2024, Law Society study shows' (*The Global Legal Post*) <https://www.globallegalpost.com/news/value-of-uk-legal-services-exports-surged-in-2024-law-society-study-shows-1111531162> accessed 12 May 2026.
[58] Carol Rasnic, 'Northern Ireland's Criminal Trials without Jury: The Diplock Experiment' (1981) 16 Annual Survey of American Law 37 <https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1044&context=annlsurvey> accessed 12 May 2026.
UN Human Rights Committee, 'Concluding Observations: United Kingdom of Great Britain and Northern Ireland' (2001) UN Doc CCPR/CO/73/UK, para 18.
Amnesty International (n 44).
[59] Jackson and Doran (n 6) 15.

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Jury: Proposed Restrictions held in July 2025, junior minster in the Department of Justice Sarah Sackman MP opined "the shadow Secretary of State for Justice quotes Magna Carta, but the state's obligation is to ensure a fair trial, and essential to a fair trial is timely justice… What the shadow Secretary of State for Justice has not read is the entirety of Magna Carta. I quote: "To no one will we…delay right or justice." The right to a timely trial is embedded in Magna Carta."[60]

However, writing in the Times newspaper in 2020, Former England and Wales High Court Judge Sir Richard Henriques begins his piece by claiming that "Trial by jury is the cornerstone of the British criminal justice system".[61] If we are to take the assertions made in the previous paragraph, this seems not to be the case. There is a wealth of academic scholarship extolling the common law settlements of juries. For example, Mark Elliott and Kirsty Hughes' book, *Common Law Constitutional,* seeks to examine the uncertainties surrounding the amorphousness of common law rights.[62] They reference the Supreme Court in which the court states "The constitutional right of access to the courts is inherent in the rule of law: it is needed to ensure that the laws created by Parliament and the courts are applied and enforced."[63] It would appear then that there is some degree of orthodoxy to the view that a jury is *a fundamental or, at least, very important feature* of our legal system.[64]

In fact, Blackstone speaks of the jury as perhaps the primary feature of the British legal system, he writes "Trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law… So that the liberties of England cannot but subsist so long as this palladium remains sacred and inviolate[65] This therefore presents us with a dialetheia, how can it be the case that jury trials are the cornerstone of the British legal system and yet simultaneously there exists no constitutional or common law footing on which they stand?

Only 1% of criminal cases in England and Wales are decided by jury.[66] The bulk of criminal proceedings are dealt with in Magistrates courts. As referenced briefly prior, Sir Brian

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[60] HC Deb 9 July 2025, vol 770, cols 949–50 <https://hansard.parliament.uk/commons/2025-07-09/debates/E03E9092-8179-4F60-B9C4-4CEF70353EEA/TrialByJuryProposedRestrictions#:~:text=As%20I%20said%20in%20my,criminal%20justice%20system%20currently%20functions.> accessed 24 October 2025.
[61] Richard Henriques, 'Judge-only trials would let courts get back to work' *The Times* (London, 1 May 2020) <https://www.thetimes.com/uk/healthcare/article/jury-trials-could-restart-next-month-as-court-backlogs-grows-says-robert-buckland-rtjq3xpd5> accessed 24 October 2025.
[62] Mark Elliott and Kirsty Hughes, 'Common Law Constitutional Rights' (Hart Publishing, 2020).
[63] R (Unison) v Lord Chancellor [2017] UKSC 51.
[64] Benn (n 49).
[65] Sir William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765) 379.
[66] Cheryl Thomas, 'Are Juries Fair?' (Ministry of Justice Research Series 1/10, Ministry of Justice 2010).

Leveson asserts, "I make clear my position that there exists no such constitutional or common law right to a trial by jury."[67] A statement like this is deeply shocking, and yet the statistics would seem, *de facto*, to bear out the validity of this assertion. While it is true that simply because something is in the minority does not mean that there is no right to it, what once was, and remains, a *de jure* right, has, over time been weathered away and further qualified so that it is a mere residue of what it once was.

