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Foreword

Professor Sue Westwood
Head of York Law School

It is a particular pleasure to write this foreword to the seventh volume of the York Law Review. As a journal run by students to showcase the very best of their work, the Review occupies a distinctive and important place within the intellectual life of York Law School. Each volume reflects not only the strength of our students' scholarship, but also the collaborative, enquiry-led ethos that underpins our approach to legal education.

For me, this volume carries an additional, more personal significance. When I joined York Law School in 2018, the York Law Review was no longer in operation, having ceased publication several years earlier. One of the tasks I was given was to explore how it might be re-established. Working with a group of committed and highly capable students, we brought together a new editorial team, developed the structures needed to support the journal, and relaunched it with a renewed sense of purpose. That first revived edition demonstrated what our students could achieve when given the space, support, and responsibility to produce scholarship of real quality.

Since then, stewardship of the Review has passed into the hands of colleagues and successive editorial teams, each of whom has contributed to its continued development. It is immensely gratifying to see how the journal has evolved over the years—growing in confidence, ambition, and reach. The consistency of its success is a testament to the dedication, skill, and intellectual generosity of the students who edit and contribute to it. Each volume has offered something to be genuinely proud of, and this year's edition is no exception.

The articles in this volume exemplify the breadth, depth, and critical engagement that characterise York Law School scholarship. They address pressing contemporary issues while also pushing at the conceptual and normative boundaries of legal analysis.

The opening article explores the role of emotion in constitutional law, testing András Sajó's theory against the German constitutional framework. In doing so, it challenges the conventional assumption of legal neutrality and offers a nuanced account of how law both reflects and shapes democratic sentiment.

Questions of historical continuity and structural injustice are taken up in the analysis of British immigration law, which traces the persistence of colonial legal logics from the mid-twentieth century to the present day. By reframing contemporary controversies through the lens of imperial legacy, the article offers a powerful critique of narratives that treat exclusion as aberrational rather than systemic.

The volume also includes an important contribution on the treatment of unaccompanied asylum-seeking children, focusing on age assessment practices in the UK. Through a careful engagement with international human rights standards, this work exposes the limitations—and potential harms—of current approaches, and calls for a more fundamentally child-centred framework.

In a different but equally timely vein, the article on misinformation and the decentralisation of media power examines the challenges posed by social media to traditional models of regulation. Its focus on system design and platform responsibility highlights the need for legal frameworks that can respond to rapidly evolving forms of communication and influence.

The ethical and legal complexities of medical innovation are explored in the discussion of fetal surgery, which interrogates the tension between maternal autonomy and fetal interests. By drawing on both ethical theory and legal doctrine, the article argues persuasively for reform that better reflects the realities of contemporary medical practice.

Global questions of accountability and justice are addressed in the analysis of corporate social responsibility in the wake of the Rana Plaza disaster. This article underscores the limits of voluntary regulatory regimes and makes a compelling case for enforceable legal mechanisms to protect workers' rights in global supply chains.

Finally, the volume looks beyond the Earth itself, with an examination of the regulatory challenges posed by satellite mega-constellations in low Earth orbit. By identifying gaps in existing international frameworks, the article highlights the urgent need for coordinated global governance in an increasingly crowded and contested domain.

Taken together, these contributions demonstrate not only technical legal competence, but also a willingness to engage critically with the social, political, and ethical dimensions of law. They reflect a community of students who are not content simply to describe the law as it is, but who are committed to questioning how it operates, whom it serves, and how it might be improved.

The production of this volume is, as ever, the result of considerable effort by the student editorial team. Their work—often undertaken alongside demanding academic commitments—requires care, precision, and collaboration. The quality of this volume is a clear reflection of that commitment, and they deserve to be warmly congratulated.

It is a pleasure to present this seventh volume of the York Law Review. It stands as a testament to the continued vitality of the journal and to the intellectual curiosity, rigour, and dedication of York Law School students. I am delighted to see how far the Review has come, and I look forward to its continued success in the years ahead.

Sue Westwood

May 2026

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Editorial

Eleana Kasoulide

For the third and final time as Editor in Chief it is with great joy that I invite you to engage with the seventh volume of the York Law Review. The excellent foreword provided by the Head of the York Law School has done a lot of the heavy lifting in describing the different articles contained within this volume so I will not expand upon this here. I will say, however, that once again we were impressed by the breadth of topics that York Law School students have been engaging. Receiving feedback on work that you have not only spent ample time on, but had also considered finished is not easy, but the authors of this volume rose to the challenge. I would like to thank my editorial team Uijin, Liya, Youssef, and Roma for all their work this year. I hope that in taking the time to support their peers through the oftentimes painful and stressful editing process they have each gained something in return. Finally, on behalf of the whole editorial team, our biggest thanks must be extended to Professor Mattia Pinto for reliably and kindly having our back throughout the year. We wish you a pleasant read, and I hope that this tradition continues for many years to come.

Sentimental Constitutionalism? Testing András Sajó's Theory in German Constitutional Law

Paula Mein

Abstract

This paper explores the relationship between law and emotions in German constitutional law through András Sajó's theory of constitutional sentiments. It examines how emotions shape constitutional design, how German public law regulates public emotions, and what these findings reveal about law's role in fostering democratic resilience. The paper contributes to Law and Emotion scholarship, tests Sajó's framework against a concrete legal system, and addresses law's function in maintaining democratic stability. The analysis demonstrates both the emotional foundations of German constitutional design and the emotional dimensions of militant democracy instruments, such as party bans. I argue that Sajó's theory provides valuable explanatory insights into the German case. Constitutional law is not emotionally neutral; yet in a liberal democracy its capacity to strengthen democratic life is limited. Its strength lies in preserving the framework for politics without attempting to substitute for it.

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1 Introduction

Law has often been portrayed as a purely rational, objective system, but this view has increasingly been challenged.[1] Scholarship in *Law and Emotion* shows that emotions are not external to law but shape legal reasoning, institutions and legitimacy.[2] In constitutional theory this perspective remains underdeveloped. The assumption of law's rationality is particularly pronounced in constitutional law scholarship in democratic constitutional states, where democracy is often characterised by its strong emphasis on enlightenment and rationalisation.[3] Against this common narrative, András Sajó's theory of *constitutional sentiments* suggests that constitutions not only arise from collective emotions but also regulate them through doctrine and institutional design.[4]

This paper evaluates that claim by analysing the German constitutional system as a particularly illustrative case. The Basic Law [5] of 1949 was drafted in the emotional aftermath of National Socialism and the Second World War (WW2). Its architecture as a *defensive democracy* was profoundly shaped by the trauma of Weimar's collapse and the National Socialist takeover. At the same time, the enlightenment philosophical tradition and post-war scepticism toward political emotionalism fostered a constitutional culture of rational restraint and institutional sobriety.[6] This duality makes Germany an exemplary site to assess whether Sajó's claim holds true.

I proceed in three steps, moving from the theoretical foundations of Sajó's framework to its application in the German case, examining how shame and fear became embedded in the Basic Law and how militant democracy functions as emotion regulation, before evaluating the

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* Author's note: Unless otherwise indicated, all translations of German quotations, court decisions, and legal texts are the author's own. For German legal sources, statutes are cited by section (§§) or article (Art.), while court decisions are cited by court name (or abbreviation), date, and file number.

[1] András Sajó, 'Emotions in Constitutional Law' in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023); Sophie Schönberger, 'Noch Einmal Mit Gefühl' (2024) 63 DS 91; Johannes Eichenhofer, Eyk Lenschow and Leonie Schmidt, 'Emotionen Im Recht' (2024) 63 DS 63; András Sajó, *Constitutional Sentiments* (Yale University Press 2011).

[2] Terry A Maroney, 'Law and Emotion: A Proposed Taxonomy of an Emerging Field.' (2006) 30(5) LHB 119.

[3] Sophie Schönberger, 'Noch Einmal Mit Gefühl' (2024) 63 DS 91.

[4] András Sajó, *Constitutional Sentiments* (Yale University Press 2011); András Sajó, 'Emotions in Constitutional Law' in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023).

[5] Basic Law (Grundgesetz, hereinafter: GG).

[6] Ute Frevert, *The Power of Emotions: A History of Germany from 1900 to the Present* (Cambridge University Press 2023); András Sajó, 'Constitutional Sentiments' (2006) 47(1) AJH 1; Sophie Schönberger, 'Noch Einmal Mit Gefühl Für Einen Emotive Turn in Der Verfassungsrechtswissenschaft' (2024) 63 DS 91.

broader implications for democratic resilience and the limits of law as an instrument of emotion control. The analysis concludes that Sajó's theory provides important explanatory insights into the German case, but its prescriptive value is limited. Constitutional law is not emotionally neutral, yet its ability to regulate emotions or cultivate counter-emotions remains fragile. Its role should therefore remain one of securing the framework for democratic politics without substituting for it.

2 Theoretical Framework

2.1 The Emotion-Reason Relation

For much of modern legal and political thought, reason and emotion were treated as "entirely different beasts."[7] Emotion was cast as subjective, irrational, and volatile, whereas reason was identified with neutrality and restraint.[8] This dichotomy underpinned both liberal constitutionalism and legalism, which prided themselves on rational objectivity.[9]

The classical view in psychology reinforced this divide. Emotions were conceived as universal forces of nature, triggered by biological mechanisms with fixed, necessary and sufficient features. Crucially, they were regarded as categorically distinct from cognition, which was assumed to play only a regulatory role in emotional processes.[10]

Contemporary Constructivist approaches emphasise that emotions are not fixed reactions but culturally shaped and socially learned.[11] They draw on collective repertoires of meaning: *what*

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[7] Terry A Maroney, 'Law and Emotion: A Proposed Taxonomy of an Emerging Field' (2006) 30(5) LHB 119, 120.

[8] Kathryn Abrams and Hila Keren, 'Who's afraid of law and the emotions (2010)' in Susan A Bandes et al (eds), *Research Handbook on Law and Emotion* (Edward Elgar Publishing Limited 2021).

[9] András Sajó, 'Emotions in Constitutional Law' in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023); Sophie Schönberger, 'Noch Einmal Mit Gefühl Für Einen Emotive Turn in Der Verfassungsrechtswissenschaft' (2024) 63 DS 91; Terry A Maroney, 'Emotion and Reason in Judicial Decision-Making' in Sigrid G. Köhler et al (eds), *Recht fühlen* (Brill 2017).

[10] Maria Gendron, 'The evolving neuroscience of emotion: challenges and opportunities for integration with the law' in Susan A Bandes et al (eds), *Research Handbook on Law and Emotion* (Edward Elgar Publishing Limited 2021), 31-35; Ute Frevert, *The Power of Emotions: A History of Germany from 1900 to the Present* (Cambridge University Press 2023), 1-19; Lisa Feldman Barrett, *How Emotions Are Made the Secret Life of the Brain* (Mariner Books 2017), 25f; András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 14-19.

[11] Terry A Maroney, 'Law and Emotion: A Proposed Taxonomy of an Emerging Field' (2006) 30(5) LHB 119, 120, 123; Susan A Bandes et al., 'Introduction' in Susan A Bandes et al (eds), *Research Handbook on Law and Emotion* (Edward Elgar Publishing Limited 2021); Ute Frevert, 'Introduction: Powerful Emotions in German

people feel and *how* they express it depends on cultural scripts and historical experience. Neuroscience supports this: Emotions are closely integrated with cognitive operations, emerging through neural networks shaped by learning. They are not confined to isolated brain modules but emerge through neural networks shaped by lifelong learning.[12] Barrett describes them as "constructed emotions," highlighting that people actively model their own affective life.[13] Sajó stresses that "Emotion and cognition, though often treated correctly as having functionally separate features and influences are interactive and integrated or mingled in the brain".[14] The dichotomy is not simply an oversimplification but untenable in light of modern science.[15]

If the separation between reason and emotion cannot be maintained empirically, its persistence in law must be understood as normative: the claim that law *ought* to be governed by reason alone.[16] Even as such, this exclusion has been increasingly challenged.[17] Yet since all human behaviour is shaped by affect, legal systems are necessarily built on assumptions about emotions, whether acknowledged or not. Legal theory cannot disregard the affective dimension.[18] How much normative weight should be assigned to such findings, however, remains an open question.

History' in Ute Frevert, *The Power of Emotions: A History of Germany from 1900 to the Present* (Cambridge: Cambridge University Press 2023).

[12] Maria Gendron, 'The evolving neuroscience of emotion: challenges and opportunities for integration with the law' in Susan A Bandes et al. (eds), *Research Handbook on Law and Emotion* (Edward Elgar Publishing Limited 2021); Ute Frevert, *The Power of Emotions: A History of Germany from 1900 to the Present* (Cambridge University Press 2023), 1-19; Lisa Feldman Barrett, *How Emotions Are Made the Secret Life of the Brain* (Mariner Books 2017), 25f; András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 14-19.

[13] Lisa Feldman Barrett, *How Emotions Are Made the Secret Life of the Brain* (Mariner Books 2017), 25f; Ute Frevert, *The Power of Emotions: A History of Germany from 1900 to the Present* (Cambridge University Press 2023), 2-5.

[14] András Sajó, 'Emotions in Constitutional Law' in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023), 70.

[15] András Sajó, 'Constitutional Sentiments' (2006) 47 AJH 1, 3; Maria Gendron, 'The evolving neuroscience of emotion: challenges and opportunities for integration with the law' in Susan A Bandes et al. (eds), *Research Handbook on Law and Emotion* (Edward Elgar Publishing Limited 2021), 31-35.

[16] Johannes Eichenhofer et al., 'EMOTIONEN IM RECHT. Eine rechtstheoretische und -dogmatische Annäherung am Beispiel der Grundrechte' (2024) 63, 77; Terry A Maroney, 'Emotion and Reason in Judicial Decision-Making' in Sigrid G. Köhler et al (eds), *Recht fühlen* (Brill 2017), 152.

[17] See (2.2).

[18] Susan A Bandes et al., 'Introduction' in Susan A Bandes et al. (eds), *Research Handbook on Law and Emotion* (Edward Elgar Publishing Limited 2021); András Sajó, 'Emotions in Constitutional Law' in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023), 80.

2.2 Law and Emotions

Sajó's theory mainly draws on two traditions that recognized this: the eighteenth-century moral sentiment tradition and contemporary Law and Emotion scholarship.

David Hume and Adam Smith established the idea that sentiments are constitutive of normativity.[19] For Hume, moral judgment rests on sympathy, the human capacity to resonate with the feelings of others. Smith, in turn, emphasised the "impartial spectator" (the internalised gaze of others) through which individuals regulate their conduct.[20]

Montesquieu argued that forms of government rest on guiding sentiments: political virtue, "a love of the republic" in republics, fear in despotisms.[21] He saw emotions as the foundations of political order, shaping both the stability and the legitimacy of regimes.[22]

Despite such early insights, liberal constitutionalism long upheld the normative claim that law should be insulated from emotion.[23] Since the 1990s, however, legal scholars such as Bandes, Maroney and Nussbaum have explored how emotions influence judicial reasoning, legal actors and public perceptions of law.[24] Research has increasingly shifted toward treating emotions as social and institutional processes shaped by culture and context, though limited work exists directly on emotions in constitutional law.[25]

[19] András Sajó, 'Emotions in Constitutional Law' in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023), 73; David Hume, *A Treatise of Human Nature* (Clarendon Press 1896).
[20] Adam Smith, *The Theory of Moral Sentiments* (Cambridge University Press 2002); Bastian Ronge, 'Sympathetisches Recht. Zur Rechtsphilosophie von Adam Smith' in Hilge Landweer and Fabian Bernhardt (eds), *Sphären Der Verletzlichkeit* (Verlag Karl Alber 2017), 79f; David Hume, *A Treatise of Human Nature* (Clarendon Press 1896).
[21] Charles Montesquieu, *The Spirit of the Laws* (Montesquieu 1748), Book 5 Chapter 2.
[22] Ibid.
[23] András Sajó, 'Constitutional Sentiments' (2006) 47 AJH 1, 3.
[24] Susan A Bandes, *The Passions of Law* (New York University Press 1999); Susan A Bandes et al., *Research Handbook on Law and Emotion* (Edward Elgar Publishing Limited 2021).
[25] Susan A Bandes and Jeremy A Blumenthal, 'Emotion and the Law' (2012) 8 ARLSS 161.

2.3 Introduction to Sajó's Theory

Sajó's theory of constitutional sentiments fits into this gap. Drawing on the moral sentiment tradition while engaging with modern law-and-emotion scholarship, he argues that constitutions are both products of collective emotions and instruments for regulating them.

Sajó proposes a "partial descriptive" theory of liberal constitutionalism highlighting the role of collective emotions in institutional design.[26] His research hypothesis is:

> Emotions, through complicated mechanisms, do have an actual impact on constitutional design and law. At the same time, constitutional design is a half-conscious venture of emotion management, and constitutional law and politics have unintended consequences in the emotional culture. By improving our knowledge regarding emotions, we can improve constitutional design.[27]

He acknowledges that constitutional design always reflects multiple factors, and that his framework offers only a partial explanation of constitution-making, acceptance, and interpretation.[28]

2.3.1 Key Concepts and Terminology

Sajó introduces the term sentiment to highlight the social interpretation and normative significance of emotions in public discourse.[29] Constitutional sentiments are therefore not private feelings but socially mediated and publicly recognisable patterns of expectation, which legitimise constitutional arrangements and shape institutional development.[30] Sajó adopts a broad understanding of the term "constitution," encompassing formal texts, jurisprudence,

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[26] András Sajó, 'Emotions in Constitutional Design' (2010) 8 International Journal of Constitutional Law 354; András Sajó, *Constitutional Sentiments* (Yale University Press 2011); András Sajó, 'Emotions in Constitutional Law' in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023).

[27] András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 4.

[28] András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 11; András Sajó, 'Emotions in Constitutional Law' in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023), 70.

[29] András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 4f; András Sajó, 'Emotions in Constitutional Law' in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023), 71.

[30] Ibid.

conventions, and symbolic practices, but limits his analysis to liberal democratic orders.[31] The table below defines key terms used throughout this paper.

Key Concepts and Terminology

Feeling	A subjective, affective experience
Emotion	An individual or collective affective response with motivational force and social meaning
Moral intuition	A pre-reflective, emotionally grounded sense of right and wrong, shaped by culture and history
Moral judgement	A more reflective, often reasoned evaluation of normative rightness or wrongness
Public sentiment	Socially shared emotion with normative significance
Constitutional sentiment	Public sentiment oriented toward constitutional norms, principles, or institutions

2.3.2. From Emotions to Institutions

Emotions become constitutionally relevant when they are socially reinforced and morally interpreted as public sentiments. Which sentiments enter constitutional design depends on cultural legitimacy, historical context, and the influence of relevant actor (e.g. political elites). Sajó illustrates this with the shift in public attitudes toward cruelty in the eighteenth century, which culminated in the legal prohibition of torture and with the presumption of innocence, reflecting empathy for the wrongly accused.[32] Such sentiments are not static: in different contexts, concern about impunity may instead generate punitive sentiments.[33] In short, persistent and morally endorsed sentiments act as a bridge between individual/collective emotions and institutional choice.

[31] András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 5.
[32] Ibid, 36, 41-42.
[33] Ibid.

2.3.3 Public Sentiment and Institutional Feedback

Sajó highlights the reciprocal relationship between public sentiment and constitutional design. Once encoded into law, constitutional arrangements in turn shape public emotions—both directly, through cultural norms and "display rules," and indirectly, through institutional structures.[34] Cultural norms define appropriate behaviour within a community, while display rules regulate the expression of emotion.[35] The figure below illustrates the dynamics between collective sentiments and institutional design.

[34] Ibid, 52.

[35] Ibid; American Psychological Association, 'APA Dictionary of Psychology' (*dictionary.apa.org* 19 April 2018) <https://dictionary.apa.org/display-rule>accessed 5 June 2026.

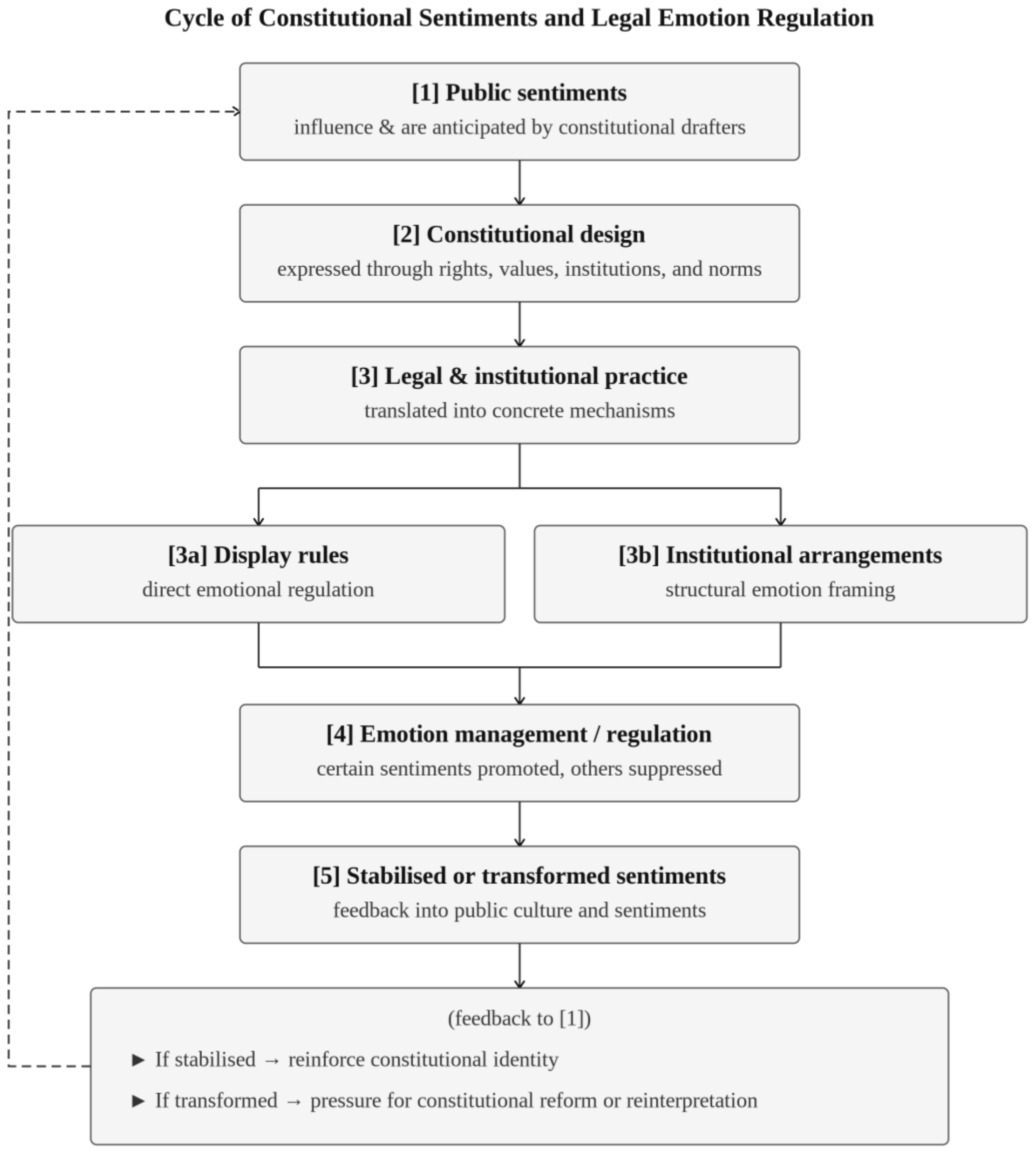

Figure 1 Cycle of Constitutional Sentiments and Legal Emotion Regulation: presents the interaction between collective sentiments and constitutional design

The paper focuses on two central aspects:

1. The Role of Emotions in Constructing Constitutional Orders: How foundational sentiments (e.g. fear (of tyranny), (collective) shame) shape constitutional texts, principles, and structures.
2. The Regulation of Emotions through Constitutional Law: How legal norms and doctrine are used to manage and reshape public emotion.

Sajó's theory is descriptive and social constructivist.[36] Public sentiments emerge from specific historical and cultural constellations, and their influence on legal systems can therefore only be understood in context.[37] The subsequent analysis traces how such sentiments have operated within the German constitutional tradition, testing the applicability of Sajó's framework within a specific legal order.

3 Emotions in German Constitutional Law & Doctrine

3.1 The Basic Law: a provisional constitution

Key emotional drivers behind German constitutionalism need to be situated within Germany's constitutional history. Germany's post-war constitutional history began with the division into four occupation zones and the creation of two states. The Basic Law was adopted in West Germany with the approval of the Western Allied powers in 1949. That same year, the German Democratic Republic (GDR) enacted its own constitution.

After the fall of the Berlin Wall in 1989, the GDR's *Volkskammer* voted to join the Federal Republic under Article 23 (old version) of the Basic Law in 1990 with the Unification Treaty of 31 August 1990 formalising the process"[38]

The FCC, established in 1949, quickly emerged as the Basic Law's guardian and primary interpreter.[39] Through the constitutional complaint individuals may challenge state action directly before the Court. Its powers are extensive, as it may review acts of all three *branches of government* for their constitutionality.[40] Smend famously remarked that "the Basic Law now applies in practice as the FCC interprets it."[41]

3.2 Constitutional Sentiments in German Constitutional Culture

[36] András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 41.
[37] Ibid, 9, 14-33.
[38] Treaty between the Federal Republic of Germany and the German Democratic Republic on the establishment of German Unity (as amended) (BGBl 1990 II S 889); Grundgesetz für die Bundesrepublik Deutschland Präambel (1990).
[39] Christoph Möllers, *Das Grundgesetz - Geschichte Und Inhalt* (4th edn., CH BECK 2024), 63-66.
[40] GG, Art. 93 in conjunction with Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz herinafter BVerfGG).
[41] Lothar Michael, 'Rudolf Smend (1882–1975): Die Verfassung Als Integrationsordnung' (2023) 3 ZJS 444 <https://www.zjs-online.com/dat/artikel/2023_3_1747.pdf> accessed 5 June 2026.

The sentiments embedded in the Basic Law were largely those prioritised by political elites, since the drafting process involved no public participation and was carried out by the Parliamentary Council, a body elected by the Länder parliaments.[42] However, drafters must also anticipate sentiments that will secure compliance and legitimacy (of the people).[43]

In the immediate aftermath of WW2, German society found itself in what Sajó aptly describes as a "depressed mental state."[44] Public morale was low, the future uncertain, and trust in political institutions virtually absent.[45]

This section examines shame and fear as the two central collective emotions in post-war West Germany and how they developed into public sentiments.[46]

3.2.1 Post war shame and fear

Germans must not forget what, in those shameful years, was committed by people of their own nation. (...) Nobody, absolutely no one, will relieve us from that shame[47]

—Theodor Heuss, 1952

Sajó argues that German constitutional law reflects the lived experience of collective shame after the Nazi era.[48] Shame, as a deeply moral emotion, arises from a perceived failure to uphold shared norms and values.[49] Of particular importance in this context is "social shame": the fear of exposure and loss of standing in the eyes of others.[50] Social shame, as part of the broader "shame family" of emotions, is adaptive: It preserves social acceptance and self-esteem and is especially significant in post-totalitarian contexts.[51]

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[42] Christoph Möllers, *Das Grundgesetz - Geschichte Und Inhalt* (4th edn., CH BECK 2024), 21.
[43] András Sajó, 'Emotions in Constitutional Law' in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023), 77.
[44] Ibid, 74.
[45] Ute Frevert, *Verfassungsgefühle* (Wallstein Verlag 2024), 130-133.
[46] Ute Frevert, *The Power of Emotions: A History of Germany from 1900 to the Present* (Cambridge University Press 2023), 123f; András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 115f; Frank Biess, *German Angst: Fear and Democracy in the Federal Republic of Germany* (Oxford University Press 2020), 25–65.
[47] Theodor Heuss, 'Memorial Speech at Bergen-Belsen' (Opening of the Bergen-Belsen Memorial 30 November 1952) <https://www.ardaudiothek.de/episode/urn:ard:episode:f081236bd82e9d57/> accessed 5 June 2026.
[48] András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 269f.
[49] Rosa Maria Puca, 'Scham Im Dorsch Lexikon Der Psychologie' (*Hogrefe.com* 2025) <https://dorsch.hogrefe.com/stichwort/scham> accessed 5 June 2026.
[50] András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 271.
[51] Ibid, 269-273.

Starting in 1945, British and American forces confronted Germans with film footage from liberated concentration camps to provoke shame.[52] Public appeals to shame were not unusual: in June 1945, the German Communist Party urged that "in every German, the shame must burn" over complicity in Nazi atrocities, while intellectuals described shame as the purgatory needed to cleanse national disgrace.[53]

In 1949, Federal President Theodor Heuss introduced the term *Kollektivscham* (collective shame) as an alternative to *Kollektivschuld* (collective guilt), which he considered an oversimplification. For Heuss, shame was an unavoidable legacy that could be transformed into constructive counteraction.[54] Revealingly, Heuss framed shame as something imposed: Hitler had "forced us into shame." [55]

Frevert points out that this echoes psychological patterns of shame avoidance: turning away, falling silent, or deflecting/shifting responsibility. These reactions were mirrored in society at large.[56] From 1949 through the early 1970s, collective shame was unevenly distributed, often suppressed, and accompanied by silence and denial.[57] As Möllers notes, the "political guilt consciousness" still palpable in the Parliamentary Council quickly dissipated in wider society.[58]

From Sajó's perspective, this indicates that the Basic Law did not simply mirror a broadly shared collective emotion. Rather, it institutionalised specific moral judgments articulated by political elites and linked them to fragmented societal feelings. In Sajó's words "Germany built up its shame politically and judicially".[59] In doing so, sentiments that were fragile and contested in society were stabilised through constitutional form, granting them durability and normative

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[52] Ute Frevert, *The Power of Emotions: A History of Germany from 1900 to the Present* (Cambridge University Press 2023), 309.
[53] Ibid, 309-312.
[54] Ute Frevert, *The Power of Emotions: A History of Germany from 1900 to the Present* (Cambridge University Press 2023), 311.
[55] Deutschlandfunk.de, 'Heuss-Rede Vor 70 Jahren - Nazi-Verbrechen Und Deutsche Kollektivscham' (*Deutschlandfunk* 7 December 2019) <https://www.deutschlandfunk.de/heuss-rede-vor-70-jahren-nazi-verbrechen-und-deutsche-100.html> accessed 5 June 2026.
[56] Ute Frevert, *The Power of Emotions: A History of Germany from 1900 to the Present* (Cambridge University Press 2023), 311.
[57] Ibid, 312-313.
[58] Christoph Möllers, *Das Grundgesetz - Geschichte Und Inhalt* (4th edn., CH BECK 2024), 121.
[59] András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 291.

force. Moreover, shame also had a political function: it served to signal moral reckoning both to domestic victims and to the international community, whose approval was essential for Germany's reintegration.[60] The cultivation of shame thus worked simultaneously as internal moral orientation and external legitimation.

Fear was an even more evident emotion in the post-war context.[61] Frevert identifies "deep-seated collective fears rooted in social, economic and political experiences," above all a lasting "fear of war and destruction" after two world wars.[62] Added to this was the anxiety of political elites about both a return of Weimar-style instability and a resurgence of National Socialism.[63] Even before the Basic Law was adopted, political theorist Sternberger described the widespread anxiety about authoritarianism as a kind of "public illness," and labelled the Basic Law a "fear-built constitution".[64] He argued that this fear was driving members of the Parliamentary Council to draft a primarily defensive "counter-constitution," one grounded in fear and mistrust of the citizens rather than constructive democratic vision.[65]

These emotional dynamics decisively shaped the constitutional moment of 1949. Both, shame over National Socialism and fears of renewed tyranny and instability, were anticipated and perpetuated by the drafters.

3.2.2 Constitutional Embedding of Shame and Fear

The Parliamentary Council drafted the Basic Law under intense international scrutiny, and Germany's reintegration into the post-war order depended on the perceived sincerity of its moral transformation or "disavowal of past injustice."[66] The constitution had to signal both an inner break with the Nazi past and reliable safeguards against authoritarian relapse.

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[60] Ibid, 289.
[61] Frank Biess, *German Angst: Fear and Democracy in the Federal Republic of Germany* (Oxford University Press 2020), 25-65; Ute Frevert, *The Power of Emotions: A History of Germany from 1900 to the Present* (Cambridge University Press 2023), 123-139.
[62] Ute Frevert, *The Power of Emotions: A History of Germany from 1900 to the Present* (Cambridge University Press 2023), 127.
[63] András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 146.
[64] Dolf Sternberger, 'Demokratie der Furcht oder Demokratie der Courage?' (1949) 4(1) DW, 8.
[65] Ibid.
[66] András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 289.

The Preamble sets the tone, invoking "responsibility before God and man" and affirming a commitment to peace.[67] It reflects collective memory, expressing the longing for reintegration into the European community of states, arising from historical guilt and shame.[68]

Article 1 GG famously declares:

> Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

Placed deliberately at the beginning of the Basic Law, this provision was intended "to demonstrate the entire spirit of the new state order in contrast to the state order destroyed in May 1945."[69] The Parliamentary Council regarded the dignity guarantee as a repudiation of National Socialism's moral transgressions.[70] It was further elevated by the *eternity clause* in Article 79(3) GG, which rendered it unamendable. As Möllers noted, "Where human dignity begins, democratic self-determination ends and whatever touches human dignity in the hands of the [FCC] turns to stone."[71]

The dignity clause's emotional dimension is twofold: on the one hand, the shame of past violations and the determination to demonstrate moral transformation to international and domestic audiences; on the other, the fear of renewed tyranny and the determination to keep dignity beyond political reach.

The same protective logic extends to the system of fundamental rights in Articles 1–19 GG, conceived primarily as defensive rights against the state.[72] This is reinforced by Article 19(4) GG, which guarantees judicial recourse to anyone whose rights are violated by public authority.

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67 Basic Law (GG), Preamble.
68 Theodor Maunz and Günter Dürig, *Grundgesetz Kommentar* (Rupert Scholz and others eds, Werkstand: 107th edn, March 2025, CHBECK 1958) <https://beck-online.beck.de/> accessed 5 June 2026. Preamble, paras. 3–5.
69 Theodor Maunz and Günter Dürig, *Grundgesetz Kommentar* 107, GG Art. 1 Abs. 1 paras 14-16.
70 Christoph Möllers, 'Democracy and Human Dignity: Limits of a Moralized Conception of Rights in German Constitutional Law' (2009) 42 ILR 416.
71 Ibid, 417.
72 Ralf Poscher, *Grundrechte Als Abwehrrechte* (Mohr Siebeck 2003), 42-47; BVerfG, Urteil des Ersten Senats vom 15. Januar 1958 - 1 BvR 400/51 -, Rn. 1-75, <https://www.bverfg.de/e/rs19580115_1bvr040051> accessed 5 June 2026.

The subsequently added Article 94(1) no. 4a GG allows constitutional review of all three branches of government.[73]

Article 20 GG, often described as the normative core of the constitution, defines Germany as a federal, democratic, (and social state)—a deliberate reaction against the dangers of centralised authoritarianism.[74]

Article 20(2) affirms that state authority emanates from the people, but only through institutionalised, representative mechanisms, explicitly rejecting plebiscitary forms of democracy partially associated with Weimar's instability. President Heuss (himself a member of the Parliamentary Council) warned that referenda were a *"prize for every demagogue"*, a view that met with broad approval among the Council's members.[75]

Finally, Article 20(4) enshrines a right to resist attempts to overthrow the constitutional order, thereby constitutionalising the fear of democratic collapse.[76]

Together, Articles 1 and 20 form the highest principles of the constitutional order and are shielded from amendment by Article 79(3) GG.

Alongside this, the Basic Law introduced the instruments of militant democracy[77], which can also be understood as tools of emotional regulation.[78]

These are illustrative examples; the list does not claim to be exhaustive. The Basic Law embedded sentiments of shame and fear in its design, but constitutional text alone could not fix their orientation toward constitutional norms. Over time, public discourse and jurisprudence reinterpreted and stabilised these sentiments, translating them into enduring constitutional commitments.