Charles Bullock's work documents the abolition of the jury in civil cases, he writes "When, in the twentieth century, Parliament finally decided to effectively eliminate the civil jury – initially on a temporary basis, and then permanently in 1933[68] – it did so by expanding the category of cases deemed unsuitable for jury trial to include the vast majority of cases, such that the exception became the rule."[69] The civil jury's incremental abolition was brought about through legislative changes and on a statutory footing, by way of litigant waivers, compulsory references, and judicial defaults.

When reading Bullock, one becomes aware that the Leveson review recommendations follow a similar tac to the one that fundamentally 'abolished' the jury in civil matters. As will be discussed in greater depth shortly, the Leveson recommendations provide for a 'jury waiver' but Bullock's commentary is strikingly applicable here when he stresses that, "it should be noted that trial by jury was never formally abolished. Instead, it was retained as one of several theoretically available modes of trial while the authority to choose between the available modes was incrementally stripped away from litigants and imparted to the trial judge… Parliament and the courts also encouraged litigants to choose trial by judge alone instead of jury trial"[70]

This article's purpose is not to probe the constitutionality of juries, albeit there are reasonable arguments to their common law status. As Diplock shows, along with the response to Covid-19 it is the case, historically, that the 'right' to a jury is not absolute and has often been restricted. Prior settlements on juries have been legitimately qualified when pitted against other contemporary considerations, an example from history being the Administration of Justice (Emergency Provisions) Act 1939, a wartime measure that reduced the use of juries in criminal proceedings save for the most serious cases, reflecting the pressure of national

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[67] Leveson (n1) ch 5, para 42.
[68] Administration of Justice (Miscellaneous Provisions) Act 1933.
[69] Charles Bullock, 'The Abolition of the Right to Trial by Jury in Civil Cases in England' (2023) 63 American Journal of Legal History 281 <https://academic.oup.com/ajlh/article-abstract/63/4/281/7477884> accessed 12 May 2026.
[70] Bullock (n 69) 299.

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emergency rather than any rejection of jury trial in principle.[71] But it seems unrealistic to argue that jury trial is insignificant or that it is the nadir of the present problems plaguing the criminal courts.[72] The basis for Leveson's recommendations stems from the 'crisis' in the criminal courts in England and Wales. It is indeed no secret that the criminal courts are in disarray, Leveson devotes chapter 2 of his report to assessing the current landscape of the courts. By way of preface to this section Leveson stresses that it is not exclusively a financial issue that burdens the court system and notes "without systemic reform, [we] cannot solve this crisis."[73] He is aware therefore of a need to reform procedure and practice rather than exclusively petition for further funding.

Leveson's proposals are different from Diplock proceedings. Leveson forwards what he terms a 'jury-waiver' and introduces it at paragraph 44. His 'jury-waiver' is a mechanism whereby defendants in specified Crown Court cases, may elect for judge-alone proceedings to alleviate backlog and costs. The idea of allowing defendants to elect to be tried by a judge alone has been floated previously.[74] There is a crucial procedural difference here between Leveson and Diplock, under Leveson a defendant can opt out of a jury trial (opting in to judge-alone), whereas under Diplock this choice is non-existent at all.

Whether many defendants would exercise this waiver remains in question, given the perceived advantages of jury trials. However, Bullock's chronology of the civil jury's decline provides a striking analogue for the concerns surrounding Leveson's recommendations. In the nineteenth and early twentieth centuries, pressures (both procedural and cultural) gradually eroded a litigant's right to choose jury trial in civil cases. Bullock shows that what began as a voluntary waiver under the Common Law Procedure Act 1854 evolved, through successive statutory and procedural changes, into a system in which judges determined the mode of trial almost exclusively.[75] Although the right to request a jury never vanished from the statute book, litigants were both *formally permitted* but *practically discouraged* from exercising it. As Bullock observes, "Parliament and the courts also encouraged litigants to choose trial by judge alone instead of jury trial … facilitating the *de facto* prohibition of jury trials in civil cases."[76] With this history in mind Leveson's 'jury-waiver', while framed as defendant-driven, could

[71] Administration of Justice (Emergency Provisions) Act 1939.
[72] Ibid.
[73] Leveson (n1*) Executive Summary*, para 9.
[74] Lord Justice Auld, 'Review of the Criminal Courts of England and Wales' (2001) <https://www.criminal-courts-review.org.uk/auldconts.htm> accessed 24 October 2025.
[75] Common Law Procedure Act 1854.
[76] Bullock (n 69).

similarly evolve into a *de facto* norm where backlog and other pressures discourage opt-outs, mirroring Bullock's account of civil litigants facing "formal permission yet practical discouragement" until juries became vestigial. While unforeseen, this procedural creep might entrench judge-alone trials without repeal, eroding jury centrality as efficiencies override voluntariness.

At paragraph 104 the review makes its sole reference to the Diplock courts. Leveson writes "it is difficult to rely on data from the judge-alone courts in Northern Ireland where the trials in the 'Diplock courts' were not by defendant election and must be seen in the particular context of the sectarian conflicts and the types of offence that would be tried in that forum."[77] It is surprising that a review of this magnitude and scope only references Northern Ireland and Diplock once, given that there is a variation of the model the review seeks to recommend historically and currently in place in that jurisdiction. A jurisdiction of staggering similarity, given both the historic development and introduction of laws in both jurisdictions through parliament in Westminster, and the fact that the UK Supreme Court is the highest and binding authority on both jurisdictions. This is perhaps indicative of a failure of the review to engage fully with the secondary, tertiary and fourth order effects as it pertains to the issue of non-jury trials. For example, Jackson and Doran observe that at the hight of Diplock court usage, there was greater pressure on defence counsel to plea bargain and to plead guilty.[78]

Leveson cites research on how litigant confidence in the process enhances perceptions of satisfaction in the outcome of the trial.[79] The review then applies this to defendants electing for judge only trials, detailing how their participation in the decision making could potentially lead them to feel greater confidence in the process, however it omits to apply the research in the reverse, that defendant's confidence can and does also come from the jury. If they, the defendant, find their trial is before a judge alone, they may understandably feel that they have not been dealt with fairly.[80] Now it is true that the defendant under Leveson would have the power to 'opt in', the Review contains limited inquiry into the possible pressures defendants would face in terms of making that decision and the perceived ramifications on them if they negate to opt in.

[77] Leveson (n1) ch 9, para 104.
[78] Jackson and Doran (n 6).
[79] Tom Tyler, 'Procedural Justice and the Courts' (2007) 44(1/2) Court Rev J American Judges Assoc 26–31 <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1254&context=ajacourtreview> accessed 24 October 2025.
[80] Hannah Quirke, 'Editorial: Independent Review of the Criminal Courts' (2025 9) Crim LR 515–17.

This article is not suggesting that Leveson's Review does not consider at all the potential pressure placed on defendants, in fact Leveson engages with this concern directly writing "I am not intending to place what might be considered improper pressure on defendants to plead guilty inappropriately."[81] Yet this 'improper pressure' is precisely what the research form Northern Ireland implies is the case of such courts and such a settlement.[82] As discussed previously, Jackson and Doran draw the conclusion that Diplock proceedings create an 'adversarial deficit';[83]that the jury-less proceedings fundamentally change how counsel approach and advocate in a case. They speak at length, in broadly value neutral terms, about steps to overcome this 'deficit' weighing up the differences in kind between lay triers and professional triers of fact, looking acutely at the effect this has upon both defendant and counsel.