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[73] Jörn Ipsen, 'G. Justizgrundrechte' in Jörn Ipsen *Staatsrecht II* (24th edn, CHBECK 2021) <https://doi.org/10.15358/9783800658312> accessed 5 June 2026, 249 – 268.
[74] Theodor Maunz and Günter Dürig, *Grundgesetz Kommentar* , GG Art. 20 paras 3-6.
[75] Speech before the Parliamentary Council (9 September 1948) in Theodor Heuss and Jutta Limbach, *Theodor Heuss - Vater Der Verfassung* (Walter de Gruyter 2009) 63.
[76] Theodor Maunz and Günter Dürig, *Grundgesetz Kommentar* , GG Art. 20 Rn. 3-12.
[77] E.g. GG Art. 9(2), GG 21(2), GG Art. 18.
[78] András Sajó, 'Emotions in Constitutional Law' in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023), 70, 79-83.

3.2.3 Shift from shame to historical responsibility

One significant transformation was the reframing of shame into the notion of *historical responsibility*. In his 1985 speech marking the 40th anniversary of the end of WWII, President Weizsäcker stated: "The young are not guilty of what happened back then. But they are responsible for what becomes of it in history."[79] This went alongside a broader change in society and reframed the emotional posture toward the past from internalised shame to a forward-looking sense of civic duty.[80]

This transition did not erase shame but retained it as the underlying emotional foundation.[81] Responsibility became the more socially acceptable face of shame, allowing it to be articulated in public without the paralysing associations of guilt.[82]

That same year, the Bundestag criminalised "Insults as well as the disparagement of deceased persons that are connected with their persecution by the National Socialist regime or another regime of violence and arbitrary rule" prosecutable *ex officio*.[83] This was a response to growing public unease about the emerging international phenomenon of Holocaust denial and can be read as evidence that the sense of historical responsibility was not only imposed from above but was increasingly present within society.[84]

While the Basic Law's structure had embedded sentiments of fear and signalled shame, it was in constitutional jurisprudence that the FCC actively preserved and reinterpreted the sentiment of responsibility. According to Sajó, in post-totalitarian contexts, reappearance of some component elements of the foundational injustice can trigger insecurity and shame.[85] The FCC

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[79] Der Bundespräsident, 'Gedenkveranstaltung Im Plenarsaal Des Deutschen Bundestages Zum 40. Jahrestag Des Endes Des Zweiten Weltkrieges in Europa' (*Der Bundespräsident*) <https://www.bundespraesident.de/SharedDocs/Reden/DE/Richard-von-Weizsaecker/Reden/1985/05/19850508_Rede.html?nn=129626#Start> accessed 5 June 2026.

[80] Ute Frevert, *The Power of Emotions: A History of Germany from 1900 to the Present* (Cambridge University Press 2023), 315f.

[81] Ibid, 316.

[82] Ibid, 315-316.

[83] German Criminal Code (Strafgesetzbuch, hereinafter: StGB) § 194, as amended by the 21st Criminal Law Amendment Act (21. Strafrechtsänderungsgesetz, 21. StrÄndG), officially promulgated in BGBl. I 1985, Nr. 29 (15 June 1985) <https://www.bgbl.de/xaver/bgbl/start.xav#/switch/tocPane?_ts=1756640997408> accessed 5 June 2026.

[84] Bundeszentrale für politische Bildung, '25. April 1985: Verabschiedung Des Gesetzes Gegen Die "Auschwitz-Lüge"' (*bpb.de* 22 April 2025) <https://www.bpb.de/kurz-knapp/hintergrund-aktuell/561391/25-april-1985-verabschiedung-des-gesetzes-gegen-die-auschwitz-luege/> accessed 5 June 2026.

[85] András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 290.

played a vital role in reinforcing this process by embedding such sentiments into its jurisprudence.[86]

3.2.4 Historical Responsibility in the Jurisprudence of the FCC

This is particularly evident is the Court's freedom of expression jurisprudence under Article 5(1) GG. While the Basic Law guarantees freedom of opinion, speech, and press, it also requires the state to protect the historically charged principle of human dignity.[87] Restrictions of freedom of speech are permitted only under so-called "general laws", laws that do not target specific opinions as such.[88]

The early *Lüth* case illustrates this interplay.[89] Erich Lüth had called for a boycott of a film directed by a filmmaker closely tied to Nazi propaganda, but the Hamburg Regional Court prohibited him from urging cinemas or the public to comply. Notably, the FCC gave weight to his concern that the director's return could signal abroad that German cultural life had not changed, thus valuing notions of historical shame and responsibility.[90] The Court used the case to develop the doctrine of the *objective value order,* holding that all restrictions on freedom of expression must be interpreted in its light.[91] This order, constituted by the Basic Law, is not value-neutral reflecting substantive constitutional values.[92]

This tension re-emerged in 1994 when the Federal Court of Justice ruled that Holocaust denial did not in itself constitute incitement to hatred, provoking widespread public outrage that reflected the continuing sensitivity of questions linked to the Shoah.[93]

One month later, in the context of an unsuccessful constitutional complaint concerning restrictions imposed on a demonstration where Holocaust denial was expected, the FCC

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[86] Ibid, 25f, 281.
[87] GG, Art. 1.
[88] GG Art. 5(2) (permitting restrictions only through general laws, provisions for the protection of minors, and the right to personal honour); See also The Federal Constitutional Court (Bundesverfassungsgericht hereinafter BVerfG), Judgement of the first senate, 15. January 1958 - 1 BvR 400/51, [34] (*Lüth)*.
[89] BVerfG Judgement of the first senate, 15. January 1958 - 1 BvR 400/51, [1]-[75] (*Lüth)*.
[90] Ibid, [50].
[91] Ibid, Headnotes.
[92] Ibid, [25].
[93] Federal Court of Justice (Bundesgerichtshof, hereinafter: BGH), Judgment of 15 March 1994, 1 StR 179/93, interpreting the scope of StGB § 130 (incitement to hatred); For public reactions see taz, '„Freibrief" Für Leugner Des Holocaust? Reaktionen Auf Das BGH-Urteil' *taz. die tageszeitung Ausgabe 4266* (17 March 1994).

clarified that Holocaust denial is not protected under Article 5(1) GG (freedom of expression).[94] It found such denial to be a demonstrably false factual claim, therefore falling outside the scope of protected opinion.[95] While the reasoning was still formally limited to falsity, the decision prepared the ground for later jurisprudence which rests on Germany's special historical responsibility.

That same year legislature introduced § 130(3) StGB to criminalise Holocaust denial as a distinct offence.[96] In 2005, § 130(4) StGB followed, banning public approval, glorification or justification of the National Socialist tyranny and arbitrary rule.[97]

In the 2009 *Wunsiedel* decision, the FCC upheld the constitutionality of § 130(4) StGB.[98] In a notable departure from its own dogmatics on "special laws", the Court acknowledged that the law did in fact target a particular ideological position.[99] However, it justified this exception by invoking Germany's "long-term (special historical) responsibility".[100] The Court argued that approval, glorification or justification of the Nazi regime strike at the very foundation of the Basic Law, which had been conceived as a direct antithesis to the injustice and horror of the Nazi regime.[101] The reference to special responsibility thus functioned as a constitutional value, justifying restrictions on speech that would otherwise be impermissible.

Two further decisions in 2018 reaffirmed the constitutionality of § 130(3) StGB, using the same rationale.[102]

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[94] BVerfG, Decision of the First Senate, 13 April 1994 - 1 BvR 23/94, <https://www.bverfg.de/e/rs19940413_1bvr002394> accessed 5 June 2026, [1]-[52].
[95] Ibid, [34].
[96] Act Amending the Criminal Code, the Code of Criminal Procedure and Other Acts (Gesetz zur Änderung des Strafgesetzbuches, der Strafprozeßordnung und anderer Gesetze), promulgated in BGBl. I 1994, Nr. 76 (4 November 1994).
[97] Act Amending the Criminal Code 24 March 2005 officially promulgated in BGBl. 2005 I S. 969 (31 March 2005).
[98] BVerfG, decision of the First Senate of 4 November 2009 - 1 BvR 2150/08 -, [1]-[87], (Wunsiedel) <https://www.bverfg.de/e/rs20091104_1bvr215008en> accessed 5 June 2026.
[99] Ibid, Headnotes.
[100] Ibid, [62] (English version).
[101] Ibid, Headnote 1.
[102] BVerfG, decision of the Third Chamber of the First Senate of 22 June 2018 - 1 BvR 673/18 -, [1]-[37], <https://www.bverfg.de/e/rk20180622_1bvr067318en>accessed 5 June 2026; BVerfG, decision of the Third Chamber of the First Senate of 22 June 2018 - 1 BvR 2083/15 -, [1]-[34], <https://www.bverfg.de/e/rk20180622_1bvr208315en> accessed 5 June 2026.

This line of reasoning has provoked considerable scholarly criticism. It has been described as a doctrinal shift “with the effect of a constitutional amendment”, a “singularity” within German constitutional law, a non-transferable deviation, justified solely by the exceptional moral weight of the Nazi past.[103]

From the perspective of Sajó’s theory, however, this singularity can be understood as an illustration of constitutional sentiments at work. The emotion of shame, transformed into a sense of historical responsibility stabilised by the moral repudiation of the Nazi past—remains embedded in the constitutional identity of the Federal Republic. The judgment provoked public ambivalence,[104] underscoring both the durability and the contestability of shame/responsibility as constitutional sentiments. They make exceptional doctrinal steps acceptable, but at the price of ongoing debate. Therefore, the Court acts not only as a legal guardian, but as a guide of public sentiment, maintaining the moral boundaries of the constitutional order.

Seen this way, restrictions of freedom of speech function not only as protectors of public peace and human dignity but also as “sentiment stabilizers”. They feed back into public culture by reinforcing collective boundaries through public signalling and, in effect, something like constitutional “shaming.”[105]

3.3 The Regulation of (Public) Emotions in German Constitutional Law

Building on the preceding analysis, this section turns to the question of whether German public law operates as a form of emotion regulation in Sajó’s sense. He sees law as a *“social regulatory system (which) participates in emotion regulation by providing uniform (and hence biased) scripts”*.[106]

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[103] Mathias Hong, ‘Holocaust, Meinungsfreiheit Und Sonderrechtsverbot – BVerfG Erklärt § 130 III StGB Für Verfassungsgemäß’ (*Verfassungsblog* 5 August 2018)<https://verfassungsblog.de/holocaust-meinungsfreiheit-und-sonderrechtsverbot-bverfg-erklaert-%C2%A7-130-iii-stgb-fuer-verfassungsgemaess/> accessed 5 June 2026.
[104] Dietmar Hipp, ‘Germany’s Nazi Exception: Constitutional Court OKs Curtailing of Free Speech’ (*Spiegel.de* 18 November 2009) <https://www.spiegel.de/international/germany/germany-s-nazi-exception-constitutional-court-oks-curtailing-of-free-speech-a-662031.html> accessed 5 June 2026; Deutsche Welle, ‘Nazi Ban Upheld’ (*dw.com* 18 November 2009) <https://www.dw.com/en/german-constitutional-court-upholds-law-banning-neo-nazi-march/a-4905614> accessed 5 June 2026.
[105] András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 278.
[106] András Sajó, ‘Emotions in Constitutional Law’ in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023), 79-83.

Following the "mad emotionality" of the Nazi regime, the early Federal Republic developed a deep-rooted scepticism toward political emotionalism.[107] Federal President Heuss urged the population to remain "sober and free of illusions" and to liberate themselves from "the shackles of buzzwords and ideologies".[108] This reflects the postwar effort to contain political passions through institutional restraint, rational legalism and moral distancing from previous emotional excess.[109]

However, this scepticism did not translate into a rejection of all emotion, as Heuss's own appeals to *Kollektivscham* demonstrate. What was at stake was not emotion as such, but particular kinds of emotional mobilisation (associated with nazi propaganda).[110]

As Sajó notes, some of the actions of the Nazis aimed to increase group cohesion around irrational values, foster in-group solidarity, and incite hatred against the out-group. Others, relying on aggressive self-presentation, marches, and actual violence, sought to intimidate and silence opponents by provoking fear and a sense of helplessness.[111]

Postwar German constitutional law therefore responds not with a purely emotionless model of democracy, but by steering emotional expression away from such dynamics and toward forms of civic engagement that support constitutional acceptance.

(a) Emotions encouraged

Positive law can generate "new motives for compliance with legal norms by producing shared identification".[112]

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[107] Theodor Heuss as cited in Ute Frevert, *The Power of Emotions: A History of Germany from 1900 to the Present* (Cambridge University Press 2023), 5-7.
[108] Ibid.
[109] András Sajó, 'Emotions in Constitutional Law' in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023), 81.
[110] Ibid.
[111] Ibid.
[112] Ibid, 74.

Since (national) patriotism as a form of emotional attachment was discredited after 1945, German intellectuals turned to the idea of identity formation through law.[113] In the early years, the population's attitude toward the Basic Law was characterised largely by indifference, directed not only toward the Basic Law but toward politics more generally.[114]

It was in this context that Sternberger proposed *Verfassungspatriotismus* (constitutional patriotism). First formulated in the 1960s as Staatsfreundschaft (friendship with the state), he later described it as a form of "passionate rationality" that would ground loyalty in the democratic state and constitutional values.[115] Schönberger sees the original conception as explicitly emotional: a blend of love, loyalty, and pride directed at constitutional values.[116]

Though Habermas later shifted this from an emotional to a rational framework, even he acknowledged that principles must enter the "denser web of cultural value orientations", what Frevert reads as requiring "emotional appropriation".[117]

In practice, the state promotes a modest "constitutional patriotism light", visible in citizenship law, civic education, and party foundation financing, though emotional expectations remain minimal, requiring only a basic consensus around democratic values.[118] Historical responsibility has been reinforced through limits on free speech,[119] as well as a 2024 reform which requires applicants for citizenship to explicitly affirm it.[120] Future-oriented solidarity is emphasised in the FCC's Climate Verdict.[121]

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113 Sophie Schönberger, 'Noch Einmal Mit Gefühl Für Einen Emotive Turn in Der Verfassungsrechtswissenschaft' (2024) 63 DS 91, 95.

114 Ute Frevert, *Verfassungsgefühle* (Wallstein Verlag 2024), 161.

115 Jan-Werner Müller, *Constitutional Patriotism* (Princeton University Press 2007), 24.

116 Sophie Schönberger, 'Noch Einmal Mit Gefühl Für Einen Emotive Turn in Der Verfassungsrechtswissenschaft' (2024) 63 DS 91, 95.

117 Jürgen Habermas and Joseph Ratzinger, *Dialektik Der Säkularisierung* (Verlag Herder 2018), 22-25; Ute Frevert, *Verfassungsgefühle* (Wallstein Verlag 2024), 229; Jan-Werner Müller, *Constitutional Patriotism* (Princeton University Press 2007), 36; Sophie Schönberger, 'Noch Einmal Mit Gefühl Für Einen Emotive Turn in Der Verfassungsrechtswissenschaft' (2024) 63 DS 91, 95.

118 Judith Froese, 'Verfassungspatriotismus als Bürgerpflicht' (2024) 79(1) JZ 426.

119 Under GG Art. 5 and StGB § 130.

120 Act on the Modernization of Nationality Law (StARModG) 22 March 2024, officially promulgated in BGBl. 2024 I No. 104, (26 March 2024).

121 BVerfG, Order of the First Senate of 24 March 2021 - 1 BvR 2656/18 -, [1]-[270] <https://www.bverfg.de/e/rs20210324_1bvr265618en> accessed 5 June 2026.

(b) Emotions Discouraged

Sajó aptly notes that "constitutional democracies, because of their liberal orientation, are reluctant to directly proscribe specific emotions or emotion displays, except hate (and increasingly certain forms of disrespect)."[122] In Germany this is visible in restrictions on hate speech.

A more specific form of regulation targets the emotions associated with particular groups and specific forms of mobilisation.[123] Sternberger's idea of "friends of the constitution" presupposes "enemies", and it is precisely against these enemies that German constitutional law directs its restrictive measures.

3.3.1 Militant Democracy as Emotion Regulation

The most systematic expression of this logic is the doctrine of militant democracy. The term originally referred to a state's ability to defend itself militarily against external threats.[124]

This understanding shifted with Loewenstein's writings, which focused on the necessity for democracies to defend themselves internally specifically against fascism, which had "declared war" on democratic systems.[125] An inward-looking reading has since prevailed in Germany, where the FCC today regards this concept as "defensive democracy" and as one of the constitution's core principles.[126]

The FCC highlights several constitutional provisions as expressions of this principle: the ban on unconstitutional associations,[127] the possibility of party bans,[128] the forfeiture of basic

[122] András Sajó, 'Emotions in Constitutional Law' in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023), 81.
[123] Ibid.
[124] Gertrude Lübbe-Wolff, 'Wehrhafte demokratie Demokratie' (*Verfassungsblog* 13 October 2023) <https://verfassungsblog.de/wehrhafte-demokratie/> accessed 5 June 2026.
[125] Ibid; Karl Loewenstein, 'Militant Democracy and Fundamental Rights, I' (1937) 31 APSR 417.
[126] Gertrude Lübbe-Wolff, 'Wehrhafte demokratie Demokratie' (*Verfassungsblog* 13 October 2023) <https://verfassungsblog.de/wehrhafte-demokratie/> accessed 5 June 2026; BVerfG, Judgment of the Second Senate of 17 January 2017 - 2 BvB 1/13 -, [418] <https://www.bverfg.de/e/bs20170117_2bvb000113en> accessed 5 June 2026.
[127] GG Art. 9(2).
[128] GG Art. 21(2).

rights,[129] and the right of resistance.[130] More recently, Article 21(3) GG was added to allow the exclusion of anti-constitutional parties from state funding.[131] Further instruments include the use of domestic intelligence services and the loyalty obligation of civil servants.[132]

In practice, some of these provisions are more relevant than others. The forfeiture of basic rights article has played almost no role in practice and was described as a "functionless fear clause".[133] In contrast, the association ban continues to be actively applied. [134]

The party ban mechanism was introduced as a direct response to the collapse of the Weimar Republic. As the FCC stated, the provision reflects the legislator's intent "to create structural preconditions to prevent a repetition of the catastrophe of National Socialism and a development of the party system as in the final phase of the Weimar Republic."[135]

A party can be declared unconstitutional if its goals or behaviour are directed against the "free democratic basic order" or the "existence of the Federal Republic."[136] The FCC clarified that this order rests on three core principles human dignity, democracy, and the rule of law, with human dignity forming the foundation for the latter two.[137]

However, mere ideological opposition is not sufficient: the party must actively and aggressively seek these goals, and there must be concrete indications that success is not entirely implausible (*Potentialität*).[138]

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[129] GG Art. 18.
[130] GG Art. 20(4); BVerfG, Judgment of the Second Senate of 17 January 2017 - 2 BvB 1/13 -, paras. 1-1010; Gertrude Lübbe-Wolff, 'Wehrhafte demokratie Demokratie' (*Verfassungsblog* 13 October 2023) <https://verfassungsblog.de/wehrhafte-demokratie/> accessed 5 June 2026.
[131] Act Amending the Basic Law (Article 21) (Gesetz zur Änderung des Grundgesetzes (Artikel 21)), (13 July 2017), officially promulgated in <BGBl. 2017 I S. 2346 19. Juli 2017 > accessed 5 June 2026; See also BVerfG, Judgement of the second senate 23. January 2024 - 2 BvB 1/19 -, Rn. 1- 510 <https://www.bverfg.de/e/bs20240123_2bvb000119> accessed 5 June 2026.
[132] Gertrude Lübbe-Wolff, 'Wehrhafte demokratie Demokratie' (*Verfassungsblog* 13 October 2023) <https://verfassungsblog.de/wehrhafte-demokratie/> accessed 5 June 2026.
[133] Klaus Ferdinand Gärditz, 'Religionsfreiheit Unter Dem Vorbehalt Der Verwirkung?' (*Verfassungsblog* 30 September 2018) <https://verfassungsblog.de/religionsfreiheit-unter-dem-vorbehalt-der-verwirkung/> accessed 5 June 2026.
[134] List of banned associations: Federal Ministry of the Interior: BMI, Vereinsverbote <https://www.bmi.bund.de/DE/themen/sicherheit/extremismus/vereinsverbote/vereinsverbote-artikel.html> accessed 22 June 2026.
[135] BVerfG, Judgment of the Second Senate of 17 January 2017 - 2 BvB 1/13 -, [1]-[1010], [512].
[136] GG Art. 21 (4) and 21(2) and §§ 43 ff. BVerfGG.
[137] BVerfG, Judgment of the Second Senate of 17 January 2017 - 2 BvB 1/13 -, [529]; Judith Froese, 'Verfassungspatriotismus als Bürgerpflicht' (2024) 79(1) JZ 426.
[138] BVerfG, Judgment of the Second Senate of 17 January 2017 - 2 BvB 1/13.

Only the Bundestag, Bundesrat, or Federal Government can initiate proceedings. The Court first reviews admissibility in a preliminary stage before potentially proceeding to the main proceedings, where a two-thirds majority is required to dissolve the party and ban any successor organisations. If a party is declared unconstitutional, it must be dissolved and any substitute or partial organisations banned.[139] Members of a prohibited party lose their Bundestag mandates and successors their eligibility. For direct mandates, a repeat election is held.[140]

In the history of the federal republic, two parties were successfully banned: the Socialist Reich Party (SRP) in 1952 and the Communist Party of Germany (KPD) in 1956.[141] Later attempts to ban the far-right extremist National Democratic Party (NPD) in 2001-2003 and again between 2013–2017 failed.[142] But in 2024, the party Die Heimat (formerly NPD) was excluded from state party financing for a period of six years.[143]

In both successful cases, the FCC's reasoning addressed not only the political program of the parties but also their emotional methods of mobilisation.

In the case of the SRP, the Court argued that the party's public presence was deliberately designed to "strongly appeal to romantic feelings," an effect further amplified through modern techniques of mass persuasion.[144] Central to its messaging was the *Reichsidee*, the idea of a unified German order transcending regional divisions, which the court noted a "special emotional value" as an expression of the longing for national unity.[145] The party's "propaganda" followed Hitler's model: authentic emotions were exploited, resentments manufactured, and hatred deliberately incited.[146] By obscuring the true causes of Germany's hardship and shifting blame onto those working for the country's recovery, the SRP sought to erode critical judgement and prepare listeners for allegiance.[147]

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[139] BVerfGG § 46(3); §§ 32 f. Political Parties Act (Parteiengesetz, PartG).
[140] Federal Federal Elections Act (Bundeswahlgesetz, BWahlG) § 46(4) s. 1 BWahlG; § 46(4) s. 2; § 44(2)–(4) BWahlG.
[141] BVerfG, Judgment of 23 October1952 - 1 BvB 1/51; BVerfG, Judgment of 17 August 1956 - 1 BvB 2/51.
[142] BVerfG, Decision of 18 March 2003 - 2 BvB 1/01 <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2003/03/bs20030318_2bvb000101.html?nn=68080 > accessed 5 June 2026; BVerfG, Judgment of the Second Senate of 17 January 2017 - 2 BvB 1/13 -, [1]-[1010] <https://www.bverfg.de/e/bs20170117_2bvb000113en> accessed 5 June 2026.
[143] BVerfG, Judgment of 23. 01. 2024 - 2 BvB 1/19, Press Release - No. 9/2024 of 23 January 2024.
[144] BVerfG, Judgment of 23.10.1952 - 1 BvB 1/5, [21].
[145] Ibid, [235].
[146] Ibid, [248].
[147] Ibid, [249].

Similarly, in the KPD proceedings the Court paid close attention to the emotional strategies. It was pointed out the party had deliberately exaggerated "grievances, or even trivial incidents of no real significance" and presented them as proof of the illegitimacy of the entire constitutional system.[148] According to the Court, this rhetoric was aimed at provoking "emotional agitation and unclear emotions" rather than rational critique, thereby undermining the trust on which the democratic order depended.[149]

The Court further noted that the KPD's methods involved a "vulgarisation" of its political ideas, an adaptation to the "emotional needs of the masses" using slogans and appealing to sentiment. Such techniques, it stressed, were not unconstitutional in themselves, so long as the party continued to demonstrate an awareness of its role within a democratic framework.[150]

From the mobilisation techniques reminiscent of the Nazi regime in the SRP and KPD cases, the Court's focus shifted in the 2017 NPD decision to the deliberate creation of "an atmosphere of fear" that undermines equal participation in democratic will-formation.[151] Although in that case the required *Potentialität* could not be established, the reasoning shows that party bans are directed not only against concrete threats to institutions, but also against the deliberate cultivation of destabilising emotions. The Court has thus treated political strategies of emotional mobilisation and specific emotions as dangers to the democratic order that justify recourse to the defensive mechanisms of Article 21(2) GG.

Two emotional dynamics are at work here. On the one hand, certain forms of mobilisation are restricted to prevent the rise of anti-constitutional emotions. By doing so, the Court seeks to preserve the emotional preconditions of democracy: excessive emotionalisation is to be contained, the spread of certain emotions prevented, and an overall climate maintained in which democratic will-formation and participation can take place without intimidation or fear. The "enemies of the constitution" are therefore defined not only by their political/ideological content but also by their emotional style of engagement. On the other hand, party bans are themselves shaped by the emotional pressures of their time. The SRP ban was justified by the

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[148] BVerfG, Judgment of 17 August1956 - 1 BvB 2/51, [1463].
[149] Ibid, [1464].
[150] Ibid, [1468].
[151] BVerfG, Judgment of the Second Senate of 17 January 2017 - 2 BvB 1/13, Headnotes.

Interior Minister with reference to public “alarm” and “disappointment” at the re-emergence of totalitarian movements.[152]

3.3.2 Steering Public Emotion through Law

The preceding analysis confirms Sajó’s second claim that public law functions as a “social regulatory system.” While Attempts of fostering positive attachments that could sustain constitutional stability have remained comparatively abstract and restrained, post-war institutions actively sought to contain destructive passions in response to the emotional excesses of Nazism. Defensive democracy makes this explicit: party bans openly aim to neutralise destructive emotional mobilisation.

The application of these instruments depends, in turn, on the emotional pressures of their time. In Sajó’s framework, this underscores the link between foundational sentiments and emotion regulation. Defensive democracy in Germany emerged largely from the post-war fear of authoritarian relapse. When authoritarian movements resurface within the constitutional system, they also reactivate the sentiment of shame tied to the Nazi past. In moments of crisis, these emotions return as constitutional memories, prompting renewed efforts at emotion control. Party bans can therefore be understood not only as products of such sentiments, but also as their reenactment.

This observation raises the question of what these dynamics imply for democratic resilience: Can constitutional law actively stabilize democracy through emotion regulation and help prevent democratic backsliding, or does it risk reinforcing it, or perhaps both at once?

[152] Annette Wilmes, ‘Staatsfeindlich, Verfassungswidrig - Parteiverbote in Der Deutschen Geschichte’ (*Deutschlandfunk Kultur* 2 March 2016) <https://www.deutschlandfunkkultur.de/staatsfeindlich-verfassungswidrig-parteiverbote-in-der-100.html> accessed 5 June 2026.

4. Implications of Sajó's Theory for German Law

4.1 Sajó Confirmed: Constitutional Sentiments in Today's Germany

The analysis above shows that Sajó's framework can be usefully applied to the German case. Although transformed over time, sentiments of fear and shame decisively shaped the constitutional design of 1949 and have left a lasting imprint on the jurisprudence of the FCC.

Survey data indicates their continued resonance, with a significant percentage of respondents affirming that the Nazi era still shapes national self-understanding and Germany's special responsibility for peace and international cooperation.[153] This is most evident in moments of disruption. Following the 2019 Halle synagogue attack, President Steinmeier spoke of a day of "shame and disgrace," echoing President Heuss's invocation of *Kollektivscham* in the republic's founding years.[154] Open expressions of antisemitism regularly provoke strongly shame-laden reactions in the German public.

Fear, too, persists: In 2024, a significant majority of respondents stated that they believe democracy is currently endangered.[155] The rise of the AfD has been widely perceived as a threat, sparking the largest civil protests in the history of the federal republic. The protests united under the slogan "*Nie wieder ist jetzt"* ("Never again is now"), a phrase that has long been associated with the lessons of the Shoah.[156] In parliamentary debates on a potential party ban, parliamentarians explicitly invoked Germany's "historic responsibility to open the door to Karlsruhe", [157] and the Bundestag's recent decision to strengthen the FCC was likewise

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[153] SINUS Institut, '80 Jahre Nach Kriegsende: Deutschland Zwischen Sorge, Erschütterung Und Ermüdung' (*80 Jahre nach Kriegsende: Deutschland zwischen Sorge, Erschütterung und Ermüdung* 1 May 2025) <https://www.sinus-institut.de/media-center/presse/80-jahre-ende-zweiter-weltkrieg> accessed 5 June 2026.

[154] Der Bundespräsident, 'Federal President Frank-Walter Steinmeier Gives a Statement on the Attack on the Synagogue in Halle (Saale) on 10 October 2019' (*desbundespraesident.de* 10 October 2019) <https://www.bundespraesident.de/SharedDocs/Downloads/DE/Reden/2019/10/191010-Statement-Halle-Englisch.pdf?__blob=publicationFile&v=2> accessed 5 June 2026.

[155] SINUS Institut, '80 Jahre Nach Kriegsende: Deutschland Zwischen Sorge, Erschütterung Und Ermüdung' (*80 Jahre nach Kriegsende: Deutschland zwischen Sorge, Erschütterung und Ermüdung* 1 May 2025) <https://www.sinus-institut.de/media-center/presse/80-jahre-ende-zweiter-weltkrieg> accessed 5 June 2026.

[156] tagesschau, 'Demos Gegen Rechtsextremismus: Der Bundesweite Protest Geht Weiter' (*tagesschau.de* 27 January 2024) <https://www.tagesschau.de/inland/innenpolitik/demonstrationen-gegen-rechts-110.html> accessed 5 June 2026.

[157] Deutscher Bundestag, 'Deutscher Bundestag - Hitziger Schlagabtausch Zu AfD-Verbotsanträgen' (*Deutscher Bundestag* 2025) <https://www.bundestag.de/dokumente/textarchiv/2025/kw05-de-afd-1042014> accessed 5 June 2026.

justified by reference to Weimar's failure to defend democracy, a direct continuation of the fear that originally shaped the Basic Law's defensive architecture.[158]

These examples illustrate how constitutional law continues to interact with public emotions in the feedback loop that Sajó describes: founding sentiments are stabilised, reframed, and continuously shape public life, while at times gaining renewed force in response to contemporary crises. They also confirm Sajó's observation that in a post-totalitarian society, signs of foundational systemic injustice can trigger renewed waves of shame and fear.[159]

As Sajó emphasises, public sentiments are in constant formation.[160] In Germany, fear of the state being overwhelmed by migration has crystallised into one of the population's dominant anxieties, with surveys showing that a relative majority call for immigration to be restricted. This illustrates that collective emotions such as migration anxiety are not merely social moods but are translated into legal demands, confirming Sajó's insight that constitutional law is continuously shaped by shifting sentiments and their regulation.

German constitutional acceptance has long rested on sentiments of fear and responsibility. Yet this foundation is not fixed; shifts in public sentiment require constant attentiveness to ensure that institutions and doctrines retain their societal resonance.

4.2 The Limits of Law as Emotion Regulation

As for the second aspect of Sajó's theory put to the test in this paper, the central question is whether law can effectively regulate emotions to protect the constitutional democratic order. The analysis in 3.3. shows that German public law engages in emotion control, especially through party bans. Yet it is what eludes law's control, that proves Sajó's theory most illuminating: The unintended emotional "side-effects" of regulation. Instruments designed to suppress destructive passions often provoke new ones (such as anger, alienation, resentment) or enforce existing ones in the targeted group, which may ultimately undermine the democratic resilience they were meant to secure.

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158 tagesschau.de, 'Bundestag: Bundesverfassungsgericht Wird Besser Geschützt' (*tagesschau.de* 19 December 2024) <https://www.tagesschau.de/inland/innenpolitik/bundestag-verfassungsgericht-schutz-100.html> accessed 5 June 2026.

159 András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 290.

160 Ibid, 36, 41-42.

The ongoing debate about banning the AfD illustrates this dilemma directly. Momentum grew dramatically after an investigative report revealed that AfD members had met to discuss a "remigration" plan, triggering the largest civil protests since 1945.[161]

By January 2025, the Bundestag debated formal motions to initiate proceedings before the FCC.

Despite this, the AfD has become the second-strongest party in Germany, which makes any ban politically explosive.[162] Germany's domestic intelligence service (BfV) designated the AfD as a confirmed right-wing extremist organisation in 2025.[163]

Central to the party's strategy is mobilisation through a long-cultivated victimhood narrative: the party consistently portrays itself as the silenced representative of the "Volk," allegedly persecuted by "the establishment" and the media.[164] A ban procedure potentially feeds into this narrative as delaying a ban or an unsuccessful procedure could further erode trust in democratic institutions.[165]

What is meant to defend democracy could instead strengthen the party's emotional grip on its supporters, deepening feelings of betrayal, persecution and exclusion. The reactions to BfVs

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[161] Marie Bröckling and Bianca Poersch, 'Wie Die Debatte Um Ein AfD-Verbot Ins Rollen Kam – Eine Chronik' (*correctiv.org* 6 May 2025) <https://correctiv.org/aktuelles/debatte-um-afd-verbot/2025/05/06/afd-verbot-zeitstrahl/> accessed 5 June 2026 ; Marcus Bensmann et al, 'Secret Plan against Germany' (*correctiv.org* 15 January 2024) <https://correctiv.org/en/top-stories/2024/01/15/secret-plan-against-germany/> accessed 5 June 2026; Ute Frevert, *Verfassungsgefühle* (Wallstein Verlag 2024), 236.

[162] Deutschen Bundestag, 'Sitzverteilung des 21. Deutschen Bundestages' <https://www.bundestag.de/sitzverteilung> accessed 5 June 2026.

[163] Paul Kirby, 'AfD Classified as Extreme-Right by German Intelligence' *BBC* (2 May 2025) <https://www.bbc.com/news/articles/cwy6zk9wkrdo> accessed 5 June 2026; Maik Baumgärtner and others, 'Compendium of Extremism: A Look inside the Report Documenting the AfD's Right-Wing Radicalism' (*Spiegel.de* 14 May 2025) <https://www.spiegel.de/international/germany/compendium-of-extremism-a-look-inside-the-report-documenting-the-afds-right-wing-radicalism-a-de2ab5b5-623e-4100-addb-d1e44c298305> accessed 5 June 2026.

[164] Damien McGuinness, 'Germany's Far-Right AfD: Victim or Victor?' *BBC* (2 September 2019) <https://www.bbc.com/news/world-europe-49549670> accessed 5 June 2026; Fabian Reinbold, 'Politische Debatte Über Die AfD: Und Täglich Grüßt Die Opferrolle' (*DIE ZEIT* 20 May 2025) <https://www.zeit.de/politik/deutschland/2025-05/politische-debatte-afd-opferrolle-umgang-cdu-5vor8> accessed 5 June 2026; Anne Siebelhoff, 'Ethnischer Volksbegriff: Was Ist so Schlimm Daran?' (*FAZ.NET* 28 May 2025) <https://www.faz.net/aktuell/politik/inland/ethnischer-volksbegriff-was-ist-so-schlimm-daran-110504389.html> accessed 5 June 2026.

[165] Marie Bröckling, 'AfD-Verbot: Pro Und Contra' (*correctiv.org* 7 May 2025) <https://correctiv.org/aktuelles/debatte-um-afd-verbot/2025/05/07/pro-und-contra-afd-verbot/> accessed 5 June 2026.

2025 report illustrate this dynamic. Party leaders denounced the decision as "clearly politically motivated" and a "severe blow to German democracy," claiming they were being "discredited and criminalised".[166] They have also responded with legal action.[167]

It follows that when law operates as an emotion-regulating tool, its effectiveness depends not only on legal design but also on legitimacy within the emotional landscape of society. When regulation is perceived as repressive or overly top-down, it may fuel precisely the emotions it seeks to suppress. Therefore, initiatives such as party bans may diffuse short-term escalation, but they risk contributing to long-term polarisation and democratic distrust.

4.3 Counter-emotions

The preceding analysis indicates that destructive emotions cannot simply be "banned away", just as one may prohibit a party but not its voters. Sajó therefore argues that "to protect some of the values of constitutionalism that are threatened by emotional fanaticism and fanatics' emotion (...), one can rely on other emotions or other combinations of emotion".[168] The question is whether such counter-emotions can be identified and mobilised.