The Diplock courts of Northern Ireland arose out of a breakdown, or perceived breakdown, of the jury system. French academic Christian Mailhes provides a good overview of the history and rational of Diplock courts from an outsider's perspective.[84] In his piece he acknowledges the complex backdrop of Diplock, looking at both the political and social ramifications of jury trials at the time. He writes "several cases had shown that jurors, intimidated by fear of reprisals, did not dare to convict suspects or that some Protestant-majority juries had delivered a biased verdict in favor of one of their own."[85] The threats to juries, the un-safe nature of the convictions, the general socio-political atmosphere of the time put the British state and the judiciary in a compromising position. Diplock proceedings were an attempt to address this, an attempt that has a long legacy and still endures today.

However, unlike Diplock, the need for the Leveson Review recommendations, and crucially here not the review itself, appears to emanate from crass utilitarianism. Cassia Roland writes of the review, "Leveson's argument is ultimately pragmatic rather than principled. He doesn't try to make the case for judge-led trials on their own merits… His focus is on the current dire state of the courts system and the need for reform to stave off system collapse."[86] Furthermore, Leveson's own framing of the need for the Review's recommendations speaks to

[81] Leveson (n1) Ch 7, Para 53.
[82] Greer and White (n 5).
[83]Jackson and Doran (n 6) 293-294.
[84] Christian Mailhes, 'Les 'Diplock courts', Une procédure pénale d'exception en Irlande du Nord' (1999) 24(1) Etudes irlandaises 163–77.
[85] Ibid.
[86] Cassia Rowland, 'The Leveson Review: Cutting jury trials is not the only option' (Institute for Government, July 2025) < https://www.instituteforgovernment.org.uk/comment/leveson-review-courts> accessed 12 May 2026.

both the financial and efficiency-based considerations that inform it. Justice Minister Sarah Sackman, speaking in parliament noted, "Sir Brian Leveson and his team have told us, greater financial investment—namely sitting days on their own, without systemic reform—cannot solve the crisis. The Government will heed that lesson… looking at how we might divert demand away from the system in the first place through making greater use of out-of-court disposals."[87] Reflecting on the suspension of juries during the Covid pandemic, academic Hannah Quirke writes "Judge-only trials are speedier and cheaper, which will appeal to the Treasury and Ministry of Justice. If judges sit alone, it seems unlikely that metrics will not be devised to record and 'improve' trial length and conviction rates."[88]

VI. Legislative Distinctions Between NI and England and Wales

"From a constitutional perspective, Northern Ireland has been described as a kind of laboratory in which the strengths and weaknesses of different models of practice may be gauged"[89] This, for a great many reasons, is a reductive view of Northern Ireland as a jurisdiction. Yet the smaller size of the jurisdiction and procedural closeness to England and Wales does facilitate better scrutiny of rules and practice, and the ability to better gauge the merits and de-merits of a given model. As noted above, it is regrettable that the Leveson review has failed to significantly engage with the Diplock style system. The review is right when it observes that its recommendations differ substantially from Diplock in origin, but materially they both result in a defendant standing alone before a single judge. Under the Leveson recommendations, defendants will undoubtedly be placed in either pressuring or compromising positions regarding their plea. As Leveson notes, one of the necessities for the review is to increase efficiency in the court system. If, as was the case in Northern Ireland, the use of non-jury trials is implemented, it is possible and potentially even probable that the number of guilty pleas and plea bargains will rise; not out of the legitimacy of the plea but coming from the tacit pressure applied to the defendant by the very nature of the new system. It is for the reasons outlined above that to press on with the recommendations forwarded in the review is to essentially offer Hobson's Choice to a defendant.

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87 Hansard (n 60).
88 Quirke (n 80) 569-571.
89 Jackson and Doran (n 6) 13.