4.3.1 Constitutional patriotism

One influential German response has been constitutional patriotism. However, while most Germans view the Basic Law positively, it remains abstract for many: fewer than half consider it important in their everyday lives, and only one in three support an annual holiday in its honour.[169] Scholars have voiced scepticism. Möllers concludes that "there is no constitutional

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[166] Paul Kirby, 'AfD Classified as Extreme-Right by German Intelligence' *BBC* (2 May 2025) <https://www.bbc.com/news/articles/cwy6zk9wkrdo> accessed 5 June 2026.

[167] Maik Baumgärtner et al, 'Compendium of Extremism: A Look inside the Report Documenting the AfD's Right-Wing Radicalism' (*Spiegel.de* 14 May 2025) <https://www.spiegel.de/international/germany/compendium-of-extremism-a-look-inside-the-report-documenting-the-afds-right-wing-radicalism-a-de2ab5b5-623e-4100-addb-d1e44c298305> accessed 5 June 2026; For recent developments see: Paulin Kola 'AfD hails court injunction on 'extremist' label as victory' *BBC* (26 February 2026) <https://www.bbc.com/news/articles/clyg10ek7r7o> accessed 5 June 2026; Verwaltungsgericht Köln, Beschluss vom 26.02.2026-13 L 1109/25 <https://nrwe.justiz.nrw.de/ovgs/vg_koeln/j2026/13_L_1109_25_Beschluss_20260226.html> accessed 5 June 2026.

[168] András Sajó, 'Emotions in Constitutional Law' in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023), 74.

[169] SINUS Institut and YouGov, 'SINUS-Studie Anlässlich „75 Jahre Grundgesetz"' (2024) <https://www.sinus-institut.de/media-center/presse/75-jahre-grundgesetz > accessed 5 June 2026.

patriotism in the Federal Republic".[170] Schönberger calls it an "elite concept" and "overrated," insufficient to produce the broad affective identification that democratic resilience requires.[171] Among AfD voters, support for adopting an entirely new constitution is higher than in any other group, and trust in constitutional organs is likewise lowest.[172] This suggests that constitutional patriotism resonates least where a counter-emotion would be most needed.

4.3.2 Democratic/Undemocratic Emotions

If constitutional patriotism proves insufficient as a counter-emotion, this raises the broader question: are there specifically democratic or undemocratic emotions? Heidenreich proposes three criteria for distinguishing democratic from undemocratic emotions: by their content, by their origin (top-down versus bottom-up), and by their status in the public sphere. He considers the last criterion decisive: emotions can be considered democratic when they remain open to justification and transformation in public debate, and undemocratic when they close off contestation by claiming undeniability.[173]

Accordingly, most emotions cannot be categorised as democratic or undemocratic in themselves. As the analysis above has shown, fear may safeguard democracy by motivating vigilance, just as shame can reinforce responsibility for past injustice, thereby strengthening democratic norms. The same applies to anger: while Nussbaum sees it as a threat to democratic institutions, Srinivasan highlights its potential as a valuable political driver for marginalised groups.[174] In Germany, Specht has suggested that anger at attempts to erode the "Brandmauer" ("firewall against the far-right") can be a healthy sign of democratic attachment.[175] Anger, shame or fear can thus serve democratic functions—when they remain open to justification and contestation.

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[170] Christoph Möllers, *Das Grundgesetz - Geschichte Und Inhalt* (4th edn., CH BECK 2024), 121.

[171] Peter Neumann, 'Interview with Sophie Schönberger: "Der Verfassungspatriotismus Wird Maßlos Überschätzt"' (*DIE ZEIT* 3 June 2023) <https://www.zeit.de/kultur/2023-05/sophie-schoenberger-demokratie-verfassungsrecht> accessed 5 June 2026.

[172] Hans Vorländer et al., '75 Jahre Grundgesetz. Einstellungen Zu Verfassung Und Demokratie in Deutschland MIDEM Studie 2024-2' (*Mercator Forum Migration und Demokratie (MIDEM)* 7 May 2024) <https://forum-midem.de/studie-75-jahre-grundgesetz/> accessed 5 June 2026.

[173] Felix Heidenreich, 'Gefühle Ins Recht Setzen: Wann Sind Politische Emotionen (Noch) Demokratisch?' (2014) 23 JZP 575.

[174] Martha Nussbaum, *Anger and Forgiveness: Resentment, Generosity, Justice* (Oxford University Press 2016); Amia Srinivasan, 'The Aptness of Anger' (2018) 26 JPP 123.

[175] Jule Specht as cited in Paul Blickle and others, 'Polarisierung: Wie Tief Deutschland Emotional Gespalten Ist' (*DIE ZEIT* 13 May 2025) <https://www.zeit.de/politik/deutschland/2025-05/gesellschaftliche-spaltung-polarisierung-ideologisch-affektiv-asyl-klima> accessed 5 June 2026.

Yet one emotion stands out as problematic: resentment.[176] Unlike other emotions, which are ambivalent, resentment[177] tends to erode rather than sustain democratic contestation.[178]

As Koncewicz argues, resentment turns "agonistic politics", where disagreement aims at the betterment of the system through contestation, into "antagonistic politics",[179] where outcomes are rejected by denying the legitimacy of liberal democracy. In agonistic politics, disagreement improves the system through contestation. In antagonistic politics, outcomes are rejected by denying the legitimacy of liberal democracy. Resentful dissent thus instrumentalises democratic procedures to erode them from within. He insists, resentment plays a central role in democratic backsliding. It is fuelled by anger and anxiety and, at the same time, reinforces them. This creates a cycle that populist actors can exploit to consolidate power and undermine democratic institutions.[180]

This dynamic is visible in the mobilisation strategies of the AfD. No other party emotionalises voters as strongly.[181] It systematically cultivates resentment by portraying itself as the silenced representative of the "true people" while delegitimising opponents. The BfV's report on the AfD, originally classified as confidential, was made public by several media outlets. It provides a textbook case of antagonistic politics, citing remarks by AfD officials such as: "The cartel parties are dissolving our Germany like a bar of soap under a stream of warm water!" or "If we have a government that is waging war against us, then we will wage war against this government. We have come to drive these people out of their seats."[182] The reaction to the

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[176] Tomasz Tadeusz Koncewicz and Logan Strother, 'The Role of Citizen Emotions in Constitutional Backsliding – Mapping out Frontiers of New Research' (*Verfassungsblog* 21 March 2019) <https://verfassungsblog.de/the-role-of-citizen-emotions-in-constitutional-backsliding-mapping-out-frontiers-of-new-research/> accessed 5 June 2026.
[177] Used here to mean the "indignation deriving from the perception of having been treated unfairly".
[178] Tomasz Tadeusz Koncewicz and Logan Strother, 'The Role of Citizen Emotions in Constitutional Backsliding – Mapping out Frontiers of New Research' (*Verfassungsblog* 21 March 2019) <https://verfassungsblog.de/the-role-of-citizen-emotions-in-constitutional-backsliding-mapping-out-frontiers-of-new-research/> accessed 5 June 2026.
[179] Ibid.
[180] Ibid.
[181] Paul Blickle et al, 'Polarisierung: Wie Tief Deutschland Emotional Gespalten Ist' (*DIE ZEIT* 13 May 2025) <https://www.zeit.de/politik/deutschland/2025-05/gesellschaftliche-spaltung-polarisierung-ideologisch-affektiv-asyl-klima> accessed 5 June 2026; Einstein Foundation Berlin and Humboldt University Berlin, 'How Civil Society Fosters Social Cohesion Coping with Affective Polarization' (*Coping with Affective Polarization* 20 August 2025) <https://affective-polarization.hu-berlin.de/> accessed 5 June 2026 .
[182] Maik Baumgärtner and others, 'Compendium of Extremism: A Look inside the Report Documenting the AfD's Right-Wing Radicalism' (*Spiegel.de* 14 May 2025) <https://www.spiegel.de/international/germany/compendium-of-extremism-a-look-inside-the-report-documenting-the-afds-right-wing-radicalism-a-de2ab5b5-623e-4100-

report itself further illustrates this antagonistic dynamic, as the AfD portrayed its publication as proof of political persecution.

Research shows that many AfD supporters perceive themselves as excluded by the establishment, while in practice they reject other groups just as intensely.[183] Here emotions no longer sustain disagreement but harden antagonism.

This points to a broader phenomenon identified in political science as *affective polarisation.*[184] It arises when emotions become bound to group identities. In such a climate, groups cease to engage in dialogue. Emotions that might otherwise sustain democratic contestation are transformed into markers of belonging, and disagreement shifts into outright rejection of pluralism and democratic procedures.[185]

Strongly polarised citizens display significantly greater mistrust of institutions, and, in extreme cases, hostility and violence toward political opponents. This weakens social cohesion and corrodes a society's democratic self-understanding.[186] In Germany, affective polarisation is on the rise, though the trend has developed more slowly than in countries such as the United States.[187]

This analysis shows why Sajó's proposal of cultivating counter-emotions proves difficult: while fear, anger, or shame may under certain conditions sustain democracy, resentment pushes politics from agonism to antagonism, leading to affective polarisation. The central challenge, then, is not to cultivate counter emotions, but to prevent destructive ones from closing contestation which leads to the question of what law can and cannot, contribute.

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addb-d1e44c298305> accessed 5 June 2026. For the full report see: https://assets.cicero.de/2025-05/Geheimgutachten_Teil%20A.pdf> accessed 5 June 2026.

183 Paul Blickle and others, 'Polarisierung: Wie Tief Deutschland Emotional Gespalten Ist' (*DIE ZEIT* 13 May 2025) <https://www.zeit.de/politik/deutschland/2025-05/gesellschaftliche-spaltung-polarisierung-ideologisch-affektiv-asyl-klima> accessed 5 June 2026.

184 Swen Hutter et al., 'Dynamics of Political Systems Center for Civil Society Research Coping with Affective Polarization: A Research Program' (2025) <https://bibliothek.wzb.eu/pdf/2025/zz25-602.pdf> accessed 5 June 2026, 4f.

185 Ibid.

186 Paul Blickle at al., 'Polarisierung: Wie Tief Deutschland Emotional Gespalten Ist' (*DIE ZEIT* 13 May 2025) <https://www.zeit.de/politik/deutschland/2025-05/gesellschaftliche-spaltung-polarisierung-ideologisch-affektiv-asyl-klima> accessed 5 June 2026.

187 Ibid.

4.5 What Law Can Do, What It Cannot Do—and What It Ought to Do

The collapse of the reason–emotion dichotomy does not by itself indicate normative conclusions. The fact that law is inevitably intertwined with emotion does not mean that it should be used as a tool of emotion control. Any normative claim must therefore take account of the Basic Law's structural limits and the liberal commitment to pluralism.

The Basic Law itself sets clear limits on how far public law may regulate emotions. As the FCC emphasised in the 2017 NPD judgment and again in 2024 on party financing, exclusion from democratic competition is permissible only where what is "indispensable for guaranteeing free and democratic coexistence is denied."[188] The constitution rests on a minimal consensus around human dignity, democracy, and the rule of law.[189] These are deliberately abstract principles that provide a common basis for conflict or "agonistic politics" rather than prescribing harmony.[190] This boundary derives, not least, from the primacy of human dignity: the Basic Law reverses the National Socialist dictum that the individual is nothing and the state everything, affirming instead that the individual precedes the state.[191]

Within these limits, law can support efforts to counter polarisation: above all by emphasis on fair procedure, transparency, accountability, and civic equality protections to counter mistrust, feelings of exclusion and unfairness. Militant democracy can serve as a last resort, but its severity and potential side effects underscore the need for caution. Whether and how law can play a more active role in countering affective polarisation remains an open question for future research. Since law reaches its limits here, the task lies with politics: Political actors must address fear, anger, and resentment directly by acknowledging grievances while preventing their capture by anti-democratic narratives. Some argue that fostering empathy could serve as a corrective, helping to sustain trust and dialogue.[192]

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[188] BVerfG, Judgment of the Second Senate of 17 January 2017 - 2 BvB 1/13 -, [515].

[189] Ibid, [529].

[190] Judith Froese, 'Verfassungspatriotismus als Bürgerpflicht' (2024) 79(1) JZ 426; Tomasz Tadeusz Koncewicz and Logan Strother, 'The Role of Citizen Emotions in Constitutional Backsliding – Mapping out Frontiers of New Research' (*Verfassungsblog* 21 March 2019) <https://verfassungsblog.de/the-role-of-citizen-emotions-in-constitutional-backsliding-mapping-out-frontiers-of-new-research/> accessed 5 June 2026.

[191] Hans D Jarass, Martin Kment and Bodo Pieroth, *Grundgesetz Für Die Bundesrepublik Deutschland* (18th edn., CHBECK 2024), Art. 1(1)–(5).

[192] Swen Hutter and others, 'Dynamics of Political Systems Center for Civil Society Research Coping with Affective Polarization: A Research Program' (2025) <https://bibliothek.wzb.eu/pdf/2025/zz25-602.pdf> accessed 5 June 2026.

In this sense, constitutional law cannot substitute for politics. Its strength lies in rationalising stabilising and preserving space for political debate, or as Möllers has put it, constitutional law should open spaces (for politics) rather than close them.[193]

There is irony in reaching this conclusion after a paper devoted to emotions in constitutional law. Yet, it is precisely the close study of their interplay that makes the limits of law's role visible. Without acknowledging law's embeddedness in emotion, this outcome could not have been reached.

Finally, there remains the concern of legal manipulation.[194] This should not be overlooked, yet it is precisely the absence of knowledge that creates the greatest vulnerability. Ignoring the emotional dimension of law does not neutralise it; it only leaves the terrain open to those willing to manipulate it. The far right and populist movements have long understood the power of emotions in mobilising supporters and undermining trust in institutions.[195] Better knowledge of how emotions and law interact can therefore serve as a safeguard.

5 Conclusion

Building on András Sajó's theory of constitutional sentiments, this paper examined the relationship between law and emotions in German constitutional law. The German case confirms Sajó's descriptive claims while also exposing their limits. Foundational sentiments of fear and shame shaped the Basic Law and continue to resurface in moments of crisis, while other emotions such as anxiety about migration press for legal adaptation. Yet attempts to regulate emotions through instruments like party bans reveal clear limits, as such measures risk fuelling resentment and promoting affective polarisation which erode democratic self-understanding and trust in institutions. Neutralising anti-constitutional or anti-democratic emotions with counter-emotions proves difficult to realise, since even their categorisation is not always clear. The Basic Law's strength lies not in manufacturing harmony but in preserving

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[193] Christoph Möllers, *Das Grundgesetz - Geschichte Und Inhalt* (4th edn., CH BECK 2024), 125.
[194] András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 9.
[195] Tomasz Tadeusz Koncewicz and Logan Strother, 'The Role of Citizen Emotions in Constitutional Backsliding – Mapping out Frontiers of New Research' (*Verfassungsblog* 21 March 2019); Philip Faigle and Anaïs Kaluza, 'Jule Specht: "Wer Emotional Polarisiert Ist, Hält Andere Für Dumm, Herzlos, Böse"' (*DIE ZEIT* 13 May 2025) <https://www.zeit.de/gesundheit/2025-05/jule-specht-polarisierung-meinung-empathie-psychologie> accessed 5 June 2026.

space for contestation through dignity, pluralism, and procedural fairness. It cannot substitute for politics, but it can help stabilise democratic coexistence and guard against manipulation.

Three central insights follow. First, awareness of emotions is crucial for understanding constitutional acceptance. Shifts in public sentiment affect the societal acceptance of constitutional principles and institutions.

Second, the emotional layer of measures such as party and symbol bans highlights the risk of side effects. More regulation is not always better: attempts to suppress emotions can backfire. The AfD ban debate illustrates this dilemma: such a measure could only achieve its intended effect if embedded in broad societal support. Legal Scholarship should clarify these stakes rather than substitute for political decision-making.

Third, and most importantly, since emotions cannot be banned away, they must be addressed politically. The role of constitutional law is to preserve open democratic contestation; its strength lies in rationalising and stabilising political conflict through fair procedure, transparency and accountability. Politics, by contrast, must address resentment, fear and anger more directly to prevent further affective polarisation.

Hand's reminder that liberty "lies in the hearts of men and women" remains relevant.[196] No constitution or court can preserve democracy if its emotional foundations erode. How citizens can be brought to take democracy to heart remains an open and urgent question. What is clear is that this cannot be achieved through top-down regulation; in Germany's democratic order, the task ultimately lies with the people themselves, from whom all state authority derives.[197]

Recognising constitutional law's emotional dimension is not a call for more assertive intervention, but for a jurisprudence attentive to its social embeddedness. By making explicit the interplay between constitutional institutions and collective emotions, legal scholarship can strengthen democratic resilience and help prevent constitutional mechanisms from becoming instruments of emotional manipulation.

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[196] Learned Hand, '"The Spirit of Liberty"' (1944) <https://www.thefire.org/research-learn/spirit-liberty-speech-judge-learned-hand-1944> accessed 5 June 2026.
[197] GG Art. 20(2).

Empire at the Border: Evaluating How Colonial Legal Logics Shape British Immigration Law, 1948–2025

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Abstract

This article examines how contemporary British immigration law continues to operate through legal logics inherited from the colonial era. Challenging the dominant narrative that the 2018 Windrush scandal was a bureaucratic error, it argues instead that such exclusions are systemic and rooted in Britain's imperial past. Through a postcolonial legal analysis inspired by Spivak's method of reading 'against the grain,' the study examines how colonial techniques, legal dualism, bureaucratic regulation, and the performance of legal neutrality have been incorporated into domestic immigration law since 1948. Drawing on case studies from Malawi, Zimbabwe, and Burma, it shows how colonial governance established racialised legal hierarchies that were repurposed in post-war nationality and immigration statutes.

The article critically analyses legislation from 1948 to 1981, the Windrush scandal, and policies such as the 2025 Immigration White Paper to demonstrate the ongoing operation of what Stoler terms 'imperial duress.' It concludes that British immigration law has not broken with the empire but internalised its methods, embedding exclusion within legal form. Recognising the specifically colonial nature of this persistence offers a clearer understanding of how law legitimates racialised exclusion and why meaningful reform requires confronting, not erasing, the imperial foundations of the modern British state.

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1 Introduction

The 2018 Windrush scandal, in which long-settled Commonwealth citizens were wrongly classified as illegal immigrants, is often described as an administrative error. This article argues, instead, that Windrush was the predictable outcome of Britain's post-imperial legal regime — a regime that continues to govern migration through inherited colonial logics.

Windrush revealed not a malfunctioning system but one functioning as designed. Evidentiary burdens, bureaucratic indifference, and administrative exclusion echoed techniques historically used to govern colonised populations and later repurposed to regulate postcolonial migrants within Britain.

This study asks: To what extent have colonial-era practices of imperial governance been repurposed in Britain's post-1948 immigration framework, and how does recognising their colonial character help clarify the persistence of exclusions in contemporary law? While race remains central to immigration control, colonialism is understood here as a broader legal structure that governs through both exclusion and conditional inclusion.

Adopting a postcolonial legal approach inspired by Gayatri Spivak's call to 'read archives against the grain,' this article treats law, policies and administrative practices as historically situated in legal forms that continue to reproduce exclusion under the guise of neutrality.

This article analyses colonial case studies in which racialised legal structures were developed and refined, the legislation that reconfigured the empire's hierarchy, and how this transpired in the Windrush scandal. The article then turns to the present, assessing how recent policy developments mirror colonial-empire law.

Ultimately, this article argues that British Immigration law has not broken with its colonial past; it has internalised it. Empire endures not as memory, but as method.

2 Colonial Foundations

Contemporary British Immigration law reproduces governing techniques first refined within imperial administration, as evidenced by colonial case studies such as Malawi, Southern Rhodesia (Zimbabwe), and Burma. It identifies three interrelated mechanisms: legal dualism, bureaucratic regulation and performative legalities.

2.2 Mechanism I: Legal Dualism Abroad

Colonial rule rested upon what Mamdani calls a *bifurcated state*: a legal system that separated colonisers, governed by metropolitan law, from colonised populations subjected to so-called customary authority.[1] While presented as recognition of cultural difference, scholars like Chatterjee argue this dual structure was designed to institutionalise racial hierarchy within the legal order.[2]

In colonial Malawi, this dualism was reflected in separate court systems. The 1928 Thangata Ordinance transformed reciprocal communal labour into a coercive regime enforced through native courts. African tenants were compelled to provide labour for European estate owners, with breaches punishable by imprisonment or forced labour, and with minimal procedural protections.[3] European settlers, by contrast, remained subject to common law courts that retained recognised legal safeguards.

Legal historians have shown that 'customary law' was frequently a colonial construction rather than a preservation of indigenous practice. As Merry observes, what colonial authorities labelled customary law often reflected selected local practices reinterpreted to fit administrative priorities.[4] Archival records from Malawi illustrate this process: colonial officials instructed native courts to enforce labour obligations as customary practice, even when local chiefs

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[1] Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (PUP 1996), 18–19.
[2] Partha Chatterjee, *The Nation and Its Fragments: Colonial and Postcolonial Histories* (PUP 1993), 16–17.
[3] Martin Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (CUP 1985), 91–98.
[4] Sally Engle Merry, 'Law and Colonialism' (1991) 25(4) LSR 889, 897.

challenged that characterisation, emphasising that maintaining estate labour was necessary for 'order and progress.'[5]

Some colonial administrators justified dual legal systems as a form of pragmatic pluralism. Lugard's theory of indirect rule portrayed customary authority as a means of preserving local governance structures while facilitating imperial administration.[6] Yet archival correspondence demonstrates that colonial officials actively shaped customary courts and judicial appointments to secure outcomes favourable to settler economic interests, undermining any claims that the system merely recognised pre-existing legal traditions.[7]

This differentiation between formal legal status and practical access to rights provides an important precedent for modern immigration control. Later British legislation reproduced comparable forms of stratified legal status, separating nationality from substantive rights of entry and residence.

2.3 Mechanism II: Bureaucratic Regulation of Everyday Life

Colonial administration extended beyond the courtroom into everyday life, where documentation, registration, and surveillance functioned as mechanisms of racial governance through bureaucratic control.[8]

These bureaucratic practices became particularly visible in colonial Southern Rhodesia through widespread 'vagrancy swoops' and mandatory pass-document regimes. Colonial officials regularly conducted street-level operations, demanding that African individuals produce identification papers or evidence of formal employment.[9] As in Malawi, despite being officially presented as necessary measures to ensure public order, archival records reveal their deeper function: maintaining a steady supply of controlled labour for white-owned farms and industries. *The Native Registration Act 1936* mandated that all adult African males carry

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[5] John McCracken, *A History of Malawi, 1859–1966* (James Currey 2012), ch 9.
[6] Frederick Lugard, *The Dual Mandate in British Tropical Africa* (5th edn, Frank Cass 1965), 203–204.
[7] Partha Chatterjee, *The Nation and Its Fragments: Colonial and Postcolonial Histories* (PUP 1993), 91–98.
[8] Achille Mbembe, On the Postcolony (UCP 2001), 25–26; Didier Fassin, *Enforcing Order: An Ethnography of Urban Policing* (Polity 2013), 4.
[9] Jocelyn Alexander, ''Hooligans, Spivs and Loafers'? The Politics of Vagrancy in 1960s Southern Rhodesia' (2006) 47(1) JAH 103.

registration certificates, known as *situpas*, which recorded the bearer's employer, residence and tribal affiliation.[10] Government reports from 1956 show over 40,000 arrests under vagrancy laws, mainly for failure to produce registration certificates.[11] This logic echoed in modern immigration controls such as carrier sanctions, landlord checks, and documentation requirements within the UK's hostile environment.

2.4 Mechanism III: Rule-of-Law Theatre

Colonial authority further relied on performances of legality that masked coercion as justice. As illustrated in colonial Burma, British officials regularly employed detention without trial, ostensibly justified by claims of protecting public order.[12] Despite the lack of genuine judicial independence, colonial courts staged elaborate rituals.[13]

Such theatrics sought to publicly demonstrate Britain's commitment to law and fairness, even as detainees faced indefinite imprisonment without meaningful recourse.[14] These hearings expose a fundamental contradiction at the heart of colonial justice: courtroom decorum and procedural formalism coexisted seamlessly with the arbitrary exercise of state power. The performance of legality was not incidental, but a core technique of imperial rule, which Brown describes as the persistent restatement of the rule of law amid systemic judicial failure in Burma.[15]

Although some colonial officials pointed to acquittals in criminal cases as evidence of judicial fairness, the *Report on the Police Administration of Burma (RPAB)* reveals a more complex picture: courts were routinely criticised by colonial police for demanding high standards of evidence that led to the release of defendants deemed 'undoubtedly guilty,' prompting officers to resort to preventative detention in frustration.[16] Far from indicating genuine impartiality, these outcomes exposed the contradiction of a legal system that performed procedural rigour

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[10] *Native Registration Act 1936* (Southern Rhodesia) Ordinance No 21 of 1936.
[11] Teresa Barnes, *We Women Worked So Hard: Gender, Urbanisation, and Social Reproduction in Colonial Harare, Zimbabwe, 1930–1956* (Heinemann 2000), 46.
[12] Ian Brown, 'Law and Order, the Rule of Law, and the Legitimation of the Colonial Presence in Late British Burma' (2022) 65 HJ 1081, 1088.
[13] Ibid, 1090.
[14] Ibid, 1091–92.
[15] Ibid.
[16] *Report on the Police Administration of Burma* 1919, 17; 1924, 13; 1936, 50.

while simultaneously enabling arbitrary state power through parallel administrative mechanisms. Brown further demonstrates that colonial courts in Burma were plagued by perjury, witness intimidation, and police corruption. At the same time, the 1923 Crime Enquiry Committee reflected a racialised view of Burmese defendants that legitimised rather than challenged imperial domination. [17]

Colonial legal performance provides a lens for Britain's later nationality and immigration legislation. The British Nationality Acts (1948–71) and Windrush apologies echoed colour-blind fairness, while reproducing racialised exclusion first refined in colonial courtrooms.

Limited to three colonial sites, this section draws on their archival richness and clear doctrinal continuity with Britain's contemporary immigration regime to trace imperial legal logics into the present.

This section has traced how colonial techniques, legal dualism, bureaucratic regulation, and rule-of-law theatre were developed to manage racialised subjects. These forms of rule, first imposed abroad, re-emerged in statutes and practices that continue to structure racialised exclusion in Britain today. The next section turns from the colonial archive to the post-war legislature, examining how lawmakers redefined citizenship.

3 Building the Post-Imperial Border

In the decades following the formal end of the empire, Britain faced the challenge of redefining national identity, citizenship, and belonging in a rapidly changing geopolitical context. Immigration and nationality laws became a key site through which the state negotiated its retreat from empire while reasserting control over the racial and political boundaries of Britishness. This section examines a series of legislative interventions, the British Nationality Act 1948, the Commonwealth Immigrants Acts of 1962 and 1968, the Immigration Act 1971, and the British Nationality Act 1981, not simply as administrative responses to migration, but as instruments of racial governance. These laws allowed Britain to manage the consequences

[17] Ian Brown, 'Law and Order, the Rule of Law, and the Legitimation of the Colonial Presence in Late British Burma' (2022) 65 HJ 1081, 1087; *Report of the Crime Enquiry Committee* (Maymyo, 1923), 16.

of decolonisation without dismantling the imperial logics that had long structured its relationship to colonial subjects.

Framed as neutral, these laws used ancestry, documentation, and administrative discretion to redefine non-white Commonwealth citizens as outsiders, even those with British passports. They transformed the promise of shared post-imperial citizenship into a stratified system of belonging, where whiteness and ties to settler colonies shaped inclusion. In doing so, the law became a tool for reproducing colonial hierarchies within a national framework.

3.1 The British Nationality Act 1948

The British Nationality Act (BNA) 1948 created the legal status of the Citizen of the United Kingdom and Colonies (CUKC), granting a single, shared citizenship to subjects across Britain and its former imperial territories.[18] At first glance, the Act appeared to enshrine ideals of equality and mobility, an inclusive gesture aimed at consolidating imperial ties in the post-war era. Yet this promise of universal citizenship was deeply misleading. El-Enany argued that the Act's minimalist form was not ideologically neutral; it was deliberately sparse, offering no substantive protections against racial discrimination and leaving broad administrative discretion in place.[19]

This disjuncture between formal legal equality and practical racial differentiation was not oversight but the domestic re-inscription of colonial legal dualism. While all Citizens of the United Kingdom and Colonies (CUKCs) were equal in law, they were treated unequally. Historical records show that white migration from settler dominions such as Australia, Canada, and New Zealand was not only welcomed but also described as 'culturally similar,' and that relocating to the UK faced minimal bureaucratic obstacles.[20] In contrast, Black and Asian Commonwealth migrants faced restrictive screening, bureaucratic obstacles, and informal quotas.[21]

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[18] British Nationality Act 1948, Part I, Section 1(1).
[19] Nadine El-Enany, *Bordering Britain: Law, Race and Empire* (Manchester University Press 2020), 77–81.
[20] Amelia Gentleman, *The Historical Roots of the Windrush Scandal: Independent Research Report* (Home Office 2023) <https://www.gov.uk/government/publications/the-historical-roots-of-the-windrush-scandal/the-historical-roots-of-the-windrush-scandal-independent-research-report-accessible> accessed 8 June 2026, 12.
[21] Ibid.

As Paul highlights, Black and Asian migrants were constructed not merely as administratively inconvenient but as a social problem, posing cultural and racial challenges to a postwar Britain still clinging to imperial hierarchies supported by policy debates at the time.[22] These debates framed Commonwealth migration through assumptions of racial hierarchy, revealing how equal citizenship functioned alongside unequal mobility in practice.

3.2 Commonwealth Immigration Acts 1962 and 1968

3.2.1 1962

The Commonwealth Immigration Act (CIA) 1962 ended the automatic right of entry for CUKCs, replacing it with an employment-voucher system requiring prior government authorisation.[23] While framed as an administrative response to labour market pressures, this system allowed the government to regulate entry without explicitly invoking race, yet operated in practice as a racialised filter. Parliamentary debates made clear that the genuine concern was non-white migration from the Caribbean, South Asia, and Africa, with MP James Johnson noting: 'the real target of this Bill is coloured immigration. That is the reality, even though it is not stated in the text.'[24]

Statistical data from July 1962 shows approval rates remained high across the board, regardless of race or nationality.[25] However, despite these figures, individual accounts reveal a contrasting experience at the border. For instance, Paul noted examples of non-white Commonwealth citizens, especially from the Caribbean, being subjected to more intensive scrutiny at ports of entry compared to white migrants from settler dominions, despite holding identical legal status and documentation.[26] Hansen concurs with Paul's analysis, describing the 1962 Act as a 'de

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[22] Kathleen Paul, *Whitewashing Britain: Race and Citizenship in the Postwar Era* (Cornell University Press 1997) 42; HC Deb 5 November 1954, vol 533, cols 2482–2484 <https://hansard.parliament.uk/commons/1954-11-05/debates/7d180f88-61e7-476f-b3d9-9e6d0eeaf2b6/ColonialImmigrants> accessed 8 June 2026.
[23] Commonwealth Immigrants Act 1962 (UK), s.1 and s.2.
[24] HC Deb 6 February 1962, vol 653, col 304; Commonwealth Immigrants Act 1962, s.2(4).
[25] HC Deb 11 July 1962, vol 663, cols 243–246.
[26] Kathleen Paul, *Whitewashing Britain: Race and Citizenship in the Postwar Era* (Cornell University Press 1997) 42, 73–75.

facto racial filter' that functioned in practice to privilege white CUKCs.[27] Neither Paul nor Hansen tries to balance the argument or justify the 1962 Act.

3.2.2 1968

This claim of colour-blind regulation was swiftly undermined in 1968 when Parliament passed the 1968 Act, barring British-passport-holding CUKCs from entry unless they, or a parent or grandparent, had been born, naturalised or registered in the UK.[28] Although the term *patriality* would not be codified until 1971, the 1968 Act effectively operationalised this logic: citizenship and belonging were no longer determined by legal status or birthplace (*jus soli),* but by ancestry (*jus sanguinis),* excluding many non-white CUKC's who possessed valid British passports but lacked qualifying lineage.[29]

The legislation emerged in response to anticipated migration by Kenyan Asians holding British passports following post-independence Africanisation policies that limited their economic and residential rights.[30] While the government framed the measure as necessary to preserve social cohesion rather than race-based exclusion, the ancestry requirement operated in practice as a proxy for ethnicity, disproportionately affecting East African Asians while leaving most white CUKCs untouched.[31]

Ministers maintained that the rule was formally non-discriminatory because it applied equally to all citizens lacking essential ties to Britain. However, this justification was later rejected in *East African Asians v United Kingdom* [1973], where the European Commission of Human Rights (ECHR) held that the ancestry test violated the Convention by targeting British passport holders based on racial origin.[32] The decision confirmed that formally neutral immigration rules may nonetheless be unlawful where their purpose and effect produce racial exclusion, exposing

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[27] Randall Hansen, *Citizenship and Immigration in Post-War Britain: The Institutional Origins of a Multicultural Nation* (Oxford University Press 2000), 71.
[28] Commonwealth Immigrants Act 1968 (c 9); HC Deb 27 February 1968, vol 759, cols 1240–44 (James Callaghan).
[29] Ibid; Immigration Act 1971 (c 77) s 2(1)(b); Randall Hansen, *Citizenship and Immigration in Post-War Britain: The Institutional Origins of a Multicultural Nation* (Oxford University Press 2000), 99–100.
[30] HC Deb 27 February 1968, vol 759, cols 1240–44 (James Callaghan).
[31] Ibid.
[32] *East African Asians v United Kingdom* (European Commission of Human Rights, 6 March 1973).

how post-imperial immigration control reproduced colonial hierarchies through lineage rather than explicit racial classification.

The decision exposed the fragility of the colour-blind justification. In condemning the statute, the Commission's judgement affirms that the language of colour is embedded in British legislation and that the post-imperial border regime perpetuates colonial hierarchies of citizenship, now camouflaged by lineage rather than by overt references to colour.

3.3 The Immigration Act 1971

The IA 1971 consolidated the post-imperial border by codifying patriality through the 'right to abode', making ancestral connection the gateway to unconditional residence.[33] As Hansen argues, the Act separated nationality from entry and residence: individuals could hold CUKC status yet remain subject to immigration control if they lacked patriality.[34] This institutionalised a familiar logic of legal dualism—formal status in law, stratified access to rights in practice.

The Act also entrenched bureaucratic governance. By requiring non-patrials to obtain leave to enter or remain, and by delegating extensive rule-making power to the Home Secretary, it enabled immigration control to develop through executive discretion rather than sustained parliamentary scrutiny.[35] This framework produced legal uncertainty for many Commonwealth immigrants. It rendered Caribbean CUKCs newly vulnerable to immigration enforcement, laying the groundwork for later hostile-environment harms in which lawful residence had to be proved retrospectively. Having defined the purpose of the 1971 Act, the following section will focus on the 1981 Act, which dismantled the shared status of CUKC, replacing it with stratified national categories, further entrenching racialised and geographic distinctions within the legal fabric of British belonging.

3.4 The British Nationality Act 1981

[33] Immigration Act 1971, s.2(1)(b).
[34] Randall Hansen, *Citizenship and Immigration in Post-War Britain: The Institutional Origins of a Multicultural Nation* (Oxford University Press 2000), ch 5.
[35] Immigration Act 1971, s.3(2); Colin Yeo, *Welcome to Britain: Fixing Our Broken Immigration System* (Biteback 2020), 88–91.

The BNA 1981 restructured British nationality law in response to decolonisation and shifting migration patterns. Its primary objective was to clarify national status by replacing the unified CUKC category with three new classifications: *British Citizen*, *British Dependent Territories Citizen (BDTC)*, and *British Overseas Citizen (BOC)*. Only British Citizens, primarily defined by birth or descent in the UK, retained the right of abode.[36]

The Act also revised the principle of *jus soli*, requiring that at least one parent be a British citizen or settled in the UK so that a UK-born child can acquire citizenship automatically.[37] This change was presented as a modernisation of British nationality law, aligning it with practices in other European states that based citizenship primarily on descent rather than birthplace.[38]

This trend was further reflected in the selective treatment of BDTCS. While most Hong Kong residents were denied automatic access to British citizenship before the 1997 handover, full citizenship was granted to predominantly white Falkland Islanders in 1983, raising questions about the consistent application of legal criteria.[39]

This divergence suggests that ancestry-based citizenship criteria, though formally neutral, operated unevenly in practice, reinforcing exclusionary concepts of belonging under the language of modernisation.

3.5 Limitations

While this analysis focuses on how immigration and nationality laws were used to create racialised boundaries of belonging, these developments were shaped by wider social, economic and political concerns such as fears about jobs, housing, and Britain's changing role after decolonisation. Additionally, much of the evidence comes from official records and court rulings, which do not fully capture the lived experiences of those affected. Its emphasis therefore remains on legal structures and state policy, but further work could examine how migrants themselves responded to, resisted, and navigated these changes in their daily lives.

[36] British Nationality Act 1981, s.11(1).
[37] Ibid, s.1(1).
[38] HL Deb 22 June 1981, vol 421, cols 1095–1097 (Lord Belstead).
[39] Home Office, *British Nationality Law: Outline of Proposed Legislation* (Cmnd 7987, 1980), [30]; British Nationality (Falkland Islands) Act 1983.

Despite these limitations, the legal developments examined here clearly show how race was embedded in the evolving definition of who could belong in Britain.

Postwar immigration legislation transformed imperial citizenship into a system grounded in ancestral connection and administrative control, narrowing access to belonging without explicit racial classification. Rather than marking a rupture with empire, these reforms reorganised earlier hierarchies within the legal framework of the post-imperial state, redefining British membership through formally neutral mechanisms of regulation.

The next section turns to the Windrush scandal to examine how these legal transformations materialised in practice. It traces how the exclusionary frameworks established in this period laid the groundwork for the bureaucratic violence experienced by long-settled Commonwealth citizens decades later.

4 The Windrush Scandal as Case Study in Colonial Legal Persistence

Britain’s 2018 Windrush scandal has been narrated as an embarrassing bureaucratic accident. This article instead argues that Windrush was the foreseeable culmination of how these policies transformed former imperial subjects into deportable ‘others’ and embedded a dual regime of rights and exception within British law.

This section will first outline the intersection of the Windrush scandal and the Hostile Environment policy, before demonstrating how the legal frameworks and racialised logics traced in the previous section materialised in practice.

4.1 Background

The Windrush scandal refers to cases that came to public attention in 2018, in which Commonwealth citizens were wrongly classified as illegal immigrants despite having lived in the United Kingdom for decades.[40] Many were denied access to employment, housing, healthcare, and public benefits, while others faced detention or deportation.[41]

The scandal was closely linked to the 'hostile environment' policy framework, which aimed to make life untenable for undocumented migrants by embedding immigration enforcement across everyday services.[42] Under this policy, individuals were increasingly required to prove their legal status in interactions with employers, landlords and other institutions.[43] For members of the Windrush generation who lacked formal documentation, often because none had been required at the time of their arrival, this shift rendered them newly vulnerable to immigration enforcement, despite their lawful residence.[44] The scandal prompted widespread public and political condemnation, raising broader questions about the fairness, accountability, and racial implications of Britain's immigration regime.[45]

4.2 The Structural Roots of the Windrush Scandal

While the Windrush scandal is often framed as an administrative failure or a technocratic oversight, this interpretation overlooks the deeper legal and racial structures that produced it. The prevailing narrative suggests that victims were simply unintended casualties of a policy, particularly the 2012 'hostile environment' measures, designed to target undocumented migrants.[46] The Home Office, alongside the *Windrush Lessons Learned Review*, has reinforced this view, attributing the scandal to 'institutional ignorance and thoughtlessness' rather than systemic racism.[47]

However, this explanation fails to account for the scandal's racial specificity. Approximately 57,000 Commonwealth migrants were potentially affected by the Windrush scandal, with

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[40] Mike Slaven, 'The Windrush Scandal and the Individualization of Postcolonial Immigration Control in Britain' (2022) 45(16) ERS 49, 50–51.
[41] Wendy Williams, *Windrush Lessons Learned Review* (Home Office, March 2020), 6–9.
[42] Melanie Griffiths and Colin Yeo, 'The UK's Hostile Environment: Deputising Immigration Control' (2021) 41(4) CSP 521, 523–525.
[43] Ibid, 526–528.
[44] Wendy Williams, *Windrush Lessons Learned Review* (Home Office, March 2020), 28–30.
[45] Ibid, 11–14.
[46] Wendy Williams, *Windrush Lessons Learned Review* (Home Office, March 2020), 11–13.
[47] Amelia Gentleman, *The Historical Roots of the Windrush Scandal: Independent Research Report* (Home Office 2023) <https://www.gov.uk/government/publications/the-historical-roots-of-the-windrush-scandal/the-historical-roots-of-the-windrush-scandal-independent-research-report-accessible> accessed 8 June 2026, 44–49.

around 15,000 from Jamaica alone, meaning that over a quarter were Jamaican.[48] Other affected individuals came from countries such as India, Pakistan, Kenya, and South Africa, but the impact was disproportionately concentrated among Black Caribbean communities.

Notably, there are no documented cases of white migrants from settler dominions such as Australia, Canada, or New Zealand being caught up in the Windrush scandal, despite also holding Commonwealth citizenship. While exact figures are difficult to determine due to their classification at the time of entry, substantial numbers of people from the white dominions migrated to the UK during the same period, often temporarily and without being classified as immigrants, due to their perceived cultural proximity and shared British subject status.[49]

If immigration enforcement policies were truly race-neutral, the harms would have been randomly distributed across all migrant groups. Instead, the overwhelming majority of those affected were Black Caribbean and Commonwealth-born individuals, many of whom had arrived legally as CUKCs decades earlier.[50] Their exclusion was not incidental; it was the outcome of a legal system that, since decolonisation, has gradually redefined British citizenship in ways that disproportionately disadvantaged colonised, non-white populations.

This pattern is best understood through the lens of critical race theory. As Crenshaw argues, ‘structural racism does not require overt racial animus; it arises when ostensibly neutral laws produce racially unequal outcomes because they are layered upon historical inequities.’[51] In the British context, that historical structure is the empire. El-Enany further contends that Britain’s post-war legal architecture did not mark a clean break with colonialism but instead sought to retain the material and symbolic privileges of empire while excluding its racialised subjects.[52] Legal categories such as ancestry, partiality, and right of abode functioned to preserve whiteness as the unspoken norm of national belonging, transforming former imperial insiders into legal outsiders.

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[48] Wendy Williams, *Windrush Lessons Learned Review* (Home Office, March 2020), 15.

[49] Amelia Gentleman, *The Historical Roots of the Windrush Scandal: Independent Research Report* (Home Office 2023) <https://www.gov.uk/government/publications/the-historical-roots-of-the-windrush-scandal/the-historical-roots-of-the-windrush-scandal-independent-research-report-accessible> accessed 8 June 2026.

[50] Satnam Virdee, *Racism, Class and the Racialized Outsider* (London: Palgrave Macmillan, 2014), 92–97.

[51] Kimberlé Crenshaw, ‘Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law’ (1988) 101(7) HLR 1331.

[52] Nadine El-Enany, *Bordering Britain: Law, Race and Empire* (Manchester University Press 2020), 52–58.

The Windrush scandal must therefore be understood not as an aberration, but as a structural outcome of Britain's post-imperial legal regime. It exposed how the racial hierarchies of empire remain embedded in contemporary citizenship law, less visible, but no less consequential. What appeared in 2018 as a policy failure was the legal system working as designed.

4.3 Documentation and Administrative Processes

The Windrush scandal not only exposed the racialised restructuring of British citizenship but also revealed how bureaucratic systems and administrative procedures can operate as mechanisms of exclusion. The hostile environment policy tasked landlords, employers, and other civil actors with enforcing immigration rules. Under this framework, individuals were required to demonstrate their continuous lawful residence in the UK to access employment, housing, healthcare, and banking services. For many in the Windrush generation, who had arrived legally between 1948 and 1973 under CUKC status, this demand was challenging to meet. They had never been required to formalise their legal status, nor were they issued documentation upon arrival.[53]

A significant moment that came to symbolise this administrative indifference was the Home Office's destruction of the landing card archives in 2010.[54] These records, which noted arrival dates for many Commonwealth citizens, might have helped substantiate long-term residence in some cases. Although they were not determinative of legal proof of residence, their removal reflected a bureaucratic culture in which the presence of post-war migrants was neither institutionally valued nor systematically recorded.[55] While the loss of the landing cards did not directly cause the scandal, it contributed to a broader evidentiary vacuum. It exemplified the lack of institutional memory regarding post-colonial migration.

The consequence of these administrative practices is best understood through the lens of bureaucratic violence, a form of harm inflicted, not through overt racial hostility, but through evidentiary burdens, institutional omission and procedural indifference. As Gren, Abdelhady

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[53] Wendy Williams, *Windrush Lessons Learned Review* (Home Office, March 2020), 7–8.
[54] Rajeev Syal, 'Home Office Destroyed Windrush Landing Cards, Says Ex-Staffer' *The Guardian* (London, 17 April 2018).
[55] Namitasha Goring, Beverley Beckford and Simone Bowman, 'The Windrush Scandal: A Review of Citizenship, Belonging and Justice in the United Kingdom' (2020) 22(3) EJLR 266, 267.

and Joormann argue, bureaucratic violence operates through seemingly neutral administrative processes that are, in practice, 'constraining, humiliating, soul killing and sometimes life-threatening,' materialising in the Windrush scandal.[56]

Individuals were required to produce documentation covering every year of residence in the UK, often dating back several decades, even though the British state had neither required such records at the time of arrival nor preserved them.[57] As a result, long-settled Caribbean Britons lost employment, housing and pensions; were denied National Health Service (NHS) treatment for serious illnesses or were detained and deported to countries they had not seen in over fifty years.[58] The violence lay not only in exclusion itself but in the moral indifference of a system that masked these harms behind the logic of compliance and technical legitimacy.

Proponents of the documentation requirement argue that it reflects the legitimate need for a state to maintain clear and consistent immigration controls. Ryan contends that requiring individuals to prove their lawful residence is not an act of exclusion but an expression of the rule of law and administrative fairness.[59] Documentation requirements serve to prevent fraud, ensure equitable access to public services, and maintain accurate records in an increasingly data-driven governance environment.[60] The state, they argue, cannot be expected to provide rights and entitlements without verifiable proof of eligibility.[61] Moreover, responsibility is seen as shared: while the state may have failed to issue documentation upon arrival, individuals had decades to regularise their status and respond to evolving administrative expectations.[62]

This argument, however, overlooks the historical and racialised context in which such evidentiary burdens emerged. It assumes a level playing field, ignoring that the Windrush generation arrived under the CUKC framework, which granted a right of abode and required no further documentation at the time. The expectation that individuals retrospectively produce

[56] Nina Gren, Dalia Abdelhady and Martin Joormann, 'Unmasking the Impact of Bureaucratic Violence' (2024) 39(2) Refuge 1, 2–4 <https://doi.org/10.25071/1920-7336.41163> accessed 8 June 2026.
[57] Amelia Gentleman, *The Historical Roots of the Windrush Scandal: Independent Research Report* (Home Office 2023) <https://www.gov.uk/government/publications/the-historical-roots-of-the-windrush-scandal/the-historical-roots-of-the-windrush-scandal-independent-research-report-accessible> accessed 8 June 2026.
[58] Ibid.
[59] Bernard Ryan, 'Theorizing Immigration Control as a Function of the State' (2005) 61 PL 330, 332–334.
[60] Ibid.
[61] Home Office, *The Border, Immigration and Citizenship System: A Strategy for the Future* (Cm 7346, 2008), [5.5].
[62] Home Affairs Committee, *The Windrush Generation* (HC 990, 2017–19), [14].

continuous records spanning decades, despite the state's failure to need, provide, or preserve such records, amounts to an institutional sleight of hand. It shifts the burden of proof onto those whom the state had previously invited, then denied. This is not merely a bureaucratic oversight; it is a form of bureaucratic violence, as it disguises exclusionary outcomes behind the veil of neutral procedure. The invocation of legality thus becomes a tool of racialised governance, selectively applied and historically disconnected from the very conditions the state itself created.

Mbembe's concept of *commandment* clarifies this continuity. In colonial rule, bureaucratic sovereignty depended on selective legibility: only those inscribed in colonial records were recognised by law.[63] In Windrush, absence from a Home Office database was treated as nonexistence. Legal status, identity, and belonging were contingent upon visibility within a bureaucratic framework never designed to accommodate Britain's postcolonial subjects. In this sense, the Windrush scandal does not reflect a new or exceptional failure, but rather the persistence of a colonial logic in which exclusion is enacted through the very tools of state administration.

4.4 Immigration Control and Legal Exceptions

Contemporary British immigration law reflects not merely exclusion, but a system of legal exceptionalism. Noll defines legal exceptionalism as a system in which specific individuals or groups are governed outside the regular legal order, subject to special rules, discretionary authority, or suspended protections.[64] In contrast, others continue to enjoy the full rights and safeguards of the law.[65] It denotes a departure from the principles of legal universality and equal treatment, often justified by appeals to national security, sovereignty, or public interest.

In the context of immigration law, legal exceptionalism refers to the governance of migrants, particularly racialised and postcolonial populations, by a parallel legal regime that permits indefinite detention, limited access to judicial review, reduced procedural safeguards, and broad executive discretion. These measures are often viewed as exceptional because they would be unconstitutional or impermissible if applied to citizens.

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[63] Achille Mbembe, On the Postcolony (UCP 2001), 25–30.
[64] Gregor Noll, 'Why Human Rights Fail to Protect Undocumented Migrants' (2010) 12(3) EJML 241, 247.
[65] Ibid.

This form of governance does not emerge from recent migration pressures alone but is rooted in Britain's colonial legal history. As the first section established, the British Empire ruled through legal dualism, creating separate legal systems for colonisers and colonised, justified by race and cultural hierarchy. Today, immigration law reproduces this dualism internally: the full protections of law apply to some; others are governed through administrative exception.

Immigration law operates through legal exceptions. Individuals subject to immigration control can be detained indefinitely without trial, denied access to appeals, and deported at the authorities' discretion.[66] These powers echo colonial emergency regimes, forms of governance employed in the colonies to manage and punish dissent without the constraints of due process. The Windrush scandal brought these structures into public view. People with lawful residence were treated as deportable aliens because they could not meet the evidentiary requirements set by a bureaucracy that had never issued them documentation.[67] Such practices do not merely exclude; they suspend ordinary legal protections and create zones of exception within the legal system.

A key counterpoint is that the stratification seen in British immigration law may be part of a broader global trend in migration governance, rather than a uniquely colonial legacy. Oelgemöller shows that since the 1970s, international institutions and states, especially in the Global North, have developed doctrines of migration control that increasingly emphasise securitisation, 'mixed migration,' and the construction of legal categories like 'illegal migrant' to justify exclusion and control.[68] These shifts have led to the normalisation of parallel legal regimes: one for rights-bearing subjects and another for mobile people deemed suspect, undesirable, or outside the protection of rights.[69] From this perspective, British immigration law mirrors global migration containment and deterrence practices that prioritise state sovereignty over migrant protection.

However, as Oelgemöller also makes clear, these governance regimes are not neutral or universal; they are built upon colonial assumptions of who deserves protection and who poses

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[66] Immigration Act 1971, ss.3(5), 3A, 4(1), 5(1), and Sch 2 paras 16–18.
[67] Wendy Williams, *Windrush Lessons Learned Review* (Home Office, March 2020), 10–11.
[68] Christina Oelgemöller, 'Mixed Migration and the Vagaries of Doctrine Formation Since 2015' (2021) 23(2) I 250, 251-254.
[69] Ibid.

a threat.[70] The very concept of the 'illegal migrant,' which underpins much of contemporary immigration law, was formed in the post-imperial period to manage the mobility of formerly colonised populations, especially those racialised as undesirable.[71] Thus, even while Britain's legal system may align with global patterns, its specific historical genealogy is imperial. The tools it uses, delegated enforcement, discretionary exclusion, and revocable status, have precedents in colonial law. The targets it identifies, migrants from the Global South, often formerly colonised subjects, reveal that the colonial logic of legal stratification has been internalised, not discarded.

The Windrush scandal was not a bureaucratic mishap, but the product of a legal regime shaped by Britain's post-imperial legacy. It exposed how immigration law governs racialised and postcolonial populations through legal exceptionalism, suspending rights, expanding discretion, and reproducing colonial hierarchies under the guise of neutrality. Rather than breaking from empire, British immigration law has internalised its logics: conditional belonging, evidentiary burdens, and exclusion masked as legality. Even amid broader trends of migration securitisation, Britain's framework remains distinctly imperial in character. The final section traces how these logics persist in contemporary policy, differential treatment of refugee groups, and the enduring tension between racism and coloniality—asking not only how we arrived here, but whether a different legal future is possible.

5 Contemporary Immigration Policy, Imperial Duress, and the Limits of Legal Reform

This section turns from historical and analytical exposition to a normative inquiry: *What should be done about the legal and political structures that continue to organise immigration along colonial lines?* Building on the empirical and conceptual groundwork previously laid, it examines the present conjuncture of British immigration governance, interrogates the theoretical frameworks through which its persistence might be understood, and considers the scope and limits of legal reform.

[70] Ibid, 255–258.
[71] Ibid, 260–263.

This section analyses recent developments, including the 2025 Immigration White Paper and Ukrainian refugee governance, through the lens of racialised bordering and conditional belonging. It frames Britain's immigration regime as imperial duress (Stoler)—an ongoing administrative expression of empire—and considers what postcolonial reform might require within a still-colonial global order.

5.1 Whiteness, Proximity, and the Politics of Protection

Since the Windrush scandal, Britain's immigration regime has not undergone meaningful reform but instead has intensified its commitment to managing migration through exclusionary and racialised logics.

While the language of race is largely absent, the differential treatment of migrant groups suggests a racialised hierarchy of inclusion. The reception of Ukrainian refugees in 2022 exemplifies this. In contrast to the punitive measures aimed at asylum seekers from countries such as Sudan, Syria, or Afghanistan, Ukrainian nationals were offered bespoke legal routes to entry and protection through schemes such as the Ukraine Family Scheme and the Homes for Ukraine Sponsorship Scheme, which provided expedited processing and temporary leave to remain without requiring irregular entry into the UK.[72][73] The contrast is not simply administrative; it reflects an underlying distinction between those imagined as culturally proximate and those marked as other.

Popovic and Welfens highlight how Ukrainian refugees were framed as 'ethnically and culturally similar,' while non-European arrivals were construed as a crisis threatening security and integrity.[74] These framings legitimised vastly different policy responses, even though all groups were fleeing comparable conditions of war and persecution. The idea that Ukrainians

[72] BBC News, 'Refugees from Ukraine and Afghanistan Treated Differently, Charity Warns' (*BBC*, 1 August 2022) <https://www.bbc.co.uk/news/uk-england-wiltshire-62334985> accessed 23 June 2026.
[73] UK Visas and Immigration, *Guidance: Ukrainian UK Visa support for Ukrainian Nationals* (17 February 2022, Updated 21 April 2026) < https://www.gov.uk/guidance/support-for-family-members-of-british-nationals-in-ukraine-and-ukrainian-nationals-in-ukraine-and-the-uk > accessed 23 June 2026.
[74] Lara Sosa Popovic and Natalie Welfens, 'Same, Same but Different? A Discourse Network Analysis of the EU's Framings of Refugee Arrivals in 2015 and 2022' (2025) 51(3) JEMS 609, 609–614.

were more readily 'integrable' circulated widely as justification, but such arguments function to obscure the role of racialisation in policy design.

Fanon's psychoanalytic critique of colonial power remains instructive. In colonial settings, whiteness operated as a standard of full humanity, while Blackness and racialised otherness were marked as pathological, disruptive, or inferior.[75] This logic did not disappear with the end of the empire. It endures in policies that afford legal protection, mobility, and recognition to those who approximate the white European ideal, while subjecting others to suspicion, containment, and precarity.

Thus, although the legal architecture of Britain's immigration system no longer explicitly distinguishes based on race, its functioning reproduces a hierarchy rooted in colonial patterns of governance. Migrants are not excluded arbitrarily; they are stratified through inherited criteria, ancestry, economic utility, and cultural compatibility that continue to produce racialised outcomes such as the Windrush Scandal.

5.2 Reading Immigration Law Through Imperial Duress

To understand the contemporary operation of Britain's immigration regime, one must move beyond the language of historical legacy and towards an account of persistence. Colonial legal logics mentioned above persist as active features of Britain's post-war immigration regime, shaping access to citizenship protections from Windrush to the present.

Stoler's concept of imperial duress offers a framework for understanding this continuity. As Stoler defines it, duress is not a passive leftover of empire but a form of ongoing, legal, administrative, and affective pressure that shapes present-day institutions and subject positions.[76] It is not about remembering empire; it is about the structures that empire continues to reproduce.[77] This shift in focus, from legacy to durability, is crucial. It demands that we ask

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[75] Derek Hook, 'Fanon and the Psychoanalysis of Racism' in Derek Hook et al (eds), *Critical Psychology* (Juta Academic Publishing 2004), 114–119.
[76] Ann Laura Stoler, *Duress: Imperial Durabilities in Our Times* (Duke University Press 2016), 1–7.
[77] Ibid.

not just how colonial logics persist, but how they are maintained, adapted, and naturalised in modern legal frameworks.

Each section of this article has traced a dimension of this duress. From examining colonial governance in sites such as Malawi and Burma, showing how legal dualism created parallel regimes for coloniser and colonised, while bureaucratic regulation and rule-of-law theatre legitimised exclusion through procedural form, tracing how these techniques migrated into British immigration law, primarily through the 1948 BNA, the CIA, and the 1971 IA. These laws introduced ancestry-based belonging, delegated administrative discretion, and embedded formal equality while sustaining racialised differentiation. The third section showcased how these techniques persist in the hostile environment, where documentation regimes and bureaucratic enforcement reproduce exclusionary outcomes for postcolonial migrants.

However, some scholars have challenged the emphasis on colonial continuity. Griffiths and Yeo argue that the logics of Britain's immigration system are now more accurately described as neoliberal or security-oriented rather than imperial.[78] From this view, exclusion results from austerity, digitisation, and risk-based governance rather than racial hierarchy or colonial design. Immigration control, they suggest, is less about reproducing empire and more about managing labour markets, border surveillance, and public trust in an age of geopolitical volatility.

This critique rightly highlights significant shifts: as Stoler argues, imperial formations are not static legacies but recursive structures that resurface in new forms, often under the guise of technocratic or post-racial neutrality.[79] Duress 'wraps around contemporary problems' and 'is plaited through racialised distinctions.'[80] It is visible in the discretionary nature of immigration enforcement, the burden of proof imposed on racialised migrants, and the differential visibility of who is assumed to belong. These dynamics are not merely neoliberal; they are imperially configured within neoliberal modes.

Britain's immigration regime, then, cannot be fully understood without attention to its colonial grammar. It is not simply dysfunctional or ideologically confused. It is a system in which law

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[78] Melanie Griffiths and Colin Yeo, 'The UK's Hostile Environment: Deputising Immigration Control' (2021) 41(4) CSP 521.
[79] Ann Laura Stoler, *Duress: Imperial Durabilities in Our Times* (Duke University Press 2016), 1–7.
[80] Ibid.

continues to do the work of empire. If the law continues to do the work of empire, can it break from these colonial foundations? If so, what would it take to build an immigration regime that truly departs from them?

5.3 Reforms

To imagine a different future, we must ask what kind of legal and institutional reforms could begin to interrupt this design and move toward a more equitable framework. First, the repeal of citizenship deprivation powers under section 40 BNA 1981 would remove a legal mechanism rooted in colonial denationalisation.[81] According to MacDonnell, this reform could be operationalised through a targeted amendment to the BNA 1981, repealing or significantly narrowing the grounds on which deprivation may occur, particularly by removing provisions that allow deprivation without notice.[82] However, reform efforts would likely encounter political resistance, especially given the current emphasis on national security and border sovereignty in public discourse.[83]

During debates on the 1981 Act, government ministers rejected calls for stronger safeguards, insisting that deprivation powers were essential to maintaining national cohesion and state security, particularly in cases involving 'undesirable' or disloyal individuals.[84]

Notably, Lord Avebury criticised the provision: 'If this amendment undermined one of the principles of the Bill, and that was all it did, [I] would be warmly in favour of it. But the trouble is that it leaves another of the principles of the Bill unimpaired and that is the creation of two different classes of citizenship, which is what we objected to in the Green Paper of April 1977.'[85] He argued that allowing the Home Secretary to strip citizenship without sufficient oversight was an affront to the rule of law and risked reviving colonial patterns of arbitrary exclusion.[86] Nevertheless, these concerns were overruled by a political logic that framed

[81] Vanessa MacDonnell, 'Deprivation of Citizenship: A British National Scandal' (2021) 36(1) JIANL 24.
[82] Ibid.
[83] Reuven Ziegler, 'Deprivation of Citizenship, Undesirable Subjects, and the UK Supreme Court' (2022) 85(3) MLR 572, 589–591.
[84] HL Deb 30 June 1981, vol 421, cols 1135–1140.
[85] Ibid.
[86] Ibid, col 1138; Colin Yeo, *Welcome to Britain: Fixing Our Broken Immigration System* (Biteback 2020), 148–151.

citizenship not as a right but as a conditional privilege, especially for those perceived as less culturally or ancestrally 'British.'

Second, Britain should replace ancestry-based claims to citizenship with rights grounded in residence and contribution. This would require a significant restructuring of the legal framework established by the 1971 Immigration Act and the 1981 BNA. Operationalising this reform would involve legislating a new pathway to citizenship that prioritises long-term residence, community ties, and social participation over lineage. This could be achieved through amendments to the Nationality Act that establish a residency-based citizenship track with built-in protections against arbitrary refusals. However, given the entrenchment of ancestry-based citizenship in British legal tradition, any such reform would need to ensure compatibility with existing international agreements and confront the political difficulty of departing from long-established *jus sanguinis* norms, especially in a political climate concerned with migration control.

Third, Williams suggested a serious reparative approach to Windrush-style harms.[87] This requires not just compensation, but structural accountability. This could be operationalised by creating a statutory right of review for immigration-related administrative decisions, alongside establishing a permanent, independent Migration Ombudsman empowered to investigate and resolve complaints. Legislation would also be required to establish enforceable redress mechanisms for administrative injustice. While this is legally feasible within the existing framework of public administrative law, institutional inertia, limited political will, and the Home Office's broad discretionary powers pose significant barriers to implementation.

These changes alone are not sufficient. As Achiume argues, if colonialism created enduring structures of interdependence between colonisers and colonised, then former imperial powers have obligations not just to admit but to include postcolonial migrants as co-sovereigns, not outsiders.[88] Migration, in this view, is not simply a movement to be regulated but a form of political participation grounded in historical entanglement.

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[87] Wendy Williams, *Windrush Lessons Learned Review* (Home Office, March 2020), 15.
[88] E Tendayi Achiume, 'Migration as Decolonization' (2019) 71 SLR 1509, 1551–56.

5.4 Recolonising the Future

Just before this article was completed, the 2025 Immigration White Paper was released. It resists the ethical logic advanced by scholars such as Achiume, who argue that migration from former colonies constitutes a claim to inclusion grounded in historical entanglement and co-sovereignty. The 2025 Immigration White Paper proclaims 'fairness' and 'control,' yet it re-colonises the present by converting imperial responsibility into a calculus of economic risk.[89]

Its 'earned-citizenship' formula—£38,000 salary, English-language B2, a ten-year probation—revives the ancestral filter in neoliberal form.[90] Productivity replaces lineage, but the effect is the same: racialised outsiders must prove perpetual worthiness, while the state reserves the right to revoke belonging at will.

In detaching policy from Britain's colonial past, the White Paper erases the very histories that produced today's 'migrant burden'. It reframes the empire's debts as migrants' deficits, demanding assimilation as payment. If this is reform, it is reform *toward* a sharper border, not away from it. Empire's grammar survives; the paragraphs are re-punctuated.

By detaching immigration governance from Britain's colonial past, the White Paper reflects a deeper refusal to acknowledge that the inequalities it seeks to manage were produced through empire. In this way, it recasts colonial responsibility as administrative risk and postcolonial migrants as burdens to be regulated, rather than rights-bearing participants in a shared political community.

While it is essential to acknowledge that British immigration law has, in certain respects, moved away from the explicit racial hierarchies of its colonial past, and that efforts have been made to rebrand exclusion through ostensibly neutral legal language and procedural refinement, these developments do not amount to structural transformation. Nor do they obscure the more profound continuities that persist beneath the surface of reformist discourse. Though reform may be possible within the current framework and some departures from earlier logics are evident, the system's underlying foundations remain largely intact.

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[89] HM Government, *Restoring Control Over the Immigration System* (White Paper, CP 1326, May 2025), 3–5.
[90] Ibid.

For this reason, I assume the problem is not simply one of policy mismanagement or political reluctance; it is structural. Decolonisation, in its fullest sense, is not achievable within the present global order because the constitutive frameworks of sovereignty, law, and economy continue to be shaped by colonial logics. Formal independence may have dismantled the juridical apparatus of empire, but it did not dislodge the hierarchies embedded in international legal regimes, global markets, and state institutions. As Mignolo argues, 'Conceptual (and theoretical) de-linking is, in the argument I am advancing, the necessary direction of liberation and decolonisation, while transformation within the colonial matrix of power is the splendour and limitations of any project of emancipation(s).'[91] This underscores that decolonisation is not a finite task and must be understood as an unfinished, and perhaps unfinishable, project.

The analysis in this section has traced the continuing operation of colonial legal logics in contemporary British immigration policy, highlighting both their structural durability and adaptability to new political contexts. While targeted reforms, such as repealing citizenship deprivation powers and dismantling ancestry-based nationality rules, are necessary and achievable, they do not suffice. The deeper challenge lies in confronting the fact that immigration law remains embedded in an imperial grammar: one that continues to stratify belonging, distribute vulnerability, and obscure its foundations.

Achiume's theory of migration as decolonisation offers a compelling reframing, but even this must be situated within a broader recognition that the global continuities of coloniality constrain decolonisation itself. As this section has argued, law has not merely mirrored social hierarchies; it has helped produce and legitimise them. To envision a different future for immigration governance, we must confront the policies and conceptual and institutional frameworks that render exclusion seem reasonable, even necessary.

6 Conclusion

This article has argued that contemporary British immigration law remains structurally entangled with colonial legal logics. Far from representing a clean break from empire, the post-

[91] Walter D Mignolo, *The Darker Side of Western Modernity: Global Futures, Decolonial Options* (Duke University Press 2011).

1948 immigration framework has repurposed techniques first developed to govern colonial subjects—legal dualism, bureaucratic regulation, and rule-of-law theatre—for use within the metropole. These mechanisms, once used to manage racialised populations abroad, now regulate postcolonial migrants at home, producing a regime of conditional belonging, stratified rights, and legal exceptionalism.

By tracing this history from colonial rule in Malawi, Southern Rhodesia, and Burma, through the legislative shifts of the mid-20th century, and into the present-day realities of a hostile environment, this study has shown how British law has not simply administered borders but also reproduced imperial hierarchies. The analysis of the British Nationality Acts, the Commonwealth Immigrants Acts, and the Immigration Act 1971 reveals how legal form has recast imperial difference as national exclusion, embedding race and ancestry in the structure of citizenship itself.

The Windrush scandal, far from being an anomaly, exemplifies the persistence of these logics. It demonstrated how colonial-era distinctions between subject and citizen were internalised into a bureaucratic state apparatus that governs not merely through the denial of entry, but through the erosion of rights and the administration of uncertainty. The legal exclusion of Commonwealth citizens in the name of neutrality and control was not a break with Britain's colonial past; it was its domestication.

Addressing the core question, to what extent have colonial-era practices of imperial governance been repurposed in Britain's post-1948 immigration framework, and how does recognising their specifically colonial character help clarify the persistence of exclusions, this article has argued that such recognition is essential for understanding not only who is excluded from full membership, but also how the law legitimates that exclusion. Distinguishing between colonialism and racism, as this study has emphasised, is not to downplay racial injustice, but to sharpen the analytic tools available to critique it.

The final section's engagement with contemporary policy, including the 2025 Immigration White Paper and the differential treatment of refugee groups, further demonstrates that imperial formations are not static residues of the past. Drawing on Ann Stoler's concept of imperial duress, the section argued that these legal structures have been adapted, naturalised, and re-legitimated under new ideological banners: fairness, control, and productivity. Even as the state disavows its colonial history, the forms of governance that emerged from it persist and evolve, shaping how belonging is legally defined and distributed.

By prioritising statutes, case law, and archival paperwork, this article brackets the political-economy forces that currently co-produce Britain's border regime. It does not track how post-imperial debt negotiations, preferential trade agreements, or evolving security partnerships (ranging from counter-terrorism compacts to biometric data-sharing deals) influence who moves and under what conditions. Nor does it analyse the leverage exerted by international financial institutions or defence alliances over domestic immigration agendas. Incorporating those economic and geopolitical factors would likely reveal that the colonial logics mapped here are continuously reinforced, and at times recalibrated, by global circuits of capital and security; a line of inquiry that future research should pursue.

While targeted legal reforms, such as abolishing citizenship deprivation powers or replacing ancestry-based nationality rules with residence-based entitlements, are both possible and necessary, they are not sufficient. Without a more profound reckoning with the colonial foundations of Britain's immigration system, even the most progressive reforms risk reinforcing the very hierarchies they seek to dismantle. Moreover, as this article has argued, decolonisation in the legal sphere is constrained by the broader endurance of coloniality within the global order, in which law, economy, and sovereignty continue to reproduce imperial modes of differentiation.

The challenge, then, is not merely to repair the harms of Windrush or to soften the edges of a hostile bureaucracy. It is to recognise how immigration law itself continues to serve as an instrument of post-imperial governance, one that stratifies membership, naturalises exclusion, and obscures its origins. To move beyond empire, we must be willing to see how empire endures: not as a matter of memory, but as a method still at work in the legal architecture of the modern state.

Unaccompanied Asylum-Seeking Children and the Barrier of Age: How UK Age Assessment Practices and Policies Place Chronological Age Above the Rights of Asylum-Seeking Children

Amber Asmeena Shah

Abstract

Recognition of age is integral to a child's right to identity and private life. However, assessing age is not an exact science, and each method comes with a margin of error. In the UK, age assessments are also linked to a culture of disbelief surrounding asylum-seekers, raising concerns that UK practices may not uphold the rights of separated children. Drawing on a semi-systematic literature review and seven qualitative interviews, this article examines how UK age assessment practices and policies compare with international human rights law standards. It finds that UK age assessment practices encompass visual assessments, psychosocial assessments, and a potential move towards scientific methods—and that these practices do not uphold international human rights law standards, in particular the principles of the best interests of the child and the benefit of the doubt. Furthermore, this article finds that, due to the prioritisation of chronological age over the needs and interests of asylum-seeking children, age assessments cannot be improved to reflect international human rights law better. Rather, only through the abolition of age assessments, and a move towards assessing needs over age, can the best interests of children and the benefit of the doubt be upheld. Future research on age assessments from a human rights perspective, especially following recent announcements regarding UK age assessments, ought to interrogate the need to determine chronological age considering the detrimental effects it has on asylum-seeking children.