Writing in 2009 John Jackson comments "In recent years, the Criminal Cases Review Commission has referred a number of early Diplock cases to the Northern Ireland Court of Appeal and the court has quashed the convictions of a number of defendants."[90] We see here then the risks associated with non-jury trials. The risks surrounding the 'safety' of convictions are factored into the Justice and Security (Northern Ireland) Act 2007 which facilitates an automatic right of appeal for defendants convicted in this way. It has been suggested that consideration of the CCRC's Northern Ireland cases raises the question whether these cases represent the tip of an iceberg of wrongful convictions secured on the basis of coerced and/or unreliable evidence.[91]

Yet the fact that the Court of Appeal has since moved to quash some of these earlier convictions in the light of modern practice standards, demonstrates the seriousness with which the court views such convictions and the willingness of the court to scrutinise Diplock and therefore the non-jury settlement as a whole.[92] While steps have been made at different junctures in the past to reform, amend, and modify the Diplock proceedings to ensure their human rights compliance, there is an appetite to abolish Diplock proceedings altogether. One of the principal reasons why the Diplock system has survived would seem to be because its procedures have been adjusted to take account of human rights norms over the years.[93] The Diplock courts have only been able to maintain its sense of legitimacy due to the level of oversight devoted to them and the constant state of review.

Jackson notes how The Criminal Justice Act 2003 has exported the Diplock mode of trial to England and Wales in cases where there is a danger of jury tampering. "Even if it is considered necessary to invoke this mode of trial on broader grounds in Northern Ireland than in the rest of the UK, the decision to do this in a particular case should be the subject of a full judicial determination accompanied by a robust special advocate procedure where sensitive information forms the basis of the prosecution's case for nonjury trial." [94] The spectre of security considerations overriding the rule of law will continue to cast a shadow on the Diplock system in Northern Ireland, and the introduction of a similar framework in England and Wales will make that spectre's shadow even larger. It is troublesome that the jury provisions in

[90] John Jackson, 'Many years on in Northern Ireland: The Diplock legacy' (2009) 60(2) NILQ 213–29.
[91] Laurie Elks, *Righting Miscarriages of Justice? Ten years of the Criminal Cases Review Commission* (Justice 2008) 301.
[92] Jackson (n 90).
[93] Ibid 228-229.
[94] ibid 229.

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Leveson would, in all likelihood, make the juryless exception pivot to become the standard. The Leveson Review recommendations would see it that trial by jury in the criminal courts would become an anomaly and that professional, judge only trials become the practice norm.

VII. Public Trust, Efficiency, and the Future of Jury Trials

Beyond the Article 6 considerations, and in a way more profoundly, it is the symbol of the jury, the depth of meaning and sentiment with which it is regarded that gives it its power in the public consciousness. It is not merely that justice is done but as Lord Hewart famously opined, "justice must be seen to be done".[95] The jury occupies a lofty place in the minds of the professional and the layman alike it is the visual manifestation of justice being seen to operate. It is gravely erroneous to misunderstand the symbolic importance and procedural significance of the jury trial, and its significance is underestimated at the peril of the present legal structure itself.

For Lord Devlin, the jury is a symbol of freedom.[96] More precisely, he asserts "trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives".[97] Taking this assertion the Leveson recommendations therefore pose a significant threat to the legal norm in England and Wales. To implement them in the way outlined would be, as Devlin alludes to, like turning out the light. Since the Middle Ages, the principle [of jury trials] has allowed ordinary citizens to intervene directly in the resolution of a dispute between the state and the citizen.[98] It is crucial to note that jury trials are not a panacea. There is a need for reform and amendment of the current settlement, and indeed throughout British history there has been changes.

Lord Denning, in response to Lord Devlin's, remarks writes "One must not suppose from all this that trial by jury has remained unchanged. It has been altered beyond recognition. It is still retained in criminal cases of any consequence, but it has defects which cause concern."[99] Lord Denning is in concurrence with Sir Brian Leveson in his recommendations to

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[95] R v Sussex Justices, ex p McCarthy [1924] 1 KB 256.
[96] Lord Patrick Devlin, *Trial by Jury* (Hamlyn Trust Stevens & Sons 1956) 164.
[97] Ibid 164.
[98] Lord Denning, *What Next in the Law* (Butterworths 1982) 33.
[99] ibid 35.

amend juries in complex and serious fraud cases. Sir Brian Leveson recommends his modification in chapter 9 and Lord Denning concludes part Two of his work *What Next in the Law* writing, "Complicated cases of fraud or accounts tried by special jurors of the City of London; Or alternatively by a judge with assessors."[100] We see from this consensus that members of the bench have felt the need for changes to the current jury trial settlement for some time. However, it is clear from the history and legacy of Diplock that the wholesale removal of juries, be that explicit or implicit, overt or tacit, is a sledgehammer approach to a very delicate and cornerstone issue in British jurisprudence.

There are other methods available to assuage the criminal court back-log in England and Wales. Again, drawing from Northern Ireland for example, the Magistrates' Courts transfer cases to the Crown Court much less frequently than those in England and Wales. In Northern Ireland 90% of criminal cases are dealt with in the Magistrates',[101] with only 6% of cases being transferred to the Crown Court,[102] compared to 8% in England and Wales.[103] The reason Northern Ireland Magistrates' courts transfer a slightly lower proportion of cases to the Crown Court compared to England and Wales is due to a combination of legislative, judicial practice, and jurisdictional size differences. Setting aside the size of the jurisdiction,

Northern Ireland statutes define certain offences as summary-only, limiting the number of 'either-way' offences[104], a category much more prevalent in England & Wales.[105] Local reforms and judicial policy have retained a larger proportion of cases as summary-only, especially motoring, minor assaults, and regulatory offences, keeping them out of the Crown Court.[106] Therefore, statute law in Northen Ireland creates more offences that are summary-

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[100] ibid 78.

[101] Public Prosecution Service for Northern Ireland, 'Statistical Bulletin 2022/23 1 April 2022 to 31 March 2023' (NISRA 29 June 2023) <https://www.ppsni.gov.uk/files/ppsni/2023-06/Statistical%20Bulletin%202022-23.pdf> accessed 24 October 2025.

[102] Northern Ireland Statistical and Research Agency, 'Number of Crown Court cases and defendants increased from previous years' (NISRA 27 June 2025) <https://www.nisra.gov.uk/news/number-crown-court-cases-and-defendants-increased-previous-year> accessed 24 October 2025.

[103] Ministry of Justice, 'Criminal court statistics quarterly: April to June 2025' (Gov.uk 30 September 2025) https://www.gov.uk/government/statistics/criminal-court-statistics-quarterly-april-to-june-2025/criminal-court-statistics-quarterly-april-to-june-2025 accessed 24 October 2025.

[104] A hybrid offence (officially termed an offence triable either way) is a criminal charge that, depending on its severity and the defendant's choice, can be heard in either the Magistrates' Court or the Crown Court. An example of some 'either way' offences are, Possession of a Controlled Drug as per Section 5(2) of the Misuse of Drugs Act 1971, Assault Occasioning Actual Bodily Harm (ABH) as per Section 47 of the Offences Against the Person Act 1861 and, Theft as per Section 1 of Theft Act 1968.

[105] Wilson Nesbit, 'Categories of Offences in Northern Ireland' (5 October 2019) <https://wilson-nesbitt.com/categories-of-offences-in-northern-ireland/> accessed 24 October 2025.

[106] Fiona O'Connell, 'Sentencing Comparisons in Northern Ireland and England and Wales' (Northern Ireland Assembly, 20 April 2012)

only, thereby meaning a greater proportion of cases remain in magistrates' courts and fewer get transferred upwards. As England and Wales has a wider 'either-way' classification, this legally enables more cases to move upwards for jury trial or higher sentencing powers, resulting in a comparatively greater rate of transfers and need for jury trial.

A move to mimic the scope of the Magistrates in Northern Ireland may better facilitate the preservation of Jury trial as it currently stands while addressing the criminal court backlog. Combined with some of the other provisions in Leveson, particularly his writing and recommendations on complex fraud, this, it would seem, is a far more appropriate and practicable step to take rather than the current recommendations. It is more congruent with human rights provisions, procedural efficacy, and British jurisprudence, whilst recognising the very real need for change and flexibility.