Abbreviation list

ADCS – Association of Directors of Children’s Services

AESAC – Age Estimation Science Advisory Committee

AI – Artificial Intelligence

BASW – British Association of Social Workers

BD – Benefit of the doubt

BDA – British Dental Association

BIC – Best interests of the child

CoE – Council of Europe

CRC – Convention on the Rights of the Child

CtRC – Committee on the Rights of the Child

DfE – Department for Education

EASO – European Asylum Support Office

ECtHR – European Court of Human Rights

HBF – Helen Bamber Foundation

HFRN – Humans for Rights Network

ICIBI – Independent Chief Inspector of Borders and Immigration

IHRL – International human rights law

ISWS – Immigration Social Work Services

JR – Judicial review

LA – Local authority

LAs – Local authorities

NAAB – National Age Assessment Board

NABA – Nationality and Borders Act 2022

NGO – Non-governmental organisation

NGOs – Non-governmental organisations

RMCC – Refugee and Migrant Children’s Consortium

SCEP – Separated Children in Europe Programme

UASC – Unaccompanied asylum-seeking children

UK – United Kingdom

UNHCR – United Nations High Commissioner for Refugee

1 Introduction

An age assessment is the process whereby authorities seek to establish one's chronological age.[1] For unaccompanied asylum-seeking children (UASC), age assessments are used in the absence of reliable documentary evidence to establish whether they are children or adults.[2] The most common methods in Europe are visual, scientific, psychosocial, and multidisciplinary age assessments.[3] It is widely accepted that assessing age is not an exact science and that each method carries a margin of error.[4] This reflects that children are 'shaped by gender, personality, genetics, culture and childhood experiences'—not just age.[5]

In the United Kingdom (UK), establishing age is necessary for UASC to access the support afforded to separated children under the Children Act.[6] However, age assessments are also a feature of the 'culture of scepticism and suspicion surrounding the arrival' of UASC.[7] When UASC fail to meet British expectations of how children look and behave,[8] age assessments can bolster concerns about 'adults posing as children'.[9]

Recognition of age is integral to a UASC's right to identity,[10] and right to private life.[11] Yet incorrect age assessments in the UK have led to thousands of UASC being unable to access childhood support, with significant consequences.[12] As such, age assessments are a human

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[1] European Asylum Support Office, 'EASO Practical Guide on age assessment' (2nd edn, EASO Practical Guide Series 2018), 15.
[2] Home Office, 'National Age Assessment Board: The operation of the National Age Assessment Board and sections 50 and 51 of the Nationality and Borders Act 2022' (Version 2.0, Home Office April 2024), 8.
[3] Daja Wenke, 'Age Assessment: Council of Europe member states' policies, procedures and practices respectful of children's rights in the context of migration' (Council of Europe 2017), 22-27.
[4] Committee on the Rights of the Child 'General Comment No 14' (2013) UN Doc CRC/C/GC/14, 4.
[5] Mary A Kenny and Maryanne Loughry, ''These don't look like children to me': age assessment of unaccompanied and separated children' in Mary Crock and Lenni B Benson (eds.), *Protecting Migrant Children: In Search of Best Practice* (Edward Elgar Publishing 2018), 324.
[6] The Children Act 1989, s.20.
[7] Mary A Kenny and Maryanne Loughry, ''These don't look like children to me': age assessment of unaccompanied and separated children' in Mary Crock and Lenni B Benson (eds.), *Protecting Migrant Children: In Search of Best Practice* (Edward Elgar Publishing 2018), 321.
[8] Carly McLaughlin, ''They don't look like children': child asylum-seekers, the Dubs amendment and the politics of childhood' (2018) 44(11) JEMS 1757, 1763.
[9] Ibid, 1766.
[10] Convention on The Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC), art.8(1).
[11] *Darboe and Camara v Italy* App no 5797/17 (ECtHR, 21 July 2022), 124.
[12] Helen Bamber Foundation, Asylum Aid and Humans for Rights Network, 'Disbelieved and denied: Children seeking asylum wrongly treated as adults by the Home Office' (HBF, Asylum Aid and HFRN 2023), 4; Helen Bamber Foundation, Humans for Rights Network and Refugee Council, 'Forced Adulthood: The Home Office's incorrect determination of age and how this leaves child refugees at risk' (HBF, HFRN and Refugee Council

rights issue. This raises the question of which standards for assessing age have been set by international and regional human rights bodies, and how well UK age-assessment practices align with those standards.

The research question is therefore: *How do UK age assessment practices and policies compare with international human rights law standards (IHRL) for assessing age?* The research objectives are to provide a comprehensive overview of UK age assessment practices, offer a critical comparative analysis of these against IHRL standards, and produce recommendations on how UK age assessments could better align with IHRL.

The initial hypothesis was that age assessment practices could be improved to promote the rights of UASC better. However, this shifted towards the concept that age assessments are inherently unable to uphold IHRL standards, and that a preferable approach is to abandon the focus on chronological age.[13]

2 Methods

This article is based on a semi-systematic literature review and seven semi-structured interviews.[14] A semi-systematic approach was used because age assessments are conceptualised differently across disciplines, making a fully systematic review less suitable.[15] Interview participants are professionals with experience of UK age assessment practices, with one participant providing written responses to the interview questions. The article does not cover developments after 31 July 2025, although some key updates are acknowledged in the footnotes.

2024), 9; Kamena Dorling, 'Serious safeguarding scandal: new data shows that hundreds of child refugees continue to be wrongly treated as adults' (Helen Bamber Foundation, 9 July 2025) <https://helenbamber.org/resources/reportsbriefings/serious-safeguarding-scandal-new-data-shows-hundreds-child-refugees> accessed 8 June 2026.

[13] Anders Hjern, Maria Brendler-Lindqvist and Marie Norredam, 'Age assessment of young asylum seekers' (2012) 101 AP 4, 6; Mary A Kenny and Maryanne Loughry, 'Addressing the limitations of age determination for unaccompanied minors: A way forward' (2018) 92 CYSR 15, 20; Mary A Kenny and Maryanne Loughry, ''These don't look like children to me': age assessment of unaccompanied and separated children' in Mary Crock and Lenni B Benson (eds.), *Protecting Migrant Children: In Search of Best Practice* (Edward Elgar Publishing 2018), 333.

[14] Hannah Snyder, 'Literature review as a research methodology: An overview and guidelines' (2019) 104 JBR 333, 335.

[15] Ibid, 336.

The methodology is socio-legal, treating age assessment as a legal practice shaped by institutional context and policy objectives, and recognising the 'mutually constitutive relationship between law and society'.[16] The methodology also adopts an intersectional critical sociolegal approach to examine how age disputes operate within hostile immigration policies,[17] and how factors including immigration status and racialisation may shape children's experiences.[18] The absence of intersectionality carries the risk of failing to recognise the extent or existence of certain human rights violations.[19] UASC are vulnerable because of their status as children and asylum-seekers,[20] but they are also often negatively racialised,[21] which is an important context when examining UK age assessment practices. Finally, realising the law's connection to society and practice enhances research aimed at improving policy.[22]

Research limitations include the likelihood of self-selection bias in interview participation, and the absence of interviews with actors more supportive of current practices. To address this, the analysis draws on a range of governmental and non-governmental reports, including sources that defend existing approaches. Direct interviews with UASC were not conducted due to the risk of retraumatisation; instead, interviews were designed to capture practice-based perspectives from professionals working closely with age-disputed children. The interview findings are not treated as determinative but as contextual evidence that supports and tests themes emerging from the literature.

The author has provided legal advice and casework to UASC undergoing age assessments but has no lived experience of age disputes or seeking asylum. The term UASC is used for

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[16] Naomi Creutzfeldt, Marc Mason and Kirsten McConnachie, 'Socio-Legal Theory and Methods' in Naomi Creutzfeldt, Marc Mason and Kirsten McConnachie (eds.), *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge 2019), 4.
[17] Mary A Kenny and Maryanne Loughry, ''These don't look like children to me': age assessment of unaccompanied and separated children' in Mary Crock and Lenni B Benson (eds.), *Protecting Migrant Children: In Search of Best Practice* (Edward Elgar Publishing 2018), 321.
[18] Margaret Davies, 'Doing Critical-Socio-Legal Theory' in Naomi Creutzfeldt, Marc Mason and Kirsten McConnachie (eds.), *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge 2019), 88.
[19] Charlotte Helen Skeet, 'Intersectionality as Theory and Method: Human rights adjudication by the European Court of Human Rights' in Naomi Creutzfeldt, Marc Mason and Kirsten McConnachie (eds.), *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge 2019), 278.
[20] Arianna Vettorel, 'Challenges for the Protection of Migrant Children: The Right to Identity and the Age of Unaccompanied Minors Arriving at European Borders' (2024) 26 EJML 502, 510.
[21] Rachel Rosen and S Khan, 'Racialising age in the UK's border regime: a case for abolishing age assessment' (2024) 66(2*)* RC 43, 49.
[22] Margaret Davies, 'Doing Critical-Socio-Legal Theory' in Naomi Creutzfeldt, Marc Mason and Kirsten McConnachie (eds.), *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge 2019), 3.

consistency with UK policy and existing scholarship, whilst recognising its immigration-centred framing.[23]

This article will set out international human rights law standards for assessing age. It will then analyse current UK age assessment practices against IHRL standards. Finally, it will consider improvements and alternatives to age assessments.

3 International Human Rights Law Standards

3.1 Best Interests of the Child (BIC)

Under the Convention on the Rights of the Child (CRC), a child is 'every human being below the age of 18'.[24] Article 3 CRC confirms that '[i]n all actions concerning children…the best interests of the child shall be a primary consideration'.[25] This applies to actions of 'public or private social welfare institutions, courts of law, administrative authorities or legislative bodies'.[26]

In General Comment No 14, the Committee on the Rights of the Child (CtRC) clarifies that assessing BIC is 'a unique activity' depending on the specific circumstances of each case.[27] Furthermore, it defines BIC as a threefold concept.[28] Firstly, it is a 'substantive right' of children to have their 'best interests assessed and taken as a primary consideration'.[29] Secondly, it is an 'interpretative legal principle', meaning interpretations of law which most effectively guarantee BIC must be chosen.[30] Thirdly, it is a procedural rule, as decision-makers must evaluate the possible impact of decisions on children.[31] As applied to age assessments, UASC must have their best interests assessed and considered, age assessment laws must uphold BIC, and the impact of age decisions on UASC must be evaluated.

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[23] Anna V Kvittingen, 'Negotiating childhood: Age assessment in the UK asylum system' (Refugee Studies Centre, Working Paper Series No 67 2010), 8.
[24] Convention on The Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC), art.1.
[25] Ibid.
[26] Ibid.
[27] Committee on the Rights of the Child 'General Comment No 14' (2013) UN Doc CRC/C/GC/14, 12.
[28] Ibid, 4.
[29] Ibid, 4.
[30] Ibid, 4.
[31] Ibid, 4.

The importance of BIC in age assessments is confirmed in various Communications. In *M.A.B*, not assessing a UASC's birth certificate meant BIC was not a primary consideration.[32] The Refugee Youth Service (*R.Y.S*) held that genital examinations violate the right to privacy and dignity,[33] following which Spain banned invasive medical tests.[34] In each case, the CtRC found that Spain's age assessment practices violated BIC.[35]

Likewise, in *Darboe and Camara v Italy*, the European Court of Human Rights (ECtHR) found that Italian age-assessment practices violated the right to private life.[36] The Court emphasised the importance of accurately determining age, as 'if a minor is wrongly identified as an adult, serious measures in breach of his or her rights may be taken'.[37] A further violation of the right to private life was found in *F.B v Belgium* due to the lack of procedural safeguards within Belgium's age assessment process.[38] Whilst the ECtHR did not decide on whether scientific tests uphold BIC, it emphasised that invasive medical examinations should be a last resort.[39]

3.2 Benefit of the doubt (BD)

The CtRC's General Comment No 6 confirms that UASC must be identified on arrival, which includes an age assessment.[40] Regarding this process, it states:

> [It] should not only take into account the physical appearance of the individual, but also their psychological maturity. Moreover, the assessment must be conducted in a

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[32] Committee on the Rights of the Child 'Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 24/2017' (2020) UN Doc CRC/C/83/D/24/2017, 10.
[33] Committee on the Rights of the Child 'Views adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of communication No 76/2019' (2021) UN Doc CRC/C/86/D/76/2019, 13.
[34] Gertrude Mafoa Quan and Ann Skelton, 'Age determination of unaccompanied migrant children: An appraisal of the jurisprudence of the Committee on the Rights of the Child' (2025) 43(1) NJHR 59, 79.
[35] Committee on the Rights of the Child 'Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 24/2017' (2020) UN Doc CRC/C/83/D/24/2017, 10; Committee on the Rights of the Child 'Views adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of communication No 76/2019' (2021) UN Doc CRC/C/86/D/76/2019, 13.
[36] *Darboe and Camara v. Italy* App no 5797/17 (ECtHR, 21 July 2022), 124.
[37] Ibid, 125.
[38] *F.B. v Belgium* App no 47836/21 (ECtHR, 6 March 2025), 116.
[39] Ibid, 92.
[40] Committee on the Rights of the Child 'General Comment No 6' (2005) UN Doc CRC/GC/2005/6, 11.

> scientific, safe, child and gender-sensitive and fair manner…and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt.[41]

Joint General Comment No 23 also establishes standards for assessing age:

> Available documents should be considered genuine unless there is proof to the contrary, and statements by children and their parents or relatives must be considered. The benefit of the doubt should be given…States should refrain from using medical methods based on, inter alia, bone and dental exam analysis, which may be inaccurate, with wide margins of error, and can also be traumatic.[42]

As such, the CtRC has repeated the importance of giving BD when assessing age. General Comment No 6 interprets BD as: 'if there is a possibility that the individual is a child, she or he should be treated as such'.[43] *R.Y.S* views BD as meaning age-disputed UASC are 'presumed to be and treated as a minor' throughout the age assessment process.[44] *N.B.F. v Spain* clarifies that BD also involves procedural guarantees, such as providing UASC with a legal representative and interpreter.[45]

Finally, the Council of Europe's (CoE) Resolution 1810 sets out that age assessments:

> [S]hould only be carried out if there are reasonable doubts about a person being underage. The assessment should be based on the presumption of minority, involve a multidisciplinary evaluation by an independent authority over time, and not be based exclusively on medical assessment…If doubts remain that the person may be underage, they should be granted the benefit of the doubt.[46]

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[41] Ibid, 11.
[42] Committee on the Rights of the Child 'Joint General Comment No 23' (2017) UN Doc CRC/C/GC/23, 2.
[43] Committee on the Rights of the Child 'General Comment No 6' (2005) UN Doc CRC/GC/2005/6, 11.
[44] Committee on the Rights of the Child 'Views adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of communication No 76/2019' (2021) UN Doc CRC/C/86/D/76/2019, 12.
[45] *N.B.F. v Spain*, Committee on the Rights of the Child, 'Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No 11/2017' (2018) UN Doc CRC/C/79/D/11/2017, [11].
[46] Council of Europe Parliamentary Assembly, Resolution 1810 on unaccompanied children in Europe: issues of arrival, stay and return (Adopted by the Parliamentary Assembly on 15 April 2011 at the 18th sitting), 5.10.

Whilst the CoE states that scientific tests should not be the sole method for assessing age, it does not preclude their use. Indeed, the majority of European states use scientific age assessments.[47] Resolution 1810 clarifies the procedural safeguards for scientific tests: the UASC should provide consent, the method should comply with ethical standards, and any margin of error should be accounted for.[48]

3.3 Summary

International and regional human rights law standards for age assessments can be summarised as follows. Firstly, states must consider UASC's appearance, maturity, statements, and documents,[49] and scientific assessments must be a last resort.[50] Secondly, the best interests of the child must be a primary consideration when assessing age.[51] Thirdly, age-disputed UASC should be given the benefit of the doubt.[52]

However, regional and international bodies have not specified which age assessment methods best promote BIC and BD. The lack of explicit guidance has led to differing implementations of these principles.

4 UK Age Assessments

[47] Separated Children in Europe Programme, 'Review of current laws, policies and practices relating to age assessment in sixteen European Countries' (SCEP 2011), 7.
[48] Council of Europe Parliamentary Assembly, Resolution 1810 on unaccompanied children in Europe: issues of arrival, stay and return (Adopted by the Parliamentary Assembly on 15 April 2011 at the 18th sitting), 5.10.
[49] Committee on the Rights of the Child 'General Comment No. 6' (2005) UN Doc CRC/GC/2005/6, 11.
[50] Committee on the Rights of the Child 'Concluding observations on the fifth periodic report of France' (2016) UN Doc CRC/C/FRA/CO/5, 17; Committee on the Rights of the Child 'Concluding observations on the combined sixth and seventh periodic reports of France' (2023) UN Doc CRC/C/FRA/CO/6-7, 13; Council of Europe Parliamentary Assembly, Resolution 1810 on unaccompanied children in Europe: issues of arrival, stay and return (Adopted by the Parliamentary Assembly on 15 April 2011 at the 18th sitting), 5.10.
[51] Convention on The Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 3 (1).
[52] Committee on the Rights of the Child 'General Comment No 6' (2005) UN Doc CRC/GC/2005/6, 11; Committee on the Rights of the Child 'Joint General Comment No 23' (2017) UN Doc CRC/C/GC/23, 2; Council of Europe Parliamentary Assembly, Resolution 1810 on unaccompanied children in Europe: issues of arrival, stay and return (Adopted by the Parliamentary Assembly on 15 April 2011 at the 18th sitting), 5.10.

UK age assessments seek to determine whether a person is under 18.[53] The UK has conducted age assessments for decades,[54] but they were not codified until the Nationality and Borders Act 2022 (NABA).[55] This enables the Home Office to make age assessment regulations, but none have been made yet, so current practices are determined by guidance and case law. This article will examine the three types of UK age assessments, as conducted by the Home Office, local authorities (LAs), and the National Age Assessment Board (NAAB).

4.1 Home Office assessments

When an asylum-seeker arrives in the UK and claims to be a child, Home Office officials 'must treat the claimant as an adult if their physical appearance and demeanour very strongly suggests they are significantly over 18'.[56] Such visual examinations are better referred to as an 'age dispute' than an assessment: rather than the Home Office attempting to assess age, it is disputing that UASC could be their claimed age.[57]

The CtRC states that age assessments 'should not only take into account the physical appearance of the individual, but also his or her psychological maturity'.[58] Home Office guidance acknowledges physical appearance can be impacted by traumatic experiences and change with recovery time,[59] and case law refers to physical appearance as a 'notoriously unreliable basis' for assessing age.[60] This unreliability is connected to adultification, whereby subconscious biases can lead to conclusions that Black children are older than they are.[61]

[53] Department for Education, 'Working Together to Safeguard Children 2023' (DfE December 2023), 155. This definition is replicated in Scotland (Children (Scotland) Act 1995, s 15 (1)), Wales (Social Services and Well-being (Wales) Act 2014, s 3 (3)), and Northern Ireland (The Children (Northern Ireland) Order 1995, s 2 (2)).
[54] Evan Smith and Marinella Marmo, 'Examining the Body through Technology: Age disputes and the UK border control system' (2013) 2 ATR 67, 72.
[55] Rachel Rosen and S Khan, 'Racialising age in the UK's border regime: a case for abolishing age assessment' (2024) 66(2) RC 43, 48.
[56] Home Office, 'Assessing age' (Home Office May 2025), 17.
[57] Anna V Kvittingen, 'Negotiating childhood: Age assessment in the UK asylum system' (Refugee Studies Centre, Working Paper Series No 67 2010), 14-15.
[58] Committee on the Rights of the Child 'General Comment No. 6' (2005) UN Doc CRC/GC/2005/6, 11.
[59] Home Office, 'National Age Assessment Board: The operation of the National Age Assessment Board and sections 50 and 51 of the Nationality and Borders Act 2022' (Version 2.0, Home Office April 2024), 8.
[60] *R (on the application of NA) v London Borough of Croydon* [2009] EWHC 2357 (Admin), [27].
[61] Phillip A Goff and Others, 'The essence of innocence: consequences of dehumanizing black children' (2014) 106(4) JPSP 526, 526.

Indeed, age disputes can be seen as inherently racist, as they compare the physical features of foreign UASC with expected features of British children.[62]

Despite the CtRC's caution against overreliance on physical appearance, the Supreme Court upheld the Home Office's policy of visual assessments as lawful in 2021.[63] The Court found that the Home Office grants BD to a 'relatively generous degree'.[64] In reality, however, the majority of age-disputed UASC are later accepted as children. In 2022, 63% of age-disputed UASC had their ages accepted by LAs, meaning 867 children were wrongly treated as adults by the Home Office.[65] In 2024, there were 678,[66] including 296 UASC who were found to be 'clear and obvious children' in the Northwest alone.[67] These numbers are likely underestimates; the Home Office does not produce disaggregated data on age disputes, so it is impossible to know how many of its decisions get overturned.[68]

Furthermore, a culture of disbelief among Home Office staff is present at the border.[69] This includes Home Office officials not speaking to UASC beyond asking them to stand,[70] making jokes in front of them,[71] or questioning their credibility on asylum claims[72] - none of which is in line with the guidance. One UASC described the process as sitting in a slave market, waiting to be sold.[73] Rather than upholding BD, it is claimed that Home Office age disputes are

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62 Heaven Crawley, 'When is a child not a child? Asylum, age disputes and the process of age assessment' (Immigration Law Practitioners' Association 2007), 49.

63 *R (on the application of BF (Eritrea)) v Secretary of State for the Home Department* [2021] UKSC 38, [38].

64 Ibid, [60].

65 Helen Bamber Foundation, Asylum Aid and Humans for Rights Network, 'Disbelieved and denied: Children seeking asylum wrongly treated as adults by the Home Office' (HBF, Asylum Aid and HFRN 2023), 4.

66 Kamena Dorling, 'Serious safeguarding scandal: new data shows that hundreds of child refugees continue to be wrongly treated as adults' (Helen Bamber Foundation, 9 July 2025) <https://helenbamber.org/resources/reportsbriefings/serious-safeguarding-scandal-new-data-shows-hundreds-child-refugees> accessed 8 June 2026.

67 Rivka Shaw and Kathleen Whitehead, '"This system destroys you": Children trapped in adult asylum hotels by the Home Office' (Greater Manchester Immigration Aid Unit 2025), 12.

68 Helen Bamber Foundation, Asylum Aid and Humans for Rights Network, 'Disbelieved and denied: Children seeking asylum wrongly treated as adults by the Home Office' (HBF, Asylum Aid and HFRN 2023), 4. In May 2026, the government released updated data on age assessments, including the number of cases in the second half of 2025 where, after the Home Office initially assessed someone to be an adult, they were subsequently found to be a child. However, due to a number of outstanding cases, this data still does not present a clear picture of the number of inaccurate Home Office visual assessments. <https://www.gov.uk/government/statistical-data-sets/immigration-system-statistics-data-tables#age-assessments> accessed 8 June 2026.

69 David Neal, 'An inspection of the initial processing of migrants arriving via small boats at Tug Haven and Western Jet Foil: December 2021–January 2022' (Independent Chief Inspector of Borders and Immigration 2022), 42.

70 Ibid, 41.

71 David Bolt, 'An inspection of the Home Office's use of age assessments: July 2024–February 2025' (Independent Chief Inspector of Borders and Immigration 2025), 14.

72 Ibid, 14.

73 Heaven Crawley, 'When is a child not a child? Asylum, age disputes and the process of age assessment'

predicated on the idea that adults are posing as children, with visual assessments looking for information to confirm this.[74]

A new development is the use of age-declaration forms. NGOs reported that UASC were being pressured to sign forms confirming they agree with the Home Office's decision on age.[75] The Independent Chief Inspector of Borders and Immigration (ICIBI) confirmed this practice began in September 2024.[76] One interview participant noted that UASC who signed these forms did not understand what they were signing, and did not think they had a choice.[77] Concerningly, the Home Office is using these forms to refute an LA's subsequent decision to accept age.[78] It is unclear how these forms could uphold BD and BIC, given that the majority of Home Office decisions on age are incorrect.

The Supreme Court also held that there are sufficient safeguards against the unreliability of visual assessments, since Home Office officials can treat a UASC as an adult only where they have no doubt the person could be a child.[79] A further safeguard is that Home Office decisions are provisional, as UASC can ask an LA to make its own decision on age.[80] However, the use of hotel accommodation has made it difficult for children with disputed ages to approach LAs for age assessments. Where the Home Office determines that a UASC is an adult and disperses them to adult accommodation, it does not notify the relevant LA.[81] This means 'the onus is almost entirely on the child to find a charity or hotel staff member to assist them'.[82] In practice, because hotel staff believe they cannot take any action once the Home Office has determined that the UASC is an adult, many children are not supported in approaching LAs for an age

(Immigration Law Practitioners' Association 2007), 52.

[74] Ibid, 27.

[75] Rivka Shaw and Kathleen Whitehead, '"This system destroys you": Children trapped in adult asylum hotels by the Home Office' (Greater Manchester Immigration Aid Unit 2025), 31; Interview with P5.

[76] David Bolt, 'An inspection of the Home Office's use of age assessments: July 2024–February 2025' (Independent Chief Inspector of Borders and Immigration 2025), 14.

[77] Interview with P5.

[78] David Bolt, 'An inspection of the Home Office's use of age assessments: July 2024–February 2025' (Independent Chief Inspector of Borders and Immigration 2025), 15.

[79] Home Office, 'Assessing age' (Home Office May 2025), 21.

[80] *R (on the application of HAM) v London Borough of Brent* [2022] EWHC 1924 (Admin), [26].

[81] David Bolt, 'An inspection of the Home Office's use of age assessments: July 2024–February 2025' (Independent Chief Inspector of Borders and Immigration 2025), 22-23.

[82] Helen Bamber Foundation, Asylum Aid and Humans for Rights Network, 'Disbelieved and denied: Children seeking asylum wrongly treated as adults by the Home Office' (HBF, Asylum Aid and HFRN 2023), 3.

assessment. NGOs have identified children as young as 14 in adult hotels, the majority of whom are forced to share rooms with unknown men.[83]

In 2023, NGOs also began to identify age-disputed UASC who were arrested and imprisoned for immigration offences, before having the opportunity to approach an LA.[84] This includes 17 UASC who were sentenced as adults, spent time in adult men's prisons, and were later found to be children.[85] Courts and prisons are not notified when UASC are age-disputed, placing the onus on children to raise their age through complex police interviews, court hearings, and in prison.[86] The Children's Commissioner agreed that UASC in adult prisons did not meet the threshold of 'significantly over 18',[87] yet children continue to be wrongly identified as adults. These significant consequences for age-disputed UASC highlight how Home Office assessments fail to uphold BIC.

4.2 LA assessments

LA age assessments are psychosocial assessments conducted by social services.[88] This is unique in Europe, where the majority of countries do not involve social workers.[89] The process is called *Merton*-compliant, after case law which established LAs 'must seek to elicit the general background of the applicant' and 'make an assessment of his credibility' to decide age.[90] Further guidelines were summarised in *R (VS)*.[91] They state that BD is always given to UASC, and that any decision on age must be based on clear, detailed reasons.[92] These

[83] Refugee and Migrant Children's Consortium, 'Lost Childhoods: The consequences of flawed age assessments at the UK border' (RMCC 2025), 4.
[84] Vicky Taylor, '"No Such Thing as Justice Here": The Criminalisation of People Arriving to the UK on 'Small Boats" (Border Criminologies and the Centre for Criminology 2024), 28.
[85] Vicky Taylor, Maddie Harris, Basma Kamel and Francesca Parkes, '"I Told Them the Truth": An Update on the Criminalisation of People Arriving to the UK on 'Small Boats" (Border Criminologies and the Centre for Criminology 2025), 16.
[86] Vicky Taylor, '"No Such Thing as Justice Here": The Criminalisation of People Arriving to the UK on 'Small Boats" (Border Criminologies and the Centre for Criminology 2024), 30.
[87] Ibid, 31.
[88] Debbie Busler, 'Psychosocial age assessments in the UK' (2016) 52 FMR 86, 86.
[89] Anna V Kvittingen, 'Negotiating childhood: Age assessment in the UK asylum system' (Refugee Studies Centre, Working Paper Series No 67 2010), 21.
[90] *R (on the application of B) v Mayor and Burgesses of the London Borough of Merton* [2003] EWHC 1689, [37].
[91] *R (on the application of VS) v Secretary of State for the Home Department* [2014] EWHC 2483 (QB).
[92] Ibid, [78].

guidelines were replicated in the Association of Directors of Children's Services (ADCS) guidance.[93]

The CtRC's threefold concept of BIC is seen within psychosocial assessments. ADCS guidance states 'age assessments should not be carried out on every child' and are 'limited to the minimum necessary',[94] which reflects BIC as a substantive right.[95] LAs must either have explicit regard for CRC principles,[96] or consider the need to safeguard and promote the welfare of children,[97] thus upholding BIC as a legal principle.[98] Procedural guarantees also ensure UASC have an opportunity to address adverse credibility findings before a decision on age, described as 'axiomatic' to fairness,[99] which can be seen as decision-makers evaluating the impact of their decision.[100]

BD, or the presumption of minority, is also present throughout the age assessment process. ADCS guidance confirms that UASC will be accommodated by social services in child-appropriate accommodation and will receive support from a social worker, pending the outcome of a *Merton*-compliant assessment.[101] Furthermore, it directs social workers to have 'an awareness and acknowledgement' of cultural differences,[102] thereby enabling greater cultural sensitivity than visual assessments. The Scottish guidance goes further, stating social workers must 'ensure that a culture of disbelief does not develop',[103] and the Welsh government acknowledges the significance of BD given 'age assessment is not a scientific process'.[104]

However, it is less clear that LA assessments comply with IHRL in practice. Social workers question UASC about their backgrounds to determine whether their accounts are credible.[105]

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[93] Association of Directors of Children's Services, 'Age Assessment Guidance: Guidance to assist social workers and their managers in undertaking age assessments in England' (ADCS October 2015).
[94] Ibid, 5.
[95] Committee on the Rights of the Child 'General Comment No 6' (2005) UN Doc CRC/GC/2005/6, 4.
[96] United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024, s.6(1); Social Services and Well-being (Wales) Act 2014, s.7(2).
[97] The Children Act 2004 s 11 (2); The Children (Northern Ireland) Order 1995 s 3 (1).
[98] Committee on the Rights of the Child 'General Comment No 6' (2005) UN Doc CRC/GC/2005/6, 11. 4.
[99] *R (on the application of FZ) v London Borough of Croydon* [2011] EWCA Civ 59, [21].
[100] Committee on the Rights of the Child 'General Comment No 6' (2005) UN Doc CRC/GC/2005/6, 11. 4.
[101] Association of Directors of Children's Services, 'Age Assessment Guidance: Guidance to assist social workers and their managers in undertaking age assessments in England' (ADCS October 2015), 10.
[102] Ibid, 14.
[103] Scottish Government, 'Age Assessment Practice Guidance for Scotland' (Scottish Government March 2018), 30.
[104] Welsh Government, 'Unaccompanied Asylum Seeking Children: Age Assessment Toolkit' (OGL 2021), 13.
[105] Immigration Social Work Services, Young Roots and Public Law Project, 'Good Decision-Making in Age Assessments' (ISWS, Young Roots and PLP 2024), 38-40.

Testing credibility requires UASC to demonstrate 'beyond doubt that they are telling the truth'.[106] This is an unfair standard. Firstly, it assumes that all cultures share the same time consciousness as the UK.[107] An inability to recall what age they started school or having never celebrated a birthday is perceived as deceitful rather than as a consequence of a different culture.[108] Secondly, *Merton* clarifies 'an untrue history…is not necessarily indicative of a lie as to the age of the applicant'.[109] However, after examining eleven LA reports, NGOs found that the majority contained only negative credibility statements.[110] This suggests LAs 'focus disproportionately on the credibility of an asylum seeker's account' when assessing age.[111]

Although visual assessments are not conducted, physical appearance still plays a role in LA assessments. NGOs found that age assessment reports contain appearance indicators, such as facial hair and size, more than any other observation.[112] Academics have highlighted that social workers' comments on UASC's appearance during age assessments would be viewed as inappropriate for any other child.[113] The use of pseudoscientific language has also been met with criticism. For example, social workers use terms such as 'nasolabial lines'.[114] There is no research to suggest that this facial feature corresponds to older age, yet its repeated use lends their observations a false legitimacy.[115] The overemphasis on physical appearance and pseudoscientific terminology lends LA reports a racist undertone,[116] which cannot be in BIC.

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[106] Rhetta Moran and Susan Gillett, 'Twenty-first century eugenics? A case study about the Merton Test' in Michael Lavalette and Laura Penketh (eds.), *Race, Racism and Social Work: Contemporary Issues and Debates* (Policy Press 2013), 225.
[107] Rachel Rosen and S Khan, 'Racialising age in the UK's border regime: a case for abolishing age assessment' (2024) 66(2) RC 43, 54.
[108] Ibid.
[109] *R (on the application of B) v Mayor and Burgesses of the London Borough of Merton* [2003] EWHC 1689, [28].
[110] Immigration Social Work Services, Young Roots and Public Law Project, 'Good Decision-Making in Age Assessments' (ISWS, Young Roots and PLP 2024), 14.
[111] Heaven Crawley and Emma Kelly, 'Asylum, Age Disputes and the Process of Age Assessment' in Emma Kelly and Farhat Bokhari (eds.), *Safeguarding children from abroad: refugee, asylum seeking and trafficked children in the UK* (Jessica Kingsley 2012), 64.
[112] Immigration Social Work Services, Young Roots and Public Law Project, 'Good Decision-Making in Age Assessments' (ISWS, Young Roots and PLP 2024), 8.
[113] Rachel Rosen and S Khan, 'Racialising age in the UK's border regime: a case for abolishing age assessment' (2024) 66(2) RC 43, 51.
[114] Immigration Social Work Services, Young Roots and Public Law Project, 'Good Decision-Making in Age Assessments' (ISWS, Young Roots and PLP 2024), 8.
[115] Ibid, 8.
[116] Rachel Rosen and S Khan, 'Racialising age in the UK's border regime: a case for abolishing age assessment' (2024) 66(2) RC 43, 57.

Moreover, UASC who are accepted as children will continue to receive accommodation and support from social services. In contrast, if the LA concludes that the UASC is an adult, the UASC becomes the Home Office's responsibility.[117] This direct financial implication means that classifying UASC as adults may be preferable for under-resourced LAs, creating a conflict of interest.[118] In Scotland, it was found that LAs with higher numbers of referrals for age assessments are more likely to find UASC to be adults,[119] suggesting a 'postcode lottery' in which the area determines the age decision.[120] This is despite Scotland's unique position, whereby it has incorporated the CRC into Scots law,[121] and appoints independent guardians to all separated children in care, which ought to remove concerns about objectivity.[122]

Aligning with the CtRC's comment that UASC should have the opportunity to appeal age decisions,[123] LA assessments can be challenged through judicial review (JR). Following *R (A) v Croydon*,[124] the Court can make its own decision on age, which is binding on the LA and Home Office.[125] However, from obtaining legal advice to having the case determined, JRs can take years to be resolved.[126] For UASC, this means living in limbo,[127] as they may find it difficult to be accepted into school or college due to their determined age,[128] and asylum cases may also be put on hold.[129] JRs also involve UASC undergoing cross-examination,[130] which involves little consideration of the difficulties children face in recalling past traumatic

[117] Association of Directors of Children's Services, 'Age Assessment Guidance: Guidance to assist social workers and their managers in undertaking age assessments in England' (ADCS October 2015), 30.
[118] Marie-Bénédicte Dembour, 'Surely Not! Procedurally lawful age assessments in the UK' in Mateja Sedmak, Birgit Sauer and Barbara Gornik (eds.), *Unaccompanied Children in European Migration and Asylum Practices* (Routledge 2017), 170; Katia Bianchini, 'Unaccompanied asylum-seeker children: flawed processes and protection gaps in the UK' (2011) 37 FMR 52, 52.
[119] Francesca Sella and Sabrina Galella, 'Unlocking Support: age disputed young people in Scotland' (JustRight Scotland 2024), 31.
[120] Ibid, 29.
[121] United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024, s.6(1).
[122] Interview with P2.
[123] Committee on the Rights of the Child 'Joint General Comment No. 23' (2017) UN Doc CRC/C/GC/23, 2.
[124] *R (on the application of A) v London Borough of Croydon* [2009] UKSC 8.
[125] Kamena Dorling, 'Happy Birthday? Disputing the age of children in the immigration system' (Coram Children's Legal Centre 2013), 24.
[126] Ibid.
[127] Helen Bamber Foundation, Humans for Rights Network and Refugee Council, 'Forced Adulthood: The Home Office's incorrect determination of age and how this leaves child refugees at risk' (HBF, HFRN and Refugee Council 2024), 15.
[128] Sarah Walker, 'Access Denied: refugee children and the exclusionary logic of the education system in England' (2011) 3(3) P&E 210, 215.
[129] Home Office, 'Assessing age' (Home Office May 2025), 70.
[130] Sam Madge-Wyld, 'Age Assessments: Where Now After *R (A) v Croydon London Borough Council*?' (2010) 15(4) JR 382, 385.

events.[131] It is also unclear why judges are best placed to make the final, binding decision on age. This all helps explain why some UASC choose to drop their age challenges.[132] After recounting their background to Home Office officials, social workers, and lawyers, many do not want to be questioned again,[133] or risk not being believed.

4.3 NAAB assessments

Established by NABA, the NAAB is a designated body authorised to conduct age assessments.[134] It does so upon referral from LAs,[135] with 192 referrals being made in 2024.[136] The Home Office can also refer to the NAAB, doing so 44 times in 2024.[137] Like LAs, the NAAB conducts *Merton*-compliant psychosocial assessments.[138] It must ensure 'the best interests of the child are a primary consideration at all times',[139] and UASC 'must be given the benefit of the doubt and treated as a child' if doubts remain.[140] However, UASC have described NAAB assessments as similar to asylum interviews[141] and have experienced multiple full-day sessions of intense credibility questioning.[142] The views of UASC suggest they do not feel BD nor BIC is upheld during NAAB assessments.[143]

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[131] Laura Brownlees and Zubier Yazdani, 'The Fact of Age: Review of case law and local authority practice since the Supreme Court judgment in R (A) v Croydon LBC, [2009]' (Office of the Children's Commissioner 2012), 47-48.
[132] Interview with P4; Interview with P5; Interview with P7.
[133] Interview with P4; Interview with P6.
[134] Nationality and Borders Act 2022, s.50(1)(b) and s.51(1).
[135] Home Office, 'National Age Assessment Board: The operation of the National Age Assessment Board and sections 50 and 51 of the Nationality and Borders Act 2022' (Version 2.0, Home Office April 2024), 8.
[136] Refugee and Migrant Children's Consortium, 'Briefing on the National Age Assessment Board' (RMCC 2026), 9.
[137] Ibid.
[138] Home Office, 'National Age Assessment Board: The operation of the National Age Assessment Board and sections 50 and 51 of the Nationality and Borders Act 2022' (Version 2.0, Home Office April 2024), 20.
[139] Ibid, 9.
[140] Ibid, 9-10; Nationality and Borders Act 2022, ss.50-51.
[141] Interview with P3.
[142] Interview with P2.
[143] Update: In the recent case of ALK (2025), the Upper Tribunal quashed a NAAB assessment which found a 17-year-old UASC to be an adult. The assessment was found to be significantly flawed, and it was noted that there was no evidence to contradict the date of birth consistently provided by the claimant. Furthermore, it was highlighted that the NAAB assessors failed to conduct the assessment in a way which acknowledged and observed the principles of working with UASC who have experienced significant trauma. It is important to note that, given the aforementioned difficulties some UASC have in challenging negative age assessment decisions, whilst this case is considered the first successful challenge against a NAAB assessment, it is very unlikely to be the NAAB's first flawed assessment. See: R (on the application of ALK) v Secretary of State for the Home Department and Walsall Metropolitan Borough Council [2025] UKUT JR-2025-LON-000694, [125], [163]-[164]; Doughty Street Chambers, 'National Age Assessment Board Decision quashed in landmark judgment' (DSC, 4 December 2025) <https://www.doughtystreet.co.uk/news/national-age-assessment-board-decision-quashed-landmark-judgment> accessed 8 June 2026.

NAAB's introduction was met with criticism from the British Association of Social Workers (BASW), which discouraged social workers from joining, because NAAB sits within the Home Office.[144] The ICIBI's report found NAAB social workers did not feel their values were compromised,[145] yet several interview participants raised concerns about NAAB's objectivity. One reflected: 'if the Home Office pays you, and you're part of the Home Office, then you are the Home Office'.[146] This is demonstrated by the NAAB's ability to override LA decisions on age: if an LA accepts age without a full assessment, the Home Office can notify the LA that a full assessment is needed; if the LA completes an assessment and accepts age, that decision is not binding on the NAAB.[147] The Home Office's increased control could lead LAs to feel reluctant to accept age without assessments,[148] contrary to guidance that age assessments should not be routine.[149]

When conducting age assessments, NAAB looks to 'publicly accessible social media profiles'.[150] Case law, in the context of social media disclosure during JRs,[151] has held that it is disproportionate to require UASC to provide their login details and have their entire profiles scrutinised.[152] However, social media can still be accessed during an age assessment. It does not appear that NAAB adheres to this guidance. One interview participant noted that NAAB takes an aggressive approach to social media, finding anything to fit their narrative that UASC are adults; for example, having unknown or older Facebook friends.[153] Anecdotes of NAAB using photographs to claim UASC are older (despite poor-quality photographs or filters making such images unreliable[154]) include children wearing jewellery, taking pictures of motorcycles,

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[144] British Association of Social Workers, 'BASW Statement: National Age Assessment Board' (BASW 2023), 1.
[145] David Bolt, 'An inspection of the Home Office's use of age assessments: July 2024–February 2025' (Independent Chief Inspector of Borders and Immigration 2025) 30, 81.
[146] Interview with P4.
[147] Home Office, 'National Age Assessment Board: The operation of the National Age Assessment Board and sections 50 and 51 of the Nationality and Borders Act 2022' (Version 3.0, Home Office April 2024), 66. As of May 2026, the government has proposed making NAAB decisions binding on local authorities. BASW's objections to this can be accessed here: <https://basw.co.uk/about-social-work/psw-magazine/articles/proposed-changes-national-age-assessment-board-threat> accessed 8 June 2026.
[148] Interview with P2.
[149] Department for Education, 'Care of unaccompanied migrant children and child victims of modern slavery: Statutory guidance for local authorities' (DfE November 2017), 13.
[150] Home Office, 'National Age Assessment Board: The operation of the National Age Assessment Board and sections 50 and 51 of the Nationality and Borders Act 2022' (Version 2.0, Home Office April 2024), 40.
[151] *R (on the application of BG) v London Borough of Hackney* [2022] UKUT 00338 (IAC).
[152] Ibid, [65].
[153] Interview with P5.
[154] *R (on the application of ARO) v London Borough of Islington* [2025] UKUT JR-2024-LON-001201, [128].

and wearing designer clothes.[155] This is indicative of an absence of BD, with NAAB age assessors using social media to substantiate their preconceived doubts.[156] Concerningly, another interview participant noted that, whilst LAs were previously reluctant to access social media during age assessments, this has become routine since they received NAAB training.[157] NAAB has provided free age assessment training to around 80 LAs,[158] which has been referred to as an 'infection of Home Office ideology' in the field of age assessment.[159]

Furthermore, rather than improving Home Office practices at the border to ensure children are not criminalised as adults, the Home Office's new policy, introduced in June 2025, confirms that the 'additional safeguard to reduce the likelihood of children being prosecuted and imprisoned' is an abbreviated, *Merton*-compliant assessment by the NAAB.[160] Such assessments should occur after the Home Office concludes UASC are over 18, but before any arrest.[161] The guidance recognises that some age-disputed UASC will not appear to be obviously over 18 (despite being designated as such by the Home Office) and states an abbreviated assessment cannot take place if the assessors 'have doubts that the individual may be a child'.[162] However, if abbreviated assessments are only conducted when assessors have no doubts, then BD is excluded from the process. The guidance also recommends that abbreviated assessments last between 5 and 7 hours.[163] It seems difficult for NAAB social workers to claim they have no doubt the UASC could be a child, whilst spending a full day questioning them to validate this decision. Moreover, abbreviated assessments are designed to take place in hotel accommodation, immigration detention, police stations, or prison;[164] all of which have been recognised as unsuitable venues for age assessments.[165] With reports that UASC detained in

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[155] Interview with P6.
[156] Interview with P5; Interview with P6.
[157] Interview with P2.
[158] David Bolt, 'An inspection of the Home Office's use of age assessments: July 2024–February 2025' (Independent Chief Inspector of Borders and Immigration 2025), 89.
[159] Interview with P5.
[160] Home Office, 'National Age Assessment Board: The operation of the National Age Assessment Board and sections 50 and 51 of the Nationality and Borders Act 2022' (Version 3.0, Home Office April 2024), 77.
[161] Ibid, 77.
[162] Ibid, 79.
[163] Ibid, 81.
[164] Ibid, 76.
[165] Association of Directors of Children's Services, 'Age Assessment Guidance: Guidance to assist social workers and their managers in undertaking age assessments in England' (ADCS October 2015), 15; Home Office, 'Detention Services Order 02/2019: Care and management of Post Detention Age claims' (Home Office January 2022), 5; Home Office, 'National Age Assessment Board: The operation of the National Age Assessment Board and sections 50 and 51 of the Nationality and Borders Act 2022' (Version 3.0, Home Office April 2024), 89; Committee on the Rights of the Child 'General Comment No. 6' (2005) UN Doc CRC/GC/2005/6, 11.

adult prisons have suffered mental health crises, including psychosis,[166] alongside UASC experiencing NAAB assessments as hostile and retraumatising,[167] full-day assessments in unsafe venues cannot uphold BIC.

4.4 Future developments

Scientific age-assessment methods, such as sexual maturity, paediatric, and dental assessments, were discontinued in the UK in the 2010s.[168] The UK also stopped using bone X-rays to assess age in 1982, due to concerns about their reliability.[169] Bone and dental examinations are unreliable methods for UASC, because all reference populations are based on European children.[170] In comparing the development of UASC to European reference groups, this creates the 'unscientific speculation' that 'skeletons develop identically across the world'.[171] Furthermore, Post-Traumatic Stress Disorder is the most common psychiatric diagnosis for asylum-seekers,[172] yet scientific methods do not consider how traumatic experiences contribute to premature ageing.[173] Finally, many practitioners oppose the use of radiation without therapeutic value.[174] By 2012, every statutory and professional body in the UK had argued against the use of radiological age assessments,[175] and the current absence of scientific methods in the UK aligns with IHRL standards for assessing age.[176]

However, NABA enabled the reintroduction of scientific methods.[177] The justification was that scientific tests could improve the process, and the majority of European countries use these

[166] Vicky Taylor, Maddie Harris, Basma Kamel and Francesca Parkes, '"I Told Them the Truth": An Update on the Criminalisation of People Arriving to the UK on 'Small Boats'' (Border Criminologies and the Centre for Criminology 2025), 20.
[167] Rivka Shaw and Kathleen Whitehead, '"This system destroys you": Children trapped in adult asylum hotels by the Home Office' (Greater Manchester Immigration Aid Unit 2025), 41.
[168] Interview with P7.
[169] Evan Smith and Marinella Marmo, 'Examining the Body through Technology: Age disputes and the UK border control system' (2013) 2 ATR 67, 74.
[170] Johannes B Oertli, 'Forensic Age Estimation in Swiss Asylum Procedures: Race in the production of age' (2019) 35(1) R 8, 11.
[171] Gregor Noll, 'Junk Science? Four Arguments against the Radiological Age Assessment of Unaccompanied Minors Seeking Asylum' (2016) 28(2) IJRL 234, 239.
[172] Association of Directors of Children's Services, 'Age Assessment Guidance: Guidance to assist social workers and their managers in undertaking age assessments in England' (ADCS October 2015), 8.
[173] Gregor Noll, 'Junk Science? Four Arguments against the Radiological Age Assessment of Unaccompanied Minors Seeking Asylum' (2016) 28(2) IJRL 234, 244.
[174] Albert Aynsley-Green, 'Unethical Age Assessment' (2009) 206(7) BDJ 337, 337.
[175] Albert Aynsley-Green and Others, 'Medical, statistical, ethical and human rights considerations in the assessment of age in children and young people subject to immigration control' (2012) 102 BMB 17, 25.
[176] Committee on the Rights of the Child 'Joint General Comment No. 23' (2017) UN Doc CRC/C/GC/23, 2.
[177] Nationality and Borders Act 2022, s.52(1) and s.53(2).

methods to assess age.[178] The British Dental Association opposed this measure, stating dentists 'are health professionals, not border guards',[179] and the Royal College of Paediatrics and Child Health agreed X-rays are inaccurate and unethical.[180] The government's own advisory committee concluded scientific methods will not be determinative, as they only provide the likelihood of a certain age.[181] It recommended that dental and bone examinations should be secondary or in conjunction with *Merton*-compliant assessments.[182]

NABA sets out that age assessors 'must take into account, as damaging the age-disputed person's credibility…the decision not to consent' to scientific tests.[183] If scientific methods are introduced, this means NABA must issue negative credibility findings against UASC who do not wish to undergo procedures such as Magnetic Resonance Imaging or X-rays. As a result, the opportunities for assessors to identify UASC as adults will increase.[184] The desire to introduce scientific methods also embodies 'a fundamental disbelief in what people seeking asylum say'.[185] The basis of scientific methods is that migrants' words are unreliable, but their bodies hold the truth.[186] Despite criticisms of the NAAB and the unreliability of scientific tests, they are viewed as more trustworthy than UASC.[187]

In July 2025, the government announced that after considering scientific age assessment methods, 'the most cost-effective option to pursue is likely to be Facial Age Estimation'.[188] This method would use Artificial Intelligence (AI) to analyse UASC's faces and estimate age.[189] BASW has expressed concern that AI cannot consider 'racial profiling, trauma,

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[178] HC Deb 19 April 2024, vol 748, col 627.
[179] British Dental Association, 'Lords argue dentists should not be border guards' (*BDA*, 16 February 2022) <https://www.bda.org/news-and-opinion/news/lords-argue-dentists-should-not-be-border-guards/> accessed 8 June 2026.
[180] Child Protection Standing Committee and Advocacy Committee, 'Children and young people seeking asylum and refugees-guidance for paediatricians' (Royal College of Paediatrics and Child Health, 23 June 2025) <https://www.rcpch.ac.uk/resources/refugee-asylum-seeking-children-young-people-guidance-paediatricians#age-assessment> accessed 8 June 2026.
[181] Interim Age Estimation Science Advisory Committee, 'Biological evaluation methods to assist in assessing the age of unaccompanied asylum-seeking children' (AESAC 2022), 54.
[182] Ibid, 37.
[183] Nationality and Borders Act 2022, s.52(7).
[184] Interview with P5.
[185] Interview with P3.
[186] Evan Smith and Marinella Marmo, 'Examining the Body through Technology: Age disputes and the UK border control system' (2013) 2 ATR 67, 70.
[187] Didier Fassin and Estelle D'Halluin, 'The Truth from the Body: Medical Certificates as Ultimate Evidence for Asylum Seekers' (2005) 107(4) *American Anthropologist* 597, 602.
[188] HC Deb 22 July 2025, vol 771, col 100W.
[189] Ibid, col 100W.

malnutrition, abuse, [and] sleep deprivation', all of which impact physical appearance.[190] Furthermore, facial recognition is known to be less accurate and more biased than human decision-making.[191] The proposed use of AI exemplifies the government's prioritisation of unreliable methods over the needs of UASC,[192] repeating AI's cost-effectiveness claims without considering BD or BIC.[193]

The former Children's Commissioner expressed dissatisfaction that neither the ratification of the CRC nor the Home Office's statutory duty to consider BIC[194] led to improvements to UK age assessments.[195] This remains true. Home Office visual assessments are unreliable and inaccurate, replacing BD and BIC with a culture of disbelief.[196] LA psychosocial assessments, through overreliance on credibility,[197] do not prioritise BD and BIC. Finally, NAAB's focus on social media, abbreviated assessments, and scientific methods demonstrates its focus is immigration control rather than the rights of separated children.[198] In conclusion, UK age assessment practices and policies fail to comply with IHRL standards for assessing age.

5 Alternatives

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[190] British Association of Social Workers, 'Home Office-led age assessments should end, says BASW' (*Professional Social Work Magazine*, 30 July 2025) <https://basw.co.uk/about-social-work/psw-magazine/articles/home-office-led-age-assessments-should-end-says-basw> accessed 8 June 2026.
[191] Kamena Dorling, 'Helen Bamber Foundation welcomes the scrapping of x-rays to assess the age of children seeking asylum, but remains concerned at the use of visual assessments' (Helen Bamber Foundation, 22 July 2025) <https://www.helenbamber.org/resources/latest-news/helen-bamber-foundation-welcomes-scrapping-x- rays-assess-age-children-seeking> accessed 8 June 2026.
[192] Interview with P5.
[193] HC Deb 22 July 2025, vol 771, col 100W.
On 29 May 2026, the Home Office published guidance on using facial age estimation to support initial age decisions, which can be accessed here: <https://www.gov.uk/government/publications/facial-age-estimation/facial-age-estimation-using-ai-to-support-initial-age-decisions-a-guide-accessible> accessed 8 June 2026.
[194] Borders, Citizenship and Immigration Act 2009, s.55(1)(a).
[195] Albert Aynsley-Green and Others, 'Medical, statistical, ethical and human rights considerations in the assessment of age in children and young people subject to immigration control' (2012) 102 *British Medical Bulletin* 17, 38.
[196] Interview with P1; Interview with P5.
[197] Heaven Crawley and Emma Kelly, 'Asylum, Age Disputes and the Process of Age Assessment' in Emma Kelly and Farhat Bokhari (eds.), Safeguarding children from abroad: refugee, asylum seeking and trafficked children in the UK (Jessica Kingsley 2012), 64; Anna V Kvittingen, 'Negotiating childhood: Age assessment in the UK asylum system' (Refugee Studies Centre, Working Paper Series No 67 2010), 35.
[198] Greater Manchester Immigration Aid Unit, 'The National Age Assessment Board: children's experiences' (Greater Manchester Immigration Aid Unit, 20 May 2025) <https://gmiau.org/the-national-age-assessment-board-childrens-experiences/> accessed 8 June 2026. For a recent comprehensive summary of NAAB's flaws, see Refugee and Migrant Children's Consortium, 'Briefing on the National Age Assessment Board' (RMCC 2026).

Perhaps the reason that IHRL standards have not led to improvements in UK age assessment practices is that they adopt ‘a single universal definition of childhood’.[199] The CRC’s focus on chronological age does not enable flexibility for UASC who have experienced significant trauma and require ongoing support.[200] Hence, improvements to age assessment methods are insufficient, because they still prioritise chronological age.[201] The need to define childhood based on chronological age is a European concept linked to industrialisation.[202] Many countries in the Global South follow a different time-consciousness from that deemed normal in the West[203] and place less importance on chronological age as an indicator of adulthood.[204] The perceived need to determine age also introduces doubt around UASC who are unable to meet Western evidentiary standards for knowledge of age.[205] The question, therefore, should not be how to improve age assessment methods, but whether there are alternatives to this system.

5.1 Needs Assessments

The UK’s definition of a child may work for British society and culture,[206] but for UASC who arrive in the UK, their chronological age does not always align with their support needs.[207] The current system recognises that looked-after children have support needs after turning 18,[208] but this is forgotten for asylum-seekers who are 18 or older on arrival.[209] This demarcation also affects UASC who are under 18 but do not meet Western expectations of childhood appearance,

[199] David M Rosen, ‘Child Soldiers, International Humanitarian Law, and the Globalization of Childhood’ (2007) 109(2) AA 241, 242.
[200] Devyani Prabhat, Ann Singleton and Roobie Eyles, ‘Age is Just a Number? Supporting Migrant Young People with Precarious Legal Status in the UK’ (2019) 27 IJCR 228, 232.
[201] Mary A Kenny and Maryanne Loughry, ‘Addressing the limitations of age determination for unaccompanied minors: A way forward’ (2018) 92 CYSR 15, 20.
[202] Ashish I Vaska, Jill Benson, Jaklin A Eliott and Jan Williams, ‘Age determination in refugee children: A narrative history tool for use in holistic age assessment’ (2016) 52 JPCH 523, 524.
[203] Rachel Rosen and S Khan, ‘Racialising age in the UK’s border regime: a case for abolishing age assessment’ (2024) 66(2) RC 43, 55.
[204] Selma N Uugwanga, Luzelle Naudé and Amber G Thalmayer, ‘Becoming an Ovambo Adult: Growing Into Agentic Communalism in Sub-Saharan Africa’ (2025) 36(1) PS 55, 61.
[205] Aurora T Sørsveen and Marit Ursin, ‘Constructions of ‘the ageless’ asylum seekers: An analysis of how age is understood among professionals working within the Norwegian immigration authorities’ (2021) 35 C&S 198, 207.
[206] Wendy S Rogers, ‘Constructing Childhood, Constructing Child Concern’ in Pam Foley et al. (eds.), *Children in Society: Contemporary Theory, Policy and Practice* (Palgrave Macmillan 2001), 27.
[207] Mary A Kenny and Maryanne Loughry, ‘Addressing the limitations of age determination for unaccompanied minors: A way forward’ (2018) 92 CYSR 15, 19-20.
[208] Kamena Dorling, ‘Happy Birthday? Disputing the age of children in the immigration system’ (Coram Children’s Legal Centre 2013), 41.
[209] Ibid.

innocence, and vulnerability:[210] age assessments draw borders between children and adults, as well as wanted and unwanted asylum-seekers.[211] One alternative to age assessments, suggested by three interview participants, would therefore be to shift the focus from chronological age to needs.[212]

This could entail the introduction of a 'special youth category' and the provision of support for asylum-seekers[213] aged 18-25 on arrival.[214] Since this would acknowledge and prioritise the ongoing care needs and best interests of unaccompanied young people, it would result in a significant improvement to age assessments.[215] Another option would be to conduct needs assessments for all asylum-seekers, regardless of age.[216] It has been suggested that this could follow the UNHCR's 'Vulnerability Screening Tool',[217] which identifies support needs and preventive measures 'to reduce the cost of unaddressed vulnerability'.[218] This recognises that if the goal is to provide protection, needs take precedence over chronological age.[219] Whilst this approach has been critiqued as 'burdensome administration',[220] it upholds IHRL standards by prioritising needs, thereby prioritising BIC.

However, this alternative does not confront the culture of disbelief within age assessments.[221] If a special youth category were adopted, Home Office visual assessments could identify UASC as 'significantly over 25', thereby excluding them from this category. Furthermore, social

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[210] Artemis Christinaki, 'Age assessment and migration control: 'Child as method'' (2025) 0(0) GSC 1, 5.
[211] Ibid, 8.
[212] Interview with P1; Interview with P3; Interview with P4.
[213] Devyani Prabhat, Ann Singleton and Roobie Eyles, 'Age is Just a Number? Supporting Migrant Young People with Precarious Legal Status in the UK' (2019) 27 IJCR 228, 229.
[214] Susanna C Maioli and Others, 'Improving safeguarding of unaccompanied migrant young people' (2023) 384 BMJ 2626, 2626.
[215] Jo Dixon and Jim Wade, 'Leaving 'Care'? Transition Planning and Support for Unaccompanied Young People' in Ravi K S Kohli and Fiona Mitchell (eds.), Working with Unaccompanied Asylum Seeking Children: Issues for Policy and Practice (Palgrave Macmillan 2007), 136; Isabel Clifford, '"Unscrupulous People Posing as Children": The Problematisation of Unaccompanied Children in UK Home Office Policy Discourse' (GRITIM-UPF Working Paper Series No 50, 2022), 14.
[216] Mary A Kenny and Maryanne Loughry, ''These don't look like children to me': age assessment of unaccompanied and separated children' in Mary Crock and Lenni B Benson (eds.), *Protecting Migrant Children: In Search of Best Practice* (Edward Elgar Publishing 2018), 333.
[217] Mary A Kenny and Maryanne Loughry, 'Addressing the limitations of age determination for unaccompanied minors: A way forward' (2018) 92 CYSR 15, 18.
[218] UNHCR and International Detention Coalition, 'Vulnerability Screening Tool' (Geneva 2016), 24.
[219] Devyani Prabhat, Ann Singleton and Roobie Eyles, 'Age is Just a Number? Supporting Migrant Young People with Precarious Legal Status in the UK' (2019) 27 IJCR 228, 244.
[220] Gerison Lansdown, 'Innocenti Insight: The Evolving Capacities of the Child' (UNICEF Innocenti Research Centre 2005), 50.
[221] David Neal, 'An inspection of the initial processing of migrants arriving via small boats at Tug Haven and Western Jet Foil: December 2021–January 2022' (Independent Chief Inspector of Borders and Immigration 2022), 42.

workers could still dismiss UASC's accounts of their vulnerability as not credible.[222] This highlights how alternatives to age assessments are susceptible to misuse by governments,[223] and that interrogating the necessity of chronological age without confronting broader policies and practices around immigration is insufficient.

5.2 Abolition

By conducting age assessments on UASC, the UK imposes its Western concept of chronological age on people for whom age may not carry the same significance.[224] If UASC are unable to prove their age in a manner acceptable to the West, they experience an 'existential theft' echoing colonial violence,[225] linking UK age assessments to its colonial history of forcing Western conceptions of age and time-consciousness on the Global South.[226] Because of this, Rosen and Khan have proposed 'the abolition, not reform' of age assessments.[227] Four interview participants also responded that the best improvement to UK age assessment practices is not to assess age.[228] Abolition is a compelling argument — the best way to uphold BD and BIC is to believe children and not subject them to unreliable or retraumatising assessments.

Rosen and Khan liken the abolition of age assessments to the abolition of borders.[229] This seeks to demythologise the need for borders as protective measures, instead highlighting the violence they produce.[230] It also emphasises that asylum-seekers are not naturally vulnerable; rather, vulnerability is constructed through a state's immigration policies.[231] The ultimate goal of

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[222] Isabel Clifford, '"Unscrupulous People Posing as Children": The Problematisation of Unaccompanied Children in UK Home Office Policy Discourse' (GRITIM-UPF Working Paper Series No. 50, 2022), 16.
[223] Anders Hjern, Maria Brendler-Lindqvist and Marie Norredam, 'Age assessment of young asylum seekers' (2012) 101 AP 4, 6.
[224] Gregor Noll, 'Junk Science? Four Arguments against the Radiological Age Assessment of Unaccompanied Minors Seeking Asylum' (2016) 28(2) IJRL 234, 250.
[225] Rachel Rosen and S Khan, 'Racialising age in the UK's border regime: a case for abolishing age assessment' (2024) 66(2) RC 43, 58.
[226] Ibid.
[227] Ibid, 60.
[228] Interview with P2; Interview with P3; Interview with P4; Interview with P6.
[229] Rachel Rosen and S Khan, 'Racialising age in the UK's border regime: a case for abolishing age assessment' (2024) 66(2) RC 43, 60.
[230] Simon Campbell, Kathryn Medien, Sara Riva and Brian Whitener, 'Introduction' in Simon Campbell, Kathryn Medien, Sara Riva and Brian Whitener (eds.), *Border Abolition Now* (Pluto Press 2024), 3.
[231] Bridget Anderson, Nandita Sharma and Cynthia Wright, ''We are all foreigners': No Borders as a practical political project' in Peter Nyers and Kim Rygiel (eds.), *Citizenship, Migrant Activism and the Politics of Movement* (Taylor & Francis Group 2012), 78.

border abolition is revolutionary change,[232] whereby all people would have freedom of movement and freedom from displacement.[233] Border abolition also recognises that attempting to improve hostile immigration practices, without confronting their necessity, can increase the control of and harm to migrants.[234] Thus, border abolition is similar to critiques of age assessments. Viewing chronological age as protective hides the violence it can cause to UASC unable to evidence their age,[235] and chronological age creates and exacerbates vulnerability by distinguishing between UASC who can access childhood support and those who cannot.[236] Furthermore, like borders, age is an ideology rather than a natural concept,[237] serving as a further border by reflecting unequal rights between British and foreign children.[238] Like border abolition, removing age assessments would be a revolutionary change,[239] enabling all asylum-seekers to access support for their individual needs.

An immediate rebuttal to this alternative is the risk to British children if adult asylum-seekers are allowed into child-specific spaces. Multiple government documents[240] refer to three cases in which asylum-seekers, after committing tragic crimes, were said to have lied about their age.[241] By repeating these isolated incidents, the government builds a narrative of asylum-seekers consistently posing as children and causing harm.[242] Whilst there is no data to support

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[232] Ibid, 84.
[233] Bridget Anderson, Nandita Sharma and Cynthia Wright, '"We are all foreigners': No Borders as a practical political project' in Peter Nyers and Kim Rygiel (eds.), *Citizenship, Migrant Activism and the Politics of Movement* (Taylor & Francis Group 2012), 82.
[234] Lauren Cape-Davenhill, '"Alternatives to detention" and the carceral state in the UK' in Simon Campbell, Kathryn Medien, Sara Riva and Brian Whitener (eds.), *Border Abolition Now* (Pluto Press 2024), 126-127.
[235] Rachel Rosen and S Khan, 'Racialising age in the UK's border regime: a case for abolishing age assessment' (2024) 66(2) RC 43, 47.
[236] Artemis Christinaki, 'Age assessment and migration control: 'Child as method'' (2025) 0(0) GSC 1, 8.
[237] Simon Campbell, Kathryn Medien, Sara Riva and Brian Whitener, 'Introduction' in Simon Campbell, Kathryn Medien, Sara Riva and Brian Whitener (eds.), *Border Abolition Now* (Pluto Press 2024), 76.
[238] Artemis Christinaki, 'Age assessment and migration control: 'Child as method'' (2025) 0(0) GSC 1, 8; Gregor Noll, 'Junk Science? Four Arguments against the Radiological Age Assessment of Unaccompanied Minors Seeking Asylum' (2016) 28(2) IJRL 234, 250.
[239] Bridget Anderson, Nandita Sharma and Cynthia Wright, '"We are all foreigners': No Borders as a practical political project' in Peter Nyers and Kim Rygiel (eds.), *Citizenship, Migrant Activism and the Politics of Movement* (Taylor & Francis Group 2012), 84.
[240] HC Deb 19 April 2024, vol 748, col 62; Home Office, 'National Age Assessment Board: The operation of the National Age Assessment Board and sections 50 and 51 of the Nationality and Borders Act 2022' (Version 2.0, Home Office April 2024), 8; Interim Age Estimation Science Advisory Committee, 'Biological evaluation methods to assist in assessing the age of unaccompanied asylum-seeking children' (AESAC 2022), 3.
[241] BBC News, 'Ahmad Otak jailed for 34 years for murdering two teenagers' (*BBC News*, 9 November 2012) <https://www.bbc.co.uk/news/uk-england-leeds-20271840> accessed 8 June 2026; HC Deb 18 March 2025, vol 764, col 352; Jamie Grierson, 'Lawangeen Abdulrahimzai jailed for life for murder of Thomas Roberts in Dorset' (*The Guardian*, 25 January 2023) <https://www.theguardian.com/uk-news/2023/ jan/25/lawangeen-abdulrahimzai-jailed-life-murder-thomas-roberts> accessed 8 June 2026.
[242] Carly McLaughlin, '"They don't look like children': child asylum-seekers, the Dubs amendment and the politics of childhood' (2018) 44(11) JEMS 1757, 1766; Heaven Crawley, 'When is a child not a child? Asylum, age

this,[243] there is clear evidence that hundreds of UASC are wrongly age-disputed.[244] Yet the Home Office is indifferent about cases where their decisions result in children being treated as adults.[245] This highlights that age disputes are a continuation of immigration control and hostility towards asylum-seekers,[246] rather than a process designed to protect all children. As such, the expected rebuttal to abolition is a distraction from upholding BIC.

A further critique of abolitionist arguments is that they are utopian.[247] For example, prison abolition is viewed as utopian due to the perceived permanency of prisons,[248] despite incarceration once being the revolutionary alternative to corporal and capital punishment.[249] In the context of Western significance of chronological age,[250] and the hostile narratives around migrants,[251] it may seem utopian to suggest asylum-seekers should be given support for their needs. But for many UASC, it never occurs to them that they may not be believed when they say their age.[252] The utopian critique does not render abolition obsolete but provides an opportunity to reflect on why abolitionist arguments are needed. If a system whereby asylum-seekers are supported regardless of age seems utopian, that is more reason to endeavour for this societal transformation.

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disputes and the process of age assessment' (Immigration Law Practitioners' Association 2007), 27; Interview with P3; Interview with P7.

[243] Stephanie J Silverman, '"Imposter-Children" in the UK Refugee Status Determination Process' (2016) 32 R 30, 31.

[244] Helen Bamber Foundation, Asylum Aid and Humans for Rights Network, 'Disbelieved and denied: Children seeking asylum wrongly treated as adults by the Home Office' (HBF, Asylum Aid and HFRN 2023), 4; Kamena Dorling, 'Serious safeguarding scandal: new data shows that hundreds of child refugees continue to be wrongly treated as adults' (Helen Bamber Foundation, 9 July 2025) <https://helenbamber.org/resources/reportsbriefings/serious-safeguarding-scandal-new-data-shows-hundreds-child-refugees> accessed 8 June 2026; Rivka Shaw and Kathleen Whitehead, '"This system destroys you": Children trapped in adult asylum hotels by the Home Office' (Greater Manchester Immigration Aid Unit 2025), 12.

[245] David Bolt, 'An inspection of the Home Office's use of age assessments: July 2024–February 2025' (Independent Chief Inspector of Borders and Immigration 2025), 3.

[246] Susanna C Maioli and Others, 'Improving safeguarding of unaccompanied migrant young people' (2023) 384 BMJ 2626, 2626.

[247] Bridget Anderson, Nandita Sharma and Cynthia Wright, ''We are all foreigners': No Borders as a practical political project' in Peter Nyers and Kim Rygiel (eds.), *Citizenship, Migrant Activism and the Politics of Movement* (Taylor & Francis Group 2012), 84.

[248] Angela Y Davis, *Are Prisons Obsolete?* (Seven Stories Press 2011), 9.

[249] Ibid, 10.

[250] Ashish I Vaska, Jill Benson, Jaklin A Eliott and Jan Williams, 'Age determination in refugee children: A narrative history tool for use in holistic age assessment' (2016) 52 JPCH 523, 524.

[251] Carly McLaughlin, ''They don't look like children': child asylum-seekers, the Dubs amendment and the politics of childhood' (2018) 44(11) JEMS 1757, 1766; Heaven Crawley, 'When is a child not a child? Asylum, age disputes and the process of age assessment' (Immigration Law Practitioners' Association 2007), 27.

[252] Marie-Bénédicte Dembour, 'Surely Not! Procedurally lawful age assessments in the UK' in Mateja Sedmak et al. (eds.), *Unaccompanied Children in European Migration and Asylum Practices* (Routledge 2017), 177.

Following abolition, a system of assessing vulnerability and needs, as explored above, could replace age assessments. This enables greater flexibility in the process: if the care provided is no longer appropriate for an asylum-seeker's needs, it can be adjusted in their best interests, rather than applying a fixed chronological age and denying support on that basis. It would also enable social workers to focus on their expertise in assessing needs rather than on credibility,[253] and remove any contamination of Home Office ideology from their practices.[254] Finally, believing UASC's narratives about their age and needs, and ensuring they receive tailored support, upholds BD and BIC. This alternative approach aligns with IHRL standards without limiting the ability to meet them by focusing on chronological age.[255]

6 Conclusion

This article has shown that UK age assessment practices and policies do not comply with BIC and BD, which are key IHRL standards for assessing age. It has also demonstrated that IHRL prioritises the perceived necessity of establishing chronological age over children's needs and best interests.[256] It suggests that only by abolishing age assessments can IHRL standards for age assessment be upheld.

However, this article does not suggest that this proposal is a likely prospect in the UK. The most recent debate over the use of scientific methods to assess age highlights a lack of concern about whether these practices comply with IHRL standards.[257] Instead, the debate focused on the incorrect statistic that '[m]ore than 50% of those claiming to be children were found to be adults',[258] and dismissed the proven risk of violence and exploitation to hundreds of UASC who are wrongly treated as adults,[259] with repeated, isolated incidents of harm to British

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[253] Heaven Crawley and Emma Kelly, 'Asylum, Age Disputes and the Process of Age Assessment' in Emma Kelly and Farhat Bokhari (eds.), *Safeguarding children from abroad: refugee, asylum seeking and trafficked children in the UK* (Jessica Kingsley 2012), 64.
[254] Interview with P5.
[255] Mary A Kenny and Maryanne Loughry, 'Addressing the limitations of age determination for unaccompanied minors: A way forward' (2018) 92 CYSR 15, 20.
[256] Devyani Prabhat, Ann Singleton and Robbie Eyles, 'Age is Just a Number? Supporting Migrant Young People with Precarious Legal Status in the UK' (2019) 27 IJCR 228, 232.
[257] HC Deb 18 March 2025, vol 764.
[258] Ibid, col 349. For an explanation as to why this statistic is misleading, see: Helen Bamber Foundation, Asylum Aid and Humans for Rights Network, 'Disbelieved and denied: Children seeking asylum wrongly treated as adults by the Home Office' (HBF, Asylum Aid and HFRN 2023), 4; Association of Directors of Children's Services, 'Age Assessment Guidance: Guidance to assist social workers and their managers in undertaking age assessments in England' (ADCS October 2015), 1.
[259] HC Deb 18 March 2025, vol 764, col 353.

people.[260] UK age assessment practices and policies do not comply with IHRL standards for assessing age. Despite ongoing campaigns by NGOs and warnings from the ICIBI and BASW, it seems unlikely that the UK will take steps to improve its age assessment system.