VIII. Conclusion

"In the Diplock court, a form of trial is practiced which many in the United Kingdom would find alien and unacceptable, and yet which has subsisted for over 20 years within the same broad legal framework"[107] What began as an emergency provision has endured long after those who set it in motion would have foreseen it to. Diplock proves that there is nothing more permanent than a temporary solution, given a version of the original juryless trial provisions persist in Northern Ireland. Speaking to this in the context of civil juries, Bullock notes as much, citing what began as a temporary measure ultimately became permanent. In fact he goes further writing "the *de facto* prohibition of jury trials in civil cases [occurred] without ever requiring an admission that Blackstone's "palladium of our liberties"[108] was being eliminated."[109] This sadly, one imagines, would be the case even when/if the crisis in the criminal courts is abated in England and Wales.

Sir Brian Leveson is conscious of striking the balance between the rights of a defendant and the increasingly difficult and thorny nature of the ever changing and evolving crisis in the

<https://www.niassembly.gov.uk/globalassets/documents/raise/publications/2012/justice/9412.pdf> accessed 24 October 2025.

[107] Jackson and Doran (n 6) 13.

[108] Blackstone (n 65).

[109] Bullock (n 69) 299.

criminal courts. He is explicit about this concern, and he speaks to it when he says "One of the overarching principles guiding this Review is the right to a fair trial: this is one of the pillars of the justice system in England and Wales and must be upheld. I am keenly aware of the risk of coercive pressure on defendants to plead guilty and have borne it in mind in formulating these recommendations."[110]

Debate about juries, their nature, efficacy and so on, have percolated in the minds of many eminent judges and lawyers throughout legal history. Lord Devlin, Lord Denning and Sir Brian have all grappled with this and come to varying degrees a similar conclusion, albeit with differing views on how to address it. There is clearly then an argument for a revision in how trials are conducted. But it is not and cannot be the case, that jury trials are an anachronism of a bygone age which should be curtailed in favour of professional trials on a wholesale basis.

When concluding his piece on the abolition of civil juries, Bullock writes "The jury was revered in ancient times as a sacred constitutional safeguard against tyranny and was gradually replaced by more efficient and rational decision-makers as this attitude receded",[111] Blackstone warned against methods that hamper jury trials "however convenient these may appear at first (as doubtless all arbitrary powers, well executed, are the most convenient)"[112] For Blackstone "trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law… So that the liberties of England cannot but subsist so long as this palladium remains sacred and inviolate; not only from all open attacks (which none will be so hardy as to make), but also from secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial"[113] The present iteration of the Leveson recommendations 'sap and undermine' the jury, and while they may be consistent with an individual's right to a fair trial, broadly speaking, assail the very bedrock of British jurisprudence.

One appreciates the true depth of the quagmire that Sir Brian is having to navigate with the competing interests of finance, politics and judicial practice. Yet this article has sought to forward a compelling case against the 'jury-waiver' provisions of the current tranche of recommendations. Blackstone acknowledged that the issues faced by Leveson would arise however he is emphatic when he says these inefficiencies and costs are the price of a legal system such as Britain's; "yet let it be remembered, that delays and little inconveniences in the

[110] Leveson (n1) Ch 7, Para 8.
[111] Bullock (n 69) 299.
[112] Blackstone (n 65).
[113] Ibid.

forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads into the sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution"[114]

Part I of the Leveson review contains a number of excellent recommendations, well-reasoned and necessary. The review is so wide ranging and vast that this article simply cannot engage with it in any useful and fanciful way beyond the concerns of the piece. Part II of Sir Brian Leveson's review is due to be published in the very near future, and it will be interesting to see what changes, responses and new recommendations he gives in light of the response to Part I.

[114] Ibid.

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UCL Faculty of Laws, Bentham House

4-8 Endsleigh Gardens

London WC1H 0EG