[260] HC Deb 18 March 2025, vol 764, col 355.

No Ref in the Ring: Algorithmic Editorship and the Future of Social Media Regulation beyond the Online Safety Act 2023

Torin Holland

Abstract

Social media's arrival to the news-sharing sphere introduced capabilities for anybody with an internet connection to publish to millions, and the viral misinformation surrounding gold-medallist boxer Imane Khelif shows that mass communicative power can be abused. This article argues that media law must evolve to oversee platform system-design and challenge the algorithms which incentivise sensationalist or misleading content through virality. The editorial role assumed by algorithms is invisibly impactful, outmanoeuvring regulation under the guise of neutrality and creating an accountability gap which self-regulation has little incentive to fill. In evaluating the regulatory stance of the Online Safety Act (OSA) 2023, it becomes clear this legislation is unsuitable to reduce the viral spread of misinformation due to its hesitation to confront legal but harmful content. Despite OSA's shortcomings, its implementation marked a legal shift: system architecture is now subject to regulatory scrutiny. For a rapidly developing industry, system-design regulation offers the most future-proof and transparent avenue to ensure responsible dissemination of user-generated content. As such, three system-design proposals are explored, inspired by principles of existing media regulation, to assess their potential in translating onto social media platforms.

1 Introduction

The rise of social media has transformed the information age, ever since Facebook and YouTube emerged in the mid-2000s offering a platform for user-generated content. Over the last twenty years, social media has become a major site for news consumption across all age groups.[1] This shift reflects a loss of traditional media's monopoly as verified news appears alongside content from influencers and citizen journalists.[2] A turning point came in 2009 when Facebook and X (formerly Twitter) users reported Michael Jackson's death ahead of major networks, signalling a shift towards participatory journalism culture.[3] Since then, journalism has undergone 'mediatisation', evolving into a 'false information Petri dish' where symbiotic relationships between online content and traditional media generate 'churnalism', news driven by 'click-bait' and sensationalist headlines.[4] False news stories on X are now 70% more likely to be shared than true ones, leading the traditional media to criticise the internet as 'eroding the quality of the public's information environment'.[5] As anyone can now publish globally with ease, the emergence of a 'Fifth Estate' raises questions about whether regulation should target the act of journalism, rather than the identity of the journalist. Using the misinformation surrounding Imane Khelif as a case study, this article examines how decentralised media power and engagement-driven algorithms challenge traditional frameworks of media accountability. It further evaluates the Online Safety Act 2023 and argues that media law must evolve beyond content-focused approaches towards oversight of the editorial structures shaping content dissemination on social media platforms. Finally, this article explores system-design interventions aimed at visibly disrupting the structural amplification of harmful online content.

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[1] Lynn Schofield Clark and Regina Marchi, *Young People and the Future of News* (Cambridge University Press 2017), 29.

[2] Irini Katsirea, *Press Freedom and Regulation in a Digital Era* (Oxford University Press 2024), 41; Jennifer Alejandro, 'Journalism in the Age of Social Media' (2019) <https://reutersinstitute.politics.ox.ac.uk/our-research/journalism-age-social-media> accessed 8 June 2026, 41.

[3] Jennifer Alejandro, 'Journalism in the Age of Social Media' (2019) <https://reutersinstitute.politics.ox.ac.uk/our-research/journalism-age-social-media> accessed 8 June 2026, 12.

[4] Peter Coe, 'Tackling Online False Information in the United Kingdom: The Online Safety Act 2023 and Its Disconnection from Free Speech Law and Theory' (2023) 15(2) JML 217.

[5] Uta Kohl, 'Toxic Recommender Algorithms: Immunities, Liabilities and the Regulated Self-Regulation of the Digital Services Act and the Online Safety Act' (2024) 16 JML 305; William H Dutton, 'The Fifth Estate Emerging through the Network of Networks' (2009) 27(1) P CSI 1, 9.

1.1 Case Study

This article examines the events surrounding Imane Khelif's gender eligibility controversy, to show the impacts of unchecked viral claims. Khelif, an Algerian boxer, competed in the 2024 Paris Olympics where her 46 second bout against Italy's Angela Carini drew intense online scrutiny. After stopping the match, Carini commented that her opponent was 'too strong', reigniting public debate over Khelif's disqualification from the 2023 Boxing World Championships over gender eligibility grounds.[6] These previous ineligibility claims have been widely termed 'unsubstantiated', with the specifics of the eligibility tests remaining unclear.[7] Khelif was cleared however, to compete at the Olympics after passing the International Olympic Committee's eligibility requirements and ultimately won a gold medal.[8] Despite official backing, Khelif became the target of widespread cyberbullying, fuelled by media figures like Elon Musk and J.K. Rowling. With Musk being the first to post, Khelif expressed confusion as to why he 'led the attack', describing his behaviour as 'cruel'.[9] Rowling amplified the controversy by sharing a picture of Khelif and Carini on X, claiming that Khelif was 'a male [...] enjoying the distress of a woman he's just punched in the head'.[10] These posts triggered a surge of online transphobia and contributed to a prevailing narrative of misgendering Khelif, who reflected on the experience by saying:

> My name and image have been used, unauthorised, to further personal and political agendas through the spreading and dissemination of baseless lies and misinformation.
>
> –Imane Khelif [11]

[6] Shakiel Mahjouri, '2024 Olympics Boxing: Angela Carini Concedes Bout with Imane Khelif after 46 Seconds, Reigniting Gender Debate' *CBS Sports* (1 August 2024) <https://www.cbssports.com/olympics/news/2024-olympics-boxing-angela-carini-concedes-bout-with-imane-khelif-after-46-seconds-reigniting-gender-debate/> accessed 8 June 2026.

[7] ITV News, 'Algerian Boxer at Centre of Gender Row Imane Khelif Wins Olympic Gold Medal' *ITV News* (9 August 2024) <https://www.itv.com/news/2024-08-09/algerian-boxer-at-centre-of-gender-row-imane-khelif-wins-olympic-gold> accessed 8 June 2026.

[8] BBC News, 'JK Rowling and Elon Musk Reportedly Named in Imane Khelif Lawsuit' *BBC News* (14 August 2024) <https://www.bbc.co.uk/news/articles/cm2njjm4e2po> accessed 8 June 2026.

[9] Mouloud Achour, Interview with Imane Khelif, 'Imane Khelif, an Exclusive Interview for Clique' (2024) <https://www.youtube.com/watch?v=-UaSFphxRug> accessed 8 June 2026.

[10] BBC News, 'JK Rowling and Elon Musk Reportedly Named in Imane Khelif Lawsuit' *BBC News* (14 August 2024) <https://www.bbc.co.uk/news/articles/cm2njjm4e2po> accessed 8 June 2026.

[11] BBC Sport, 'Imane Khelif: Boxer Says She Is "Not Going Anywhere" Following Legal Action Announcement' *BBC Sport* (12 February 2025) <https://www.bbc.co.uk/sport/boxing/articles/cwypzj4x0e6o> accessed 8 June 2026.

1.2 Research Rationale and Theoretical Framework

Social media journalism enables misinformation to reach mass audiences with alarming speed and ease. New speakers, guided solely by their own standards, can pose as legitimate sources and distort public discourse. This threatens well-informed democratic participation, and leaves victims of targeted online harms, like Khelif, with little recourse to reputational damage and cyberbullying. While rumours and gossip are age-old features of human nature, the speed of information sharing in 'internet time' is especially concerning.[12] 'Media figures' are defined here as individuals who routinely publish to large audiences regardless of their credentials, while 'informational harms' refer to the spread of misleading information to shape narratives. Despite the 'cyberspace fallacy', the idea that the borderless internet is beyond regulation, online activity falls within the jurisdictions of actors or communication equipment.[13]

The Khelif case exemplified social media's global reach, but this article will turn focus to the UK's regulatory responses to information harms. The law lags behind technological and social change, so considering its socio-legal application is crucial in identifying shortcomings. Fourth-wave feminist legal theory informs this work, especially regarding the Khelif case where misogynistic and transphobic content is platformed. This theory enables deeper interrogation of narrative manipulation and structural bias in moderation policies that reinforce existing inequalities.[14] An intersectional lens reflects the true nature and lived experience of reputational attacks on minority individuals like Khelif, whose cyberbullying was fuelled by

[12] William H Dutton, 'The Fifth Estate Emerging through the Network of Networks' (2009) 27(1) P CSI 1, 8.
[13] Ibid, 18; David R Johnson and David Post, 'Law and Borders: The Rise of Law in Cyberspace' (1996) 48 SLR 1367.
[14] Nancy Levit and Robert RM Verchick, *Feminist Legal Theory: A Primer* (2nd edn., NYU Press 2016), 44.

transphobia. Women of colour are particularly vulnerable to transphobic attacks due to the global model on ‘femininity’ being rooted in white experiences.[15]

2 Regulation Beyond Traditional Journalism

2.1 Media Laws and Social Media

The scope of media regulation has skyrocketed alongside the diversification of information sharing technologies. Rowbottom notes the contrast between broadcast and print regulation, the latter holding greater independence from government through traditional self-regulation systems.[16] As broadcast media is consumed more passively, Katsirea believes this distinction was required so that the content ‘invading our living rooms’ was held to higher standards of impartiality and fairness.[17] A contending explanation might be that broadcast and print media emerged at different points in time, though this rationale fails to address any social concerns that we rely on such regulations to remedy. While fewer people consume print media, the deliberate choice of selecting and reading a newspaper likely prompts more relaxed regulation since the reader is in more control of their consumption choices. The underlying need for all media regulation is to hold mass communicative power to account, and with the expanding opportunities to publish digital content, more people than ever are subject to media laws.[18] Social media has presented numerous new problems for media law, though the most pressing in this context is the giant platform it provides for unregulated speakers. Furthermore, digital media convergence facilitated by social media makes the separate regulatory systems an outdated concept since both forms of content are being consumed in the same way: through our phone screens.

Social media accounts owned by broadcast and print companies retain their standard publishing rules but are often not the loudest voices on these sites. Both established celebrities and complete newcomers have the ability to gain millions of ‘followers’, and the reach of some viral posts can amass hundreds of millions of views. It is argued that social media provides

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[15] Kimberlé Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989) 1989 UCLF 156.
[16] Jacob Rowbottom, *Media Law* (Hart Publishing 2018), 257.
[17] Irini Katsirea, *Press Freedom and Regulation in a Digital Era* (Oxford University Press 2024), 25.
[18] Jacob Rowbottom, *Media Law* (Hart Publishing 2018), 321.

significant publishing power for media figures, so the question arises whether the social media platforms' self-regulated content restrictions are sufficiently safeguarding against unchecked mass communication.

The catalysing platform of Khelif's media coverage, social media site X, has held a reputation for being a 'real-time' source for news as users often tweet alongside events as they are unfolding.[19] Although this reputation has been questioned following Musk's takeover of the platform, X remains a stimulus for elevating news stories to national prominence. This reporting capability became apparent in 2009 when social media users announced Michael Jackson's death before major networks, and has since turned the journalistic process on its head as journalists scroll through social media to gather stories.[20] At the time of writing, Elon Musk and J.K. Rowling (mentioned in Khelif's cyberbullying complaint) have over 230 million followers between them on X, but journalistic involvement in X's feed means that the reach of their posts surpassed their follower counts. While the new challenges waved in by social media are present in all its various sites, X is particularly notorious for its intersection with journalism and its influence seeps into other social media platforms and media outlets.

2.2 The Case for Regulating 'Big Soapboxes'

In 1997, U.S. Supreme Court Justice Stevens observed that the internet enables any person to become 'a town crier with a voice that resonates farther than it could from any soapbox'.[21] While some view this as an expression of digital free speech, it does not negate the fact that our governing media laws were developed on principles becoming less relevant in the social media context. The free speech and media freedom foundations were established for powerful mass media institutions, at a time when it was unforeseeable that just anybody could gain mass publishing power.[22] Although media figures cannot publish directly in newspapers or mainstream broadcasts, they have gained a level playing field on social media as uploading content for a global audience resembles an act of publication comparable to that of professional institutions. The ability to publish misinformation or poorly informed views to such a large

[19] Irini Katsirea, *Press Freedom and Regulation in a Digital Era* (Oxford University Press 2024), 40.
[20] Jennifer Alejandro, 'Journalism in the Age of Social Media' (2019) <https://reutersinstitute.politics.ox.ac.uk/our-research/journalism-age-social-media> accessed 8 June 2026, 12.
[21] *Reno v ACLU*, 521 US 844 (1997) 870 (Stevens J).
[22] Jacob Rowbottom, *Media Law* (Hart Publishing 2018), 308.

audience is a harm that media law has traditionally sought to prevent. Since these harms can be posed by anybody with an internet connection, journalistic obligations should now extend beyond the legacy journalism industry.

In *Reno v ACLU,* Justice Stevens reasoned that the internet does not face the access limitations of broadcast media.[23] Therefore, a major challenge is that potential targets of regulation are no longer clearly defined by their institutional affiliations. Widening the scope of media regulation beyond the formal press would require careful consideration as to who should be subject to regulation. Though pragmatic considerations are discussed in section 4, one solution could be basing it on the size of users' platforms as the best predictor of publishing reach. A predictable counterargument is that user platforms themselves vary greatly in source types, yet this only strengthens the case for reach-based requirements. This is because social networking sites gather a diverse collection of voices into one feed, including regulated and recognised news broadcasters as well as entertainment accounts of varying formalities, advertisements, accounts run by other organisations, and those owned by our family and friends. The House of Lords identified the problem of integrating greatly varying content into one feed, claiming that it created confusion for users with the nature of content becoming 'impossible to differentiate'.[24]

This effect is supported by numerous psychological biases, particularly the disorientating nature of social media feeds which activate heuristic processing (mental shortcuts) in its readers. Kahneman reported on heuristics before the conception of social media, highlighting the bias-inducing impact of information which can be retrieved over again with ease.[25] Developing this, Ali and Zain-ul-abdin found that social media heuristics are especially impactful because users are exposed to an endless and overwhelming amount of information sharing, especially when large platform holders activate the 'authority figure heuristic' in their followers.[26] The social media environment creates impracticalities in terms of time and mental resources to carefully judge the information audiences are presented with.[27] This is likely a

[23] *Reno v ACLU*, 521 US 844 (1997) 870 (Stevens J).
[24] House of Lords Select Committee on Communications, *Media Convergence and Its Public Policy Impact* (HL 2012–13, 154).
[25] Daniel Kahneman et al., *Judgement under Uncertainty: Heuristics and Biases* (Cambridge University Press 1982), 192.
[26] Khudejah Ali and Khawaja Zain-ul-abdin, 'Post-Truth Propaganda: Heuristic Processing of Political Fake News on Facebook during the 2016 U.S. Presidential Election' (2020) 49 JACR 1.
[27] Shelley Chaiken and Durairaj Maheswaran, 'Heuristic Processing Can Bias Systematic Processing: Effects of Source Credibility, Argument Ambiguity, and Task Importance on Attitude Judgement' (1994) 66(3) JPSP 460.

cause of declining media literacy amongst social media users as its effects can increase the perception of message credibility and make ‘fake news’ appear a lot more real.

In Khelif’s case, the harm caused by the spread of misinformation affected her deeply and she experienced significant fear surrounding the claims.[28] Khelif stated that ‘Elon Musk was one of the first to attack [her]’ online and attributes the spread of the ‘online campaign’ to his comments.[29] Since online public discourse cannot be prevented, it begs the question whether the misinformation ‘campaign’ would have been as impactful had it not been for the involvement of media figures like Musk and Rowling. Some posts can go viral without high-profile endorsements, especially when they tap into existing public anxieties like the participation of transgender athletes in sports. However influential figures’ involvement often lends credibility to the claim due to the authority figure heuristic.[30] Further, celebrities making speculation around Khelif’s gender eligibility would have gained prominence on the X feed since it prioritises ‘elite interactions’, making it easier for mainstream media to scoop and insert into their stories, increasing the virality of the controversy.[31] It is compelling that media figure involvement in this ‘campaign’ boosted its virality to international levels and therefore some responsibility should be attributed to the owners of large social platforms that decided to write and publish these claims into the public sphere. Individuals acting irresponsibly with their large publishing powers may not acknowledge the influence they hold or could be aware and choose to publish regardless: journalist-like regulation will help to address both situations. By imposing basic standards of transparency and accuracy to news-like claims, it firstly signals that there can be real and harmful outcomes to social media publications and secondly creates a duty to prevent the spread of misinformation.

2.3 Freedom of Expression Concerns

Regulating speech and expression must be balanced carefully when trying to curb abuses because censorship damages the search for truth.[32] This is not just crucial in protecting this

[28] Mouloud Achour, Interview with Imane Khelif, ‘Imane Khelif, an Exclusive Interview for Clique’ (2024) <https://www.youtube.com/watch?v=-UaSFphxRug> accessed 21 March 2025.
[29] Ibid.
[30] Khudejah Ali and Khawaja Zain-ul-abdin, ‘Post-Truth Propaganda: Heuristic Processing of Political Fake News on Facebook during the 2016 U.S. Presidential Election’ (2020) 49 JACR 1.
[31] Irini Katsirea, *Press Freedom and Regulation in a Digital Era* (Oxford University Press 2024), 40.
[32] Onora O’Neill, ‘The Rights of Journalism and the Needs of Audiences’ in James Lewis and Paul Crick (eds), *Media Law & Ethics in the 21st Century* (International Bar Association 2014), 38.

media function, but in ensuring Article 10 of the European Convention on Human Rights (ECHR) guarantees freedom of expression rights to all users. This right ensures the ability of every citizen to impart and receive information online and may only be restricted in limited circumstances, of which protecting health and morals, and preventing disorder and crime are most applicable in this context.[33] A broad application of freedom of expression principles is necessary for protecting and contributing to the communication which a democratic society functions on. Citizen journalists and online activists play a vital role in diversifying the voices of public discourse, as there is great value to voices which do not reflect corporate interests and close gaps in reporting where the professional media struggle to reach.

In line with this, attention must be paid to the audience's right to receive information founded on honesty and competence when truth claims are made.[34] This links to the dominant reasoning of media regulation being to protect the public interest, which Rowbottom suggests is best served by 'leaving the media alone'.[35] However, this view may be criticised because failing to protect the needs of audiences leaves them vulnerable to information dissemination primarily geared towards the interests of the speakers. Ensuring audiences receive information in a responsible and transparent manner is a cornerstone of the public interest, and so resisting this obligation undermines the reasoning of why we need media laws in the first place. Katsirea supports the notion that democratic discourse is best enabled when both the imparters and receivers of information have their respective rights protected, critiquing the free press model as a manifestation of scepticism around State involvement.[36] The State's role in media regulation is not solely about restricting expression, but also safeguarding it when market forces fail to do so, ensuring that freedom of expression is meaningful for all.

An important consideration in respect of Article 10 ECHR is that it only protects against restrictions from the State, whereas social media platforms are private companies. These companies often have their own self-regulatory codes that users must follow in order to post content to their sites, a comparable system to print media. If online information was restricted, an important distinction is required as to whether the restriction is coming from the social media

[33] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, entered into force 3 September 1953) 213 UNTS 221, art 10, largely incorporated into English law under the Human Rights Act 1998.
[34] Onora O'Neill, 'The Rights of Journalism and the Needs of Audiences' in James Lewis and Paul Crick (eds), *Media Law & Ethics in the 21st Century* (International Bar Association 2014).
[35] Jacob Rowbottom, *Media Law* (Hart Publishing 2018), 259.
[36] Irini Katsirea, *Press Freedom and Regulation in a Digital Era* (Oxford University Press 2024), 13.

platform or from the State, since their powers and applicability will vary. In light of this, it may be asserted that social media sites would maintain greater control over restricting harmful content if they are left independent from State regulation, although concerns could be raised over the accountability of this control. Leaving social media platforms with greater powers to navigate the removal of harmful content could lead to uncertainties; since the category of 'legal but harmful' content can be especially vague, and without clear boundaries to detail what users should not post, they could experience chilling effects from regulatory overreach. Conversely, laws requiring sites to remove such content could lead to over-censorship to avoid legal sanctions, highlighting the need for clearly defined removal policies for content.

Due consideration must be paid to the freedom of expression rights of speakers, not just their audiences, which Rowbottom explains to be a good reason to protect the comments of 'low-level' speakers.[37] The majority of individual speech falls under Mill's concept of 'self-regarding' conduct, only affecting the speaker, meaning their unrestricted individuality should prevail above all other considerations.[38] However, Mill recognises the creation of harm when opinions are presented as 'instigations' to malicious acts, showing that online speech can cross the harm threshold when aimed at others in a way which incites hostility, ostracism, or reputational damage.[39] Defining 'harm' in the context of social media proves to be challenging because the durability and searchability of digital messages could mean they are more harmful than the same comments made offline. This makes 'intent' an unclear basis for determining social media harms. The cumulative impact of widespread misinformation can blur the line of when low-level speech becomes viral harm, which is why the need to focus regulation on the most powerful media voices and the social media platforms themselves becomes more prevalent. Preventing harms generated and amplified on social media presents a sound argument for intervention.[40] Without intervention, the free market determines content visibility, tailoring it for engagement rather than for truth and the public interest. If media law centres on protecting the public interest, then good reasoning can be made for the law to offer protection regardless of where the publication comes from.[41] To assert this with the least obstruction on

[37] Jacob Rowbottom, *Media Law* (Hart Publishing 2018), 323.
[38] John Stuart Mill, *On Liberty, Utilitarianism and Other Essays* (Oxford University Press 1991) 56.
[39] Ibid, 55.
[40] David Lyons, 'Liberty and Harm to Others' in Gerald Dworkin (ed), *Mill's On Liberty* (Rowman and Littlefield Publishers, Inc 1997), 116.
[41] Jacob Rowbottom, *Media Law* (Hart Publishing 2018), 322.

user expression, the audience needs to be able to assess reasons for claims they read, a responsibility that should be placed on social media platforms to provide.[42]

3 Assessing the Current Response to Informational Harms

3.1 User-driven Solutions

Some social media users challenge misinformation, through adding comments or reporting posts to moderators. However, such responses lack the speed and impact necessary to curb the rapid spread of misinformation. To highlight corrections from other users in a designated feed position, X has incorporated 'Community Notes' into feeds whereby users submit context they believe is needed on the original post, with their responses voted on by more users to determine its usefulness. Meta is following in their footsteps, claiming their initiative aims to restore 'more speech and fewer mistakes'.[43] Meta argues that moderation efforts went 'too far', censoring harmless posts as collateral to removing harmful content.[44] Despite being designed and implemented by social media platforms, this policy relies on users to do the heavy lifting, and risks recalibrating their own feeds since algorithmic associations with users' engagement is geared to continue displaying similar content.[45] Generating public debate and reasoning around misleading posts can be a positive step to redress harmful claims, but may also peddle the virality of these posts to appear on more users' feeds. Pasquale describes the media power to include, exclude, and rank as the power to determine the longevity of public impressions, and by X and Meta handing some of this power to its users, it can be argued that these platforms are delegating a huge responsibility to a group with even less accountability.[46]

Meta's initiative also relaxes their independently set restrictions on speech relating to immigration and gender identity. These examples were given in Meta's statement as they are recognised to prompt controversial discourse online. Justified as harmonising Meta's standards

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[42] Onora O'Neill, 'The Rights of Journalism and the Needs of Audiences' in James Lewis and Paul Crick (eds), *Media Law & Ethics in the 21st Century* (International Bar Association 2014), 42.
[43] Joel Kaplan, 'More Speech, Fewer Mistakes' (*Meta* 2025) <https://about.fb.com/news/2025/01/meta-more-speech-fewer-mistakes/> accessed 8 June 2026.
[44] Ibid.
[45] Sang Ah Kim, 'Social Media Algorithms: Why You See What You See' (2017) 2 GLTR 149.
[46] Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (Harvard University Press 2015), 61.

to those ‘on TV or the floor of Congress’, this approach appears naive to the snowball effect of online discourse, especially when sharing ideas that users may be discouraged from sharing in real life.[47] Transgender women' s identities are regularly belittled by the British media, normalising such attitudes and contributing to readers feeling more ‘affected’ by transgender people online than in real life.[48] Controversial topics gather more digital footfall by platforming the most discourse because the social media business model focuses on engagement-metrics (whether positive or negative), creating a feedback loop boosting polarising narratives.

Kim underscores the importance of high-engagement content to social media platforms, driving user engagement and therefore exposing them to more paid advertisements.[49] The risk of widespread misinformation is boosted by the amplification of negative interactions. Since scroll-worthy content is often controversial, ‘harmful’ ideas and views gain unprecedented virality, such as the hatred stirred up online ahead of the Southport Riots in 2024.[50] Such effects can also be seen by platforming dangerous claims regarding Khelif’s gender identity, accusing her of committing a crime by her country’s standards and exposing her to the severe effects of transmisogyny. Stepping away from content-based regulation, Meta are upholding their mission of reducing freedom of expression infringements, however their algorithm still serves this intensely profit-generating purpose. Therefore controversial topics are likely to be exploited for views at the cost of communities the discourse targets.

The most concerning aspect of Meta’s policy changes is the use of ‘less obtrusive labelling’ on posts which have been flagged as requiring fact-checking, removing full-screen warning overlays and making additional information more conspicuous, only to be found by ‘those who want to see it’.[51] This could be viewed as a step backwards in the fight against misinformation as it exploits users’ heuristic processing by making context harder to find in an already endless stream of information. By relying on user-driven solutions, X and Meta are leaning on system-based regulation (changing the design of their feeds), but in a way that will generate further discourse and therefore profit. Adding to the disorientation of the social media feed, scaling

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[47] Joel Kaplan, ‘More Speech, Fewer Mistakes’ (*Meta* 2025) <https://about.fb.com/news/2025/01/meta-more-speech-fewer-mistakes/> accessed 8 June 2026.
[48] Shon Faye, *The Transgender Issue: An Argument for Justice* (Penguin Books 2021), 90.
[49] Sang Ah Kim, ‘Social Media Algorithms: Why You See What You See’ (2017) 2 GLTR 149.
[50] Andy Gregory, ‘How Lies about Southport Knife Attack Suspect Led to Riots and Clashes with Police’ (*The Independent* 31 July 2024) <https://www.independent.co.uk/news/uk/crime/southport-attack-riots-far-right-social-media-b2588628.html> accessed 8 June 2026.
[51] Joel Kaplan, ‘More Speech, Fewer Mistakes’ (*Meta* 2025) <https://about.fb.com/news/2025/01/meta-more-speech-fewer-mistakes/> accessed 8 June 2026.

back its current safeguards only fuels the 'battle for mindshare' and honours the economic functions that facilitate irresponsible information sharing.[52]

3.2 Profit-driven Algorithms

Approximately 90% of social media users are passive and not engaging with content through likes, comments, or shares.[53] To curate personable content streams, sophisticated metrics were required to measure users' scroll-depth and total reading time to monetise time spent looking at content and advertisements.[54] Schofield and Marchi argue this has driven journalism organisations to offer an unprecedented amount of content, employing 'aggressive social media strategies' in competition for views.[55] This has also prompted the rise of 'click-bait', where posts are intentionally provocative or misleading to attract digital footfall to their websites. As an extreme form of sensationalism, click-bait heightens the sense of competition for views, having a relegating effect on credible news stories as they appear less captivating in the feed. The extent to which 'shareworthiness' itself triggers news stories to be sensationalised is up for debate, yet it could be argued that unregulated information sharers are taking advantage of this effect because they can create a news-like product which is tailored to succeed in the social media landscape.[56] This competitive edge over their formal counterparts allows unverified content to soar to unrivalled prominence, calling into question the legitimacy of social media as a trustworthy information-hosting platform. By prioritising controversy for engagement, platforms create a disproportionate focus on marginal issues and disrupt the flow of contextually grounded information.

The influence of algorithm design on shaping social media narratives cannot be overstated. An exemplar event was Facebook's algorithm change mid-2016 where posts from family and friends were boosted and mainstream news stories deemphasised. This prompted two concerning outcomes: a dramatic 26-47% fall in traffic to top news publisher's websites, and the ease of sensational fake stories to circulate far more than legitimate news during the 2016

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[52] Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (Harvard University Press 2015).
[53] Sang Ah Kim, 'Social Media Algorithms: Why You See What You See' (2017) 2 GLTR 149.
[54] Lynn Schofield Clark and Regina Marchi, *Young People and the Future of News* (Cambridge University Press 2017).
[55] Ibid.
[56] Irini Katsirea, *Press Freedom and Regulation in a Digital Era* (Oxford University Press 2024), 37.

U.S. Presidential campaign.[57] In the absence of verified content, misinformation can escalate in social media feeds and Facebook's redesign underscored the editorial function of social media platforms to shape prevailing narratives through their curation of content feeds. This editorial role assumed by platforms demonstrates a legally significant activity when considering their responsibilities in supporting public discourse.

Katsirea terms content moderation as the service which sets social media platforms apart from the open web, and a great deal of trust is placed in these platforms to provide this impartially.[58] Although extensive editorial efforts happen in newsrooms, this authority is legitimised through regulatory compliance and adherence to basic standards of transparency and neutrality. Both traditional and social media rely on profit, but social media's vast content pool fuels a more aggressive competition for attention. It is counterintuitive that the media body with unparalleled amounts of content and users is faced with the least statutory regulation. User-driven solutions could be relatively obsolete when algorithms are programmed to platform low-quality content, raising the question of whether purely profit-incentivised systems can be a responsible medium for information dissemination. Facilitating change to the profit system of a $250 billion industry is far from straightforward, and as self-regulatory initiatives are proving insufficient, the introduction of statutory duties for these media intermediaries is proving ever more necessary.

3.3 Online Safety Act 2023

Determining the role social media platforms should play in content regulation has been long disputed in the courts. Initially viewed as technology companies, it became apparent that providing and profiting from the use of their service required an assumption of responsibility.[59] The approach to determine this responsibility in England and Wales follows *Bunt v Tilley*, where the court must assess the company's level of complicity in moderating content.[60] This establishes whether the site had 'knowing involvement' of the harmful content published, a high threshold given the volume of new content shared every day.[61] Rowbottom suggests this

[57] Lynn Schofield Clark and Regina Marchi, *Young People and the Future of News* (Cambridge University Press 2017).
[58] Irini Katsirea, *Press Freedom and Regulation in a Digital Era* (Oxford University Press 2024), 46.
[59] Jacob Rowbottom, *Media Law* (Hart Publishing 2018), 329.
[60] *Bunt v Tilley* [2007] 1 WLR 1243
[61] Ibid, [23].

could deter social media platforms from taking an active role in content moderation to avoid the perception of assuming legal responsibility.[62] However, intermediaries are generally granted civil and criminal immunities for third party content, and the European Union's Digital Services Act (DSA) reaffirms that voluntary initiatives undertaken in 'good faith and in a diligent manner' will not compromise intermediary immunities.[63] The OSA 2023 remains silent on these immunities, which presents the first significant shortfall. Despite a broadly adopted understanding that platforms curate the flow of online content, the immunities regime appears frozen in the early perception of platforms as 'passive providers of a neutral infrastructure'.[64] The OSA and DSA seek to restrain these harmful algorithms, yet this aim appears to be greatly undermined by the intact immunities regime. Kohl writes that content shared by individuals may be unsavoury but only creates harm when directed in a 'clustered and escalating way to users, revealing a missed opportunity for OSA to shift accountability to those truly responsible.[65]

The main thrust of OSA's system regulation is section 9, which requires social media platforms to conduct risk assessments on the ease of illegal content dissemination on their sites.[66] This includes assessing the role that the platform's business model, governance, and proactive technology has in illegal content shareability. Although compelling platforms to undertake these risk assessments is a spearheading provision, the findings of these assessments could vary widely because OSA allows platforms to use subjective interpretations of risks.[67] Ofcom has previously highlighted this form of approach is flawed unless supported by transparency reports, independent audits, guidelines, and training.[68] With failure to implement these requirements, risk assessments may not provide an accurate reflection of risks posed by the platform's system design because they lack any incentive or statutory requirements to do so.

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[62] Jacob Rowbottom, *Media Law* (Hart Publishing 2018).

[63] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1, art 7.

[64] Uta Kohl, 'Toxic Recommender Algorithms: Immunities, Liabilities and the Regulated Self-Regulation of the Digital Services Act and the Online Safety Act' (2024) 16 JML 305, 303.

[65] Ibid, 307.

[66] Online Safety Act 2023, s.9.

[67] Victoria Nash and Lisa Felton, 'Treating the Symptoms or the Disease? Analysing the UK Online Safety Act's Approach to Digital Regulation' (2024) 16(4) P&I 818.

[68] Ofcom, *Ofcom's First Year of Video-Sharing Platform Regulation* (2022) <https://www.ofcom.org.uk/siteassets/resources/documents/online-safety/information-for-industry/vsp/reports/2022/2022-vsp-report.pdf?v=328583> accessed 8 June 2026.

Further, not extending section 9 risk assessments to 'legal but harmful' (LBH) content appears off-target because the majority of harmful content amplified by algorithms falls under the LBH bracket. Illegal content has a far smaller risk of being misleading or given prominent placement in users' feeds. The Online Harms White Paper (OHWP) sought to address the amplification of LBH content, yet was scaled back over censorship concerns.[69] Although the category's subjectivity could lead to unnecessary content removals, the government's move to substitute LBH provisions with section 15's 'User empowerment duties' does not provide adequate safeguards around LBH content.[70] Providing adults with content control features should be welcomed, but offering harm reduction as an option and not a site-wide policy appears overcautious. Social media platforms are required to provide 'clear and accessible' instructions for how users can utilise the s. 15(7) control features, but these could be buried in the terms of service and inconvenience users.[71] Such tools need to be eye-catching because the curation of LBH content is intentionally disorientating and emotion provoking, so it must be able to target those with the weakest media literacy skills who fall vulnerable to it.

The most significant shortcoming is the Act retaining the legacy media framework which regulates our traditional institutions. Given social media's distinct nature from legacy media, the shift to system-based regulation needed to be more comprehensive. To regulate system design is to regulate the editorial role that social media platforms assume. The main pushback on system design came from the House of Commons over concerns for delay and 'legal confusion', yet this represents a failure to produce a relatively future-proof piece of legislation, which could have been secured with intuitive system design policy.[72] Content-focused regulation only addresses the surface issues of the distorted information pool, whereas system-focused regulation can tackle the root cause. Were the OSA to be wholly system-based, there would be stronger protection of freedom of expression principles since the value judgements associated with traditional moderation are not required to be given on pieces of content.[73] The reluctance to regulate the spread of LBH content is rooted in the legacy framework requirement to assess the piece of content concerned, but fully embracing system-based regulation

[69] Peter Coe, 'Tackling Online False Information in the United Kingdom: The Online Safety Act 2023 and Its Disconnection from Free Speech Law and Theory' (2023) 15(2) JML 217, 229.
[70] Irini Katsirea, *Press Freedom and Regulation in a Digital Era* (Oxford University Press 2024), 63.
[71] Online Safety Act 2023, s.15(7).
[72] HC Deb 12 September 2023, vol 737, col 807.
[73] Victoria Nash and Lisa Felton, 'Treating the Symptoms or the Disease? Analysing the UK Online Safety Act's Approach to Digital Regulation' (2024) 16(4) P&I 818.

acknowledges the platforms' culpability in spreading online harms and seeks restraint on these mechanisms.

Many freedom of expression concerns over the OSA likely stem from its co-regulatory model, extending State-level limits onto social media moderation.[74] This is disjointed from the 'hands-off' approach system-based design takes on subjective content censorship, but the government's inability to harness this could suggest severe pragmatic concerns around implementation. Coe warns that by making services responsible for content curation, the OSA could enhance their ability to undertake an invisible editorial role. Nevertheless these platforms already engage in such practices, revealing a gap in editorship regulation which the OSA is beginning to address.[75] However as long as social media systems incentivise 'churnalism', there is no assurance that we will find quality information on their platforms.[76] We have not yet seen the Act's full manifestation, but it is already clear that the OSA is not the 'radical panacea' for online harms that it was purported to be.[77]

4 Design-based Solutions to Disrupt Informational Harms

4.1 The Case for Legal Intervention

The economic incentives behind social media content curation suggest self-regulation cannot protect the public interest. O'Neill argues that self-regulation has been neither effective nor ethically sufficient.[78] States have grown more willing to hold major technology companies accountable, prompting efforts to expand their corporate responsibilities.[79] The OSA is an early

[74] Uta Kohl, 'Toxic Recommender Algorithms: Immunities, Liabilities and the Regulated Self-Regulation of the Digital Services Act and the Online Safety Act' (2024) 16 JML 305, 333.
[75] Peter Coe, 'Tackling Online False Information in the United Kingdom: The Online Safety Act 2023 and Its Disconnection from Free Speech Law and Theory' (2023) 15(2) JML 217, 239.
[76] Ibid, 217.
[77] Ibid, 240.
[78] Onora O'Neill, 'The Rights of Journalism and the Needs of Audiences' in James Lewis and Paul Crick (eds), *Media Law & Ethics in the 21st Century* (International Bar Association 2014), 44.
[79] Victoria Nash and Lisa Felton, 'Treating the Symptoms or the Disease? Analysing the UK Online Safety Act's Approach to Digital Regulation' (2024) 16(4) P&I 818.

attempt to regulate system design, but gaps remain in addressing the rapid spread of harmful content.

Since algorithm design causes real-world harm, like Imane Khelif's controversy, an analogy can be drawn: just as product manufacturers must prevent foreseeable harm to its users, algorithm designers should owe a similar duty. Although less tangible, these harms resulting from service use still present a case for provider liability. Perrin and Woods' paper behind the Online Harms White Paper (OHWP), proposed an overarching duty of care for online service delivery, which was included in the OSA but later dropped as a main principle.[80] Had this duty been widely adopted, the OSA could have created stronger preventative measures to force social media platforms to assess all forms of harm, not only illegal content. While the OSA seeks to 'rebalance corporate conduct in favour of the public interest', it fell short of implementing broader statutory duties.[81]

A statutory basis behind social media regulation could enable stronger sanctions, while reducing censorship concerns by targeting platform design instead of users' content.[82] Rowbottom cautions that while State regulation can be a sign of legitimacy, concerns over political influence make transparency essential.[83] One argument could be that the explosion of online voices has diluted old media power, calling for less regulation. But this assumption overlooks the shift in power from speaker to platform editor. Recognising social media platforms are no longer neutral intermediaries is key to effective user protection.[84] These proposals are underpinned by the aim of disrupting the invisible editorial control of platforms by introducing transparency and labelling requirements, making feeds less disorientating. This could be implemented by amending s. 9 OSA to include all content in risk assessments, allowing Ofcom involvement in the oversight of feed transparency. This would improve market

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[80] Lorna Woods and William Perrin, 'Online Harm Reduction – a Statutory Duty of Care and Regulator' (*Carnegie Foundation* 2019) <https://carnegieuktrust.org.uk/publications/online-harm-reduction-a-statutory-duty-of-care-and-regulator/> accessed 8 June 2026.
[81] Victoria Nash and Lisa Felton, 'Treating the Symptoms or the Disease? Analysing the UK Online Safety Act's Approach to Digital Regulation' (2024) 16(4) P&I 818.
[82] Onora O'Neill, 'The Rights of Journalism and the Needs of Audiences' in James Lewis and Paul Crick (eds), *Media Law & Ethics in the 21st Century* (International Bar Association 2014).
[83] Jacob Rowbottom, *Media Law* (Hart Publishing 2018), 270.
[84] Uta Kohl, 'Toxic Recommender Algorithms: Immunities, Liabilities and the Regulated Self-Regulation of the Digital Services Act and the Online Safety Act' (2024) 16 JML 305.

fairness between media figures and regulated news outlets, helping high-quality journalism regain visibility over viral misinformation.

4.2 Separate Feeds for Verified News Sources

The first proposal introduces a separate feed for content from reputable news organisations. This aims to combat epistemic disorientation experienced when viewing mixed content types, offering an anchoring source of truth. Broadcasting requirements in the Communications Act offer precedent, where platforms like Freeview and Sky must ensure prominence for public service broadcasters, such as the BBC.[85] However, extending this principle to social media raises two key challenges. First, determining which news outlets qualify as reputable sources brings difficulties in practice. Ideally independent regulators, like Ofcom, would assess eligibility on standards of fairness and impartiality. This would involve close cooperation between Ofcom and platforms, as too much discretion from either body risks politicising source selection. Further, this supports traditional outlets competing with the shareability of informal news because scaling down their regulation to level the field only results in a 'race to the bottom'.[86] If the aim is to heighten standards, unregulated high-level speakers would have to meet regulatory criteria to break through to this reputable publishing space.

Secondly, most vitally, separating content risks intensifying poorly informed 'echo chambers'. Whilst this proposal highlights verified information sources, removing them from the main feed could accelerate the spread of misinformation due to claims losing direct contention. As demonstrated in section 3, quietening mainstream news on social media allowed sensationalist falsehoods to circulate Facebook in 2016, showing that 'fake news' thrives in the absence of factually based counterpoints.[87] Separating, but still displaying, verified sources could have similar effects as this feed might only engage users actively seeking news stories, rather than the majority who encounter it passively. Further, Lewandowsky and others show that factual sources are often ineffective at challenging false perceptions, even when placed closely to the

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[85] Communications Act 2003, s.310.
[86] Jacob Rowbottom, *Media Law* (Hart Publishing 2018), 327.
[87] Lynn Schofield Clark and Regina Marchi, *Young People and the Future of News* (Cambridge University Press 2017).

initial misinformation.[88] This raises doubts about the success of the reputable feed to anchor quality sources, or whether the split-feeds would alter users' perceptions on misinformation.

The split-feed rationale is undermined when factual news content is inevitably shared on the main feed by journalists or content creators with no desire to move to the reputable feed. Fierce contention over source selection could create a two-tiered information landscape, unfairly excluding emerging reporters and resulting in a more disorientating social media experience to the one at present. Despite the aim of rebalancing attention economy around quality journalism, too many risks arise.

Had this been in effect during the summer of 2024, misinformed claims about Khelif's gender identity would have been restricted to the unregulated feed. Although journalists would undoubtedly report on the speculation, bringing the discussion into the regulated feed would have added vital context. This might have made clearer the falsity of speculative claims by offering reputable outlets a designated spot to respond. Yet the reputable feed would still fall outside of most users' primary experiences, limiting its impact to those already engaged with verified news. This would be poorly aimed, since this group is already less susceptible to misinterpreting or spreading misinformation. The proposal's ambition to restore trust and structure fails to amount to worthwhile redress because its success hinges on unpredictable factors like user behaviour and platform collaboration.

4.3 Source Tags for High-Reach Posts

The second solution involves tagging high-reach posts to denote the content's source type. This could directly address interpretive confusion and prime content expectations based on source type. Labels could include: opinion, entertainment, factual reporting, and advertisements. Media convergence on the social media feed has collapsed content genres, so source tags would help distinguish tone, purpose, and factual basis. Responsible information dissemination requires enabling audiences to assess reasons behind claims, and gauge the interests it may serve.[89] Source tags expand upon online advertising disclosures set by the Advertising

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[88] Stephan Lewandowsky et al., 'Misinformation and Its Correction: Continued Influence and Successful Debiasing' (2012) 13(3) PSPI 106.

[89] Onora O'Neill, 'The Rights of Journalism and the Needs of Audiences' in James Lewis and Paul Crick (eds), *Media Law & Ethics in the 21st Century* (International Bar Association 2014), 42.

Standards Authority to uphold users' rights to clear and honest information. If the OSA seeks to promote user empowerment, then guaranteeing such clarity is a more direct method than content filtering options. Source tags would also promote accountability in exchange for visibility, an important media law principle. Requiring tags on posts surpassing a high impression threshold means that viral content must disclose its basis. With careful implementation, tags could serve broader transparency obligations expected in modern feed curation.

A key challenge is determining how 'high-reach' is defined. A fixed numerical base could offer certainty to content creators but may disproportionately impact smaller social media platforms. To ensure fairness, the threshold could vary with platform size and user base. This follows a core principle of the OSA: that regulation is proportionate to the scale and potential harm of the service.[90] Whilst fewer impressions could quickly trigger tagging on smaller sites, it ensures that source transparency is given when posts gain prevalence on their original platforms. Since mistaken beliefs often persist after correction, tagging once a threshold is reached provides no remedy for the initial audience.[91] This supports lowering the threshold, but a balance must be struck to not unfairly burden users. Another consideration is determining who assigns the tags. If assigned by the content creator, greater regard for freedom of expression is ensured but sites must provide appeal or correction routes to prevent abuse. This could repurpose X and Meta's 'Community Notes', involving users in source-type correction rather than the onus of providing interpretive context. To prevent bias in tag assignment, both users and the platform should be involved in its review, though this burden is limited by the high-reach criteria. Since tagging definitions cannot rest with a small group of editors, coordinating all impacted parties is this proposal's greatest challenge.[92] As a media literacy aid, tags must be prominent, consistent, and educational. Tagging high-impact posts could counter the decreasingly reliable way to 'define boundaries of separate media industries and interests'.[93]

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[90] Ofcom, *Risk Assessment Guidance and Risk Profiles* (2024) <https://www.ofcom.org.uk/siteassets/resources/documents/online-safety/information-for-industry/illegal-harms/risk-assessment-guidance-and-risk-profiles.pdf?v=390984> accessed 8 June 2026.

[91] Lewandowsky and others (n 88) 109.

[92] Onora O'Neill, 'The Rights of Journalism and the Needs of Audiences' in James Lewis and Paul Crick (eds), *Media Law & Ethics in the 21st Century* (International Bar Association 2014), 48.

[93] House of Lords Select Committee on Communications, *Media Convergence and Its Public Policy Impact* (HL 2012–13, 154) <https://publications.parliament.uk/pa/ld201213/ldselect/ldcomuni/154/154.pdf> accessed 8 June 2026.

Critics may view the tags as implied value judgements, especially ‘opinion’ and ‘factual’. This distinction is central to most content, so will be unavoidably contentious. Clear definitions and transparent tagging criteria could help to mitigate this, but the system must be framed as a contextual, not evaluative, tool. A valid concern is that multiple highly similar posts could reach high-visibility without individually activating tags. Decentralised posting strategies could bypass tagging requirements and undermine the effectiveness of impressions-based thresholds. While this complicates implementation, cumulative reach monitoring is no novel burden as it already exists in disinformation campaign oversight.[94] However, regulatory burden would increase, so refinements are required to address content replication that could circumvent tagging.

If this policy had been active during the 2024 Olympics, viral speculative posts would have needed to disclose their unproven nature to remain visible. This would have notified users about the nature of content, reducing misinformation by acting as a ‘pre-exposure warning’.[95] Helping the audience contextualise motivations behind viral content could have lessened reputational harm from unverified claims, restoring the interpretive lens often lost in social media convergence. Source tags offer a promising mechanism for contextualising content, but the need for clear definitions, appeal routes, and monitoring of cumulative reach shows this system requires refinement. With a transparent and appealable structure, this literacy-based tool strengthens conditions under which users encounter information, signalling clear responsibility onto those with unchecked communicative power.

4.4 Algorithmic Transparency Tags

The final proposal introduces tags denoting the platform’s reason content is shown on feeds. Algorithmic Transparency Tag (ATT) categories could include: ‘interacting with similar content’, ‘recommended based on personal data’, ‘sponsored’, ‘follower-based’, or ‘trending in your area’. The media industry promotes transparency, but lacks the disclosure duties of

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[94] Samantha Bradshaw, Hannah Bailey and Philip N Howard, ‘Industrialized Disinformation’ (*Oxford Internet Institute* 2020) <https://demtech.oii.ox.ac.uk/wp-content/uploads/sites/12/2021/02/CyberTroop-Report20-Draft9.pdf> accessed 8 June 2026.

[95] Stephan Lewandowsky et al., ‘Misinformation and Its Correction: Continued Influence and Successful Debiasing’ (2012) 13(3) PSPI 106, 116.

other public institutions, so this proposal directly disrupts algorithmic opacity.[96] ATTs empower critical engagement, reshaping content interpretation and challenging assumptions of fairness, through visible signals of behind-the-scenes decision making. This directly aligns with Article 27 of the Digital Services Act (DSA), disclosing recommender systems at the user interface level, rather than buried in terms of service.[97] Real-time explanations of profiling can further contextualise influence, particularly in political, social, or identity-based content where algorithmic amplification can structure prevailing narratives.[98] To provide meaningful context, ATTs require expandable short explanations of content placement and recommender systems in use. Transparency tools are difficult to oppose on principle and may pressure platforms to construct algorithms more responsibly, as ATTs signal shortcomings in providing a reliable information environment.

A central risk is that ATTs could worsen cognitive overload in already information-dense content feeds. Users may ignore or misinterpret tags, unless paired with education and intuitive designs that enable informed decision making. With clear, brief, and visible ATTs, users could gain greater control over their content feeds. Where interacting with content means sensationalised topics still gain virality, ATTs could help users reduce repeated exposure. I believe this supports user empowerment by providing tools to directly respond to the algorithmic forces that shape users' experiences. ATTs therefore function as both algorithmic disclosures and mechanisms for user intervention.

Effective monitoring is crucial because platforms will be reluctant to reveal exploitative editorial patterns. Opening platforms up to public scrutiny may undermine trust in their service, which could lead them to use vague tags like 'Suggested for you' to avoid backlash and generic labels fail to meaningfully inform, undermining the intent of ATTs. Robust oversight involving field experts is essential to monitor fair implementation and reduce the impact of platform self-interest. The ATT approach confronts algorithmic choices directly by exposing and challenging their role in incentivising informational harms.

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[96] Onora O'Neill, 'The Rights of Journalism and the Needs of Audiences' in James Lewis and Paul Crick (eds), *Media Law & Ethics in the 21st Century* (International Bar Association 2014), 45.
[97] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1
[98] Khudejah Ali and Khawaja Zain-ul-abdin, 'Post-Truth Propaganda: Heuristic Processing of Political Fake News on Facebook during the 2016 U.S. Presidential Election' (2020) 49 JACR 1.

If implemented before the Paris Olympics, this policy would have fostered online transparency and exposed mechanisms that amplify prejudicial content. Real-time contextualisation may have slowed the viral momentum of baseless accusations, by prompting users to reassess credibility. Achieving this outcome depends on striking a balance between the conciseness of tag explanations and sufficient detail to maintain their usefulness. By showing why posts repeatedly appear on users' feeds, ATTs reveal feedback loops and in turn empower users to engage intentionally. ATTs may not prevent vulnerable groups, such as transgender individuals, from being drawn into sensationalist headlines. However, reducing user engagement with such content lowers their visibility and profitability, reducing the incentive to utilise inflammatory content for engagement-driven gain. With strong oversight and public accountability, ATTs offer a promising recalibration of online responsibility. Despite requiring more educational groundwork, ATTs could ensure long-term redress of the systematic imbalances fuelling widespread digital harms.

Each solution presented draws on existing media policy and could enhance online experiences. By targeting system design, they circumvent the usual enforcement issues when the perpetrator is overseas, a key hurdle in Khelif's cyberbullying complaint.[99] Despite growing awareness, misinformation remains too opaque for audiences to successfully differentiate fact from fiction.[100] This presents a case for regulatory intervention because although worldview shapes individual interpretations, visible interference to platform design could foster a 'healthy degree of scepticism', contributing to a better-informed population.[101] Implementing harm redress directly onto feeds affirms the necessity of legal intervention, not for censorship, but to compel structural accountability in a relatively unchallenged industry.

5 Conclusion

5.1 Summary of Findings

Through social media's rise into the information sharing sphere, high-reach publishing power is no longer exclusive to the media industry. This power has been decentralised and is now

[99] Jacob Rowbottom, *Media Law* (Hart Publishing 2018), 318.
[100] Stephan Lewandowsky et al., 'Misinformation and Its Correction: Continued Influence and Successful Debiasing' (2012) 13(3) PSPI 106, 109.
[101] Ibid, 124.

shared to anybody with internet access. A new body of unregulated speakers, with unprecedented publishing capabilities, have been exploiting these platforms over the last decade, but the law has not caught up. Citizen journalists and influencers can mimic news products without the corresponding regulatory scrutiny, as was shown in the Khelif case where misinformation spread like wildfire under the guise of honest reporting. This highlights a critical gap in media law frameworks whereby substantial control of the public narrative is assumed by speakers with no obligation to act transparently or fairly. Section 2 also explored the freedom of expression implications for addressing this new body of speakers, underscoring the need to balance their exercise of free speech with the audience's right to high-quality information which supports democratic processes.

Section 3 expanded upon the reports of social media creating a heuristically disorientating environment; by analysing the ways certain content is amplified for higher user engagement. Controversial and misleading content, by its very nature, attracts the most user engagement which in turn brings the most views to paid advertisements. The platforming of such topics is disproportionate to the marginal issues they often represent, and the amplification of reaction-provoking misinformation shows little regard from social media platforms for the public interest. Profit incentives are continually prioritised over informational integrity, allowing algorithmic systems to assume an editorial role without the editorial responsibilities imposed on the rest of the media. This structure enabled unverified speculation around Khelif to soar to mainstream reporting heights, causing reputational harm and instigating alarming amounts of transmisogyny. Such profit incentives make self-regulation an inadequate safeguard against viral harms, and whilst the OSA 2023 introduced a shift to system-based regulation, it remained silent on the more evasive legal but harmful content or to enforce any meaningful changes in platform conduct. The OSA's reluctance to fully embrace system-based regulation limits its longevity in a rapid-paced area of technological development.

Finally, section 4 explored three design-based solutions to be implemented under comprehensive system regulation. Viral misinformation cannot be remedied through content restrictions without raising censorship concerns or being limited to reactive measures, which is not effective on social media's rapidly moving platforms. Instead, structural transparency tools offer recalibration of the digital information environment with less intrusion on free expression. Algorithmic transparency tags, as a highly visible extension of existing social media policy, provide purposeful user empowerment tools and disrupt the invisible curation of the social media feed. These tags would have slowed the spread of misinformation about Khelif, by contextualising its virality and supporting users to make informed judgements over content credibility. The law must reclaim oversight of social media platforms' editorial powers, by imposing transparency and accountability at the design level.

Ultimately, this article has argued that the decentralisation of media power must be addressed through the social media platforms responsible for the aggregation and amplification of low-quality information. The social media environment allows any source to purport credibility, a regulatory gap exposed by the rapid virality of misinformation about Imane Khelif. While the OSA marked a crucial step towards system-based regulation, it did not hold social media accountable for its systems which structure and distort public discourse.

5.2 Future Directions

Looking beyond this article, future research could examine how long-established concepts of editorial responsibility and public interest may evolve into obligations for algorithm-driven services, particularly in assessing their relevance within social media as the Fifth Estate. Comparative analysis of social media regulation would further support in holding platforms accountable across jurisdictions, reflecting their inherently cross-border nature promoting more responsible platform architecture. Additional research might evaluate the effectiveness of the proposed interventions in mitigating heuristic processing among social media users, or explore legal pluralistic approaches that extend beyond statutory frameworks. Finally, while these proposals are intended to function as media literacy tools, exploring media education initiatives would further empower users and help reduce the persuasive credibility of misinformation.

Reforming Fetal Surgery: Maternal Autonomy and Fetal Interests

Leah Hughes

Abstract

Advances in fetal surgery have intensified longstanding ethical tensions between maternal autonomy and fetal interests, exposing limitations within the current UK legal framework. Despite the increasing clinical use of in utero interventions, the law provides no coherent doctrine specifically addressing fetal surgery, instead relying on fragmented principles drawn from abortion law, consent jurisprudence, and fetal personhood doctrine. This article undertakes a doctrinal and ethical analysis of the existing statutory and case law framework to assess whether it adequately mediates conflicts between pregnant women and fetal interests in surgical contexts. It argues that the current framework obscures rather than resolves these tensions by failing to articulate clear principles governing maternal refusal, fetal benefit, and state intervention. The absence of legal clarity risks inconsistent clinical practice and reinforces conceptual confusion regarding fetal rights. The article concludes that targeted legal reform is necessary to clarify the application of consent principles in fetal surgery while preserving maternal autonomy as the central organising principle. It proposes a principled framework that integrates ethical analysis without conferring independent legal personhood on the fetus, thereby providing clearer guidance for clinicians and safeguarding reproductive rights.

1 Introduction

This article, titled *Maternal Autonomy vs Fetal Rights: Reforming the Legal Framework for Fetal Surgery,* explores how the current UK legal framework, or lack thereof, for fetal surgery heightens the ethical and legal tensions between maternal autonomy and fetal rights. As medicine evolves, the law struggles to keep up, resulting in legal gaps and ambiguity, creating inconsistencies in clinical practice and legal discourse. This article evaluates whether reform is necessary to clarify the law while safeguarding reproductive rights.

1.1 Background

Historically, medical understanding of pregnancy and fetal development was limited, both mothers and clinicians had little insight into the workings of the womb.[1] Women had two choices: continue the pregnancy despite fetal abnormalities or terminate it.[2] However, advances such as ultrasound[3] and fetal surgery[4] now offer a third option: in utero intervention. Conditions treatable by fetal surgery include spina bifida,[5] twin-twin transfusion syndrome,[6] and Sacrococcygeal teratoma.[7]

While groundbreaking,[8] these developments create legal and ethical tensions. Medical practice increasingly recognises both the pregnant woman and the fetus as patients,[9] each with their own distinct needs.[10] This becomes problematic where these needs are in opposition. Fundamental questions arise. Should the fetus be granted legal standing as a patient? Do these

[1] Helen Statham, 'Prenatal diagnosis of fetal abnormality: the decision to terminate the pregnancy and the psychological consequences' (2002) 13(4) FMMR 213.
[2] Ibid.
[3] Mark Van de Velde et al, 'Fetal Pain Perception and Pain Management' (2006) 11(4) SFNM 11(4) 232; Kha M. Tran, 'Anesthesia for Fetal Surgery*'*(2010) 15(1) SFNM 40.
[4] Jeffrey L Lenow, 'The Fetus as a Patient: Emerging Rights as a Person?' (1983) 9(1) AJLM 1.
[5] Keerthika Sampat and Paul D Losty*,* 'Fetal surgery' (2021) 108(6) BJS 632.
[6] Mayo Clinic, *Fetal Surgery*, (2025) <https://www.mayoclinic.org/tests-procedures/fetalsurgery/about/pac-20384571 > accessed 8 June 2026.
[7] Ibid.
[8] Jeffrey L Lenow, 'The Fetus as a Patient: Emerging Rights as a Person?' (1983) 9(1) AJLM 1.
[9] Frank A Chervenak and Laurence B McCullough, 'The Fetus as a Patient: An Essential Concept for the Ethics of Perinatal Medicine' (2003) 20(8) AJP 399; Clare Williams*,* *'*Framing the Fetus in Medical Work: Rituals and Practices' (2005) 60(9) SSM 2085.
[10] H Catarina M L Rodrigues and Paul P van den Berg, 'Morally and procedurally justified argument for the moral obligations of physicians toward pregnant women (and fetuses) in the context of maternal–fetal surgery: A Gewirthian precautionary approach' (2012) MLI 142.

advancements justify re-evaluating maternal autonomy? Could fetal surgery undermine protections for pregnant women? These unresolved questions urge the need for reform.[11]

1.2 The Legal Problem: Gaps, Ambiguity and Inconsistencies

UK law on pregnancy-related decision-making is heavily reliant on case law,[12] traditionally prioritising maternal autonomy[13] and establishing that the fetus has no independent rights.[14] However, fetal surgery introduces new complexities that the law has not yet adequately addressed, largely because it is a relatively recent and rapidly developing area of medical practice that blurs the legal distinction between the pregnant woman and the fetus. In the absence of clear statutory guidance,[15] legal principles must be inferred from related areas of law, ultimately creating inconsistencies in application and outcomes for women.

Two conceptualisations dominate the literature;[16] the one-patient model, which treats the pregnant woman as the sole patient,[17] and the two-patient model, which views the fetus as a separate patient.[18]

The current UK legal stance supports the one-patient model.[19] In *Paton v British Pregnancy Advisory Service,*[20] the court held that a fetus 'cannot, in English Law… have any right of its own… until it is born and has a separate existence from the mother.'[21] This was reaffirmed in *Re MB,*[22] which established that a woman's right to refuse medical treatment is absolute, even

[11] H Catarina M L Rodrigues and Paul P van den Berg, 'Morally and procedurally justified argument for the moral obligations of physicians toward pregnant women (and fetuses) in the context of maternal–fetal surgery: A Gewirthian precautionary approach' (2012) MLI 142.
[12] Kevin X Cao et al, 'The legal frameworks that govern fetal surgery in the United Kingdom, European Union, and the United States' (2018) 38(7) PD 475.
[13] *St. George's Healthcare NHS Trust v. S* [1998] 3 All ER 673
[14] *MB (Caesarean Section), Re* [1997] 2 WLUK 313
[15] Kevin X Cao et al, 'The legal frameworks that govern fetal surgery in the United Kingdom, European Union, and the United States' (2018) 38(7) PD 475.
[16] Dunja Begović, 'Maternal–Fetal Surgery: Does Recognising Fetal Patienthood Pose a Threat to Pregnant Women's Autonomy?' (2021) 29(4) HCA 301.
[17] Ibid.
[18] Jeffrey L Lenow, 'The Fetus as a Patient: Emerging Rights as a Person?' (1983) 9(1) AJLM 1.
[19] *Paton v United Kingdom* [1980] 3 EHRR 408
[20] Ibid.
[21] Ibid.
[22] *MB (Caesarean Section), Re* [1997] 2 WLUK 313.

if it may harm the fetus.[23] The decision in St. *George Healthcare,*[24] further confirms that pregnancy does not diminish a woman's legal right to make autonomous medical decisions.[25]

However, fetal surgery inherently treats the fetus as a separate patient, therefore adhering to a two-patient model. As Howe observes, 'surgical intervention on behalf of the fetus takes place inside a pregnant woman's body; however, there are two patients.'[26] This creates a legal dilemma. If a fetus is treated as a patient in medical practice, should the law acknowledge some form of protection? If a pregnant individual refuses fetal surgery, could this ever justify legal intervention to prioritise fetal welfare? Where should the legal boundary be drawn to ensure maternal rights are not eroded?

This tension remains unresolved in law, in part because recognising the fetus as a right-bearing entity would challenge the long-established legal principle that prioritises maternal autonomy and denies fetal personhood before birth. As a result, the law has been reluctant to directly engage with these issues, leaving a gap between medical practice and legal doctrine.

1.3 Inconsistencies in the Current Law

The absence of statutory guidance means courts must rely upon inference from other legal areas, namely, criminal[27] and tort law.[28] This leads to inconsistency, making it both impractical and confusing in practice.

In criminal law, the fetus is afforded limited protections.[29] The Offences Against the Person Act 1861 and the Infant Life Preservation Act 1929 criminalise unlawful abortion[30] and protect a fetus capable of being born alive.[31] These principles were reaffirmed in *Attorney-General's*

[23] Ibid.
[24] *St. George's Healthcare NHS Trust v. S* [1998] 3 All ER 673.
[25] Ibid.
[26] David Howe, 'Ethics of prenatal ultrasound' (2014) 28(3) BPRCOG 443.
[27] Kevin X Cao et al, 'The legal frameworks that govern fetal surgery in the United Kingdom, European Union, and the United States' (2018) 38(7) PD 475.
[28] Congenital Disabilities (Civil Liability) Act 1976, s.1.
[29] Kevin X Cao et al, 'The legal frameworks that govern fetal surgery in the United Kingdom, European Union, and the United States' (2018) 38(7) PD 475.
[30] Offences Against the Person Act 1861.
[31] Infant Life Preservation Act 1929, s.1.

Reference (No 3 of 1994),[32] suggesting some degree of fetal protection.[33] However, this protection is situational and does not extend to maternal decision-making by the pregnant woman.

In tort law, remedies exist for harm caused to a fetus by third parties,[34] but not by the mother.[35] The Congenital Disabilities (Civil Liability) Act 1976 allows a child born with disabilities to bring a claim for pre-birth harm[36] but explicitly prevents legal action against their mother.[37] The Law Commission later rejected proposals to allow this, reinforcing maternal immunity from liability.[38] This raises a troubling inconsistency: the fetus is protected from third-party harm, but maternal conduct remains legally irrelevant. If the law were to recognise fetal interests in surgery cases, would this set a dangerous precedent for restricting reproductive rights?

1.4 The Need for Legal Reform

The lack of clear legal principles governing fetal surgery creates significant uncertainty for medical professionals and pregnant women. This article argues that reform is needed to clarify the legal status of the fetus during in utero interventions, the scope of maternal consent and refusal rights, and how to resolve conflicts between maternal and fetal interests without undermining autonomy. Legal reform must be comprehensive, yet cautious to avoid unintended encroachment on reproductive rights, particularly abortion.

1.5 Legal Approaches to Fetal Surgery

Hyatt et al argue that the legal status of the fetus as a patient and its implications for the pregnant person's autonomy have been relatively unexamined.[39] This gap in legal recognition creates

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[32] *A-G Ref No.3* [1996] 1 Cr. App. R.351.
[33] Ibid.
[34] Law Commission Report No 60.
[35] Congenital Disabilities (Civil Liability) Act 1976, s.1.
[36] Ibid, s.1.
[37] Ibid, s.2.
[38] Law Commission Report No 60.
[39] E Goldblatt Hyatt et al., 'I don't have a telephone to the fetus: Clinicians' conceptions of fetal patienthood in maternal-fetal surgery counselling' (2024) SSM 342 (1982).

uncertainty regarding whether the state can, or should, intervene to compel a pregnant woman to undergo fetal surgery against her will.

The invasiveness of fetal surgery varies, encompassing open procedures (requiring a uterine incision) and minimally invasive fetoscopic techniques.[40] However, legal systems struggle to keep up with evolving medical innovations, relying heavily on preexisting frameworks on bodily autonomy and consent. The principle of informed consent under UK law, as redefined in the landmark case *Montgomery v Lanarkshire Health Board,*[41] dictates that an individual must be made aware of all material risks associated with the proposed treatment and its alternatives.[42] While this principle is well-established in general medical law, it becomes complicated when applied to maternal-fetal surgery as it involves two distinct yet interconnected patients.[43]

This raises the question: if a pregnant woman is well-informed, yet refuses fetal surgery, could the state override her decision based on fetal welfare? While no UK case has directly addressed this issue in a fetal surgery context, precedents involving court-ordered obstetric interventions,[44] such as forced caesareans, indicate a historical judicial reluctance to interfere with maternal autonomy.[45] This judicial stance may be rooted in fear of a slippery slope, as they may not want to risk policing pregnancy. Yet, by not intervening, they risk ignoring complex ethical issues that require guidance. This reflects a deeper structural avoidance which may prevent the evolution of the law, specifically concerning medical advancement. Moreover, the legal recognition of fetal interests has evolved in ways that complicate this issue.

By 1992, UK medical guidance shifted to classify fetal remains as deceased children's bodies rather than medical waste, a move reflecting a growing acknowledgement of fetal personhood.[46] This implies a shift in the perception of fetal status before birth and could perhaps influence arguments for fetal rights in the context of surgery. This highlights that there

[40] Ibid.
[41] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11.
[42] Ibid.
[43] H Catarina M L Rodrigues and Paul P van den Berg, 'Morally and procedurally justified argument for the moral obligations of physicians toward pregnant women (and fetuses) in the context of maternal–fetal surgery: A Gewirthian precautionary approach' (2012) MLI 142.
[44] *St George's Healthcare NHS Trust v S* (Guidelines) [1999] Fam. 26
[45] Ibid.
[46] E Goldblatt Hyatt et al., 'I don't have a telephone to the fetus: Clinicians' conceptions of fetal patienthood in maternal-fetal surgery counselling' (2024) SSM 342 (1982).

is an inconsistency in how fetuses are viewed across disciplines, which makes it significantly harder to legislate.

Legal approaches to fetal surgery are therefore at a crossroads; while the law prioritises maternal autonomy, state interests in fetal welfare remain a persistent undercurrent. The absence of clear legal protections leaves room for arguments for fetal surgery to remain wholly subject to maternal consent, or, under exceptional circumstances, intervention could be legally justified.

2 The Legal Status of the Fetus and Maternal Autonomy

Courts often avoid engaging directly with this question, instead focusing on what the fetus is not.[47] English law clearly denies fetal personhood,[47] granting legal recognition only after birth.[48] Yet, this clarity fades where medical interventions are performed directly on the fetus in utero, despite its lack of independent rights. The absence of legislative clarity on fetal surgery may be strategic, allowing flexibility while avoiding political backlash over fetal personhood.

In *Attorney-General Reference (No.3 of 1994),*[49] the House of Lords established that the fetus is a 'unique organism,'[50] distinct from the mother, yet without independent legal personhood.[51] The judgment's reluctance to grant personhood, yet acknowledge distinctiveness, mirrors the broader discomfort in bioethics and the law, recognising medical advancements while guarding against politicisation.[52] This ambiguity is problematic concerning fetal surgery. While the law's flexible approach allows for varied judicial outcomes, it also creates uncertainty that can have profound practical implications, particularly in medical practice.

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[47] *Re An application by the Northern Ireland Human Rights Commission for Judicial Review* (Northern Ireland) [2018] UKSC 27, [92].
[48] *Attorney-General Reference (No.3 of 1994)* [1998] AC 245.
[49] Ibid.
[50] *An approach approved by the Court of Appeal in CP (a child) v First-tier Tribunal* (Criminal Injuries Compensation) [2014] EWCA Civ 1554.
[51] Ibid.
[52] Benjamin Gregg, 'Political bioethics'(2022) 47(4) JMP 516.

Legal scholars diverge in their interpretation of this ambiguity. While David Nixon supports a strict post-birth threshold for legal recognition,[53] Felice Sorrentino argues that the limited legal status during gestation is ethical and necessary.[54] This comparison reveals a struggle to balance personhood as a conception with practical regulation, urging interpretation from criminal and tort law to clarify the status of the fetus.

2.1 Abortion

Fetal protection under criminal law is limited. Under the Offences Against the Person Act 1861, sections 58 and 59 criminalise unlawful abortion, but they do not recognise the fetus as a separate legal entity. The ambiguity in the statutory language, such as 'intent' and 'procure', raises concerns about potential liability for fetal death resulting from medical intervention, or a lack thereof, especially where the fetus's welfare was at stake. This reinforces societal expectations that pregnant women are subject to greater control over their bodies, potentially leading to liability in unpredictable legal circumstances.

Conversely, the Abortion Act 1967 allows for abortion under specific conditions.[55] Section 1(1)(a)'s 24-week limit[56] reflects viability as a legal framework and indicates a legal approach that attempts to balance maternal rights and fetal interests. This aligns with the Infant Life (Preservation) Act 1929,[57] which criminalises destroying a fetus 'capable of being born alive.'[58] This raises the question of whether the concept of viability should influence the legal approach to fetal surgery. And, if a viable fetus can be surgically treated, should there be formal recognition of its interests, granting more protection?

Recognising fetal interests may risk obscuring maternal autonomy, creating a tension between the rights of the woman and the interests of the fetus, as both may be viewed as patients with competing interests. As fetal surgery becomes more accessible, this in-between position may

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[53] David Nixon, 'Should UK law reconsider the initial threshold of legal personality? A critical analysis' (2010) 16(2) HRGE 182.
[54] Felice Sorrentino et al, 'Caesarean section on maternal request-ethical and juridic issues: a narrative review' (2022) 58(9) M 1255.
[55] Abortion Act 1967.
[56] Abortion Act 1967, s.1(1)(a).
[57] Infant Life (Preservation) Act 1929.
[58] Ibid.

become unsustainable long-term due to the lack of legal clarity. In *Re MB,*[59] the court held that physically invasive treatment without consent is assault.[60] Yet, in cases where the fetus is considered a patient, if a competent woman refuses surgery that could save the fetus's life, how far can the law justify intervening? This concern is heightened when considering the disproportionate effect this will have on marginalised women, whose access to healthcare is already restricted.[61]

While English law rejects fetal personhood,[62] it simultaneously offers limited legal protection to the fetus in certain legal contexts. Courts have acknowledged that the state has a role in protecting fetal interests,[63] raising the question of whether this implicitly grants a form of legal status, despite the fetus having no enforceable rights[68] or being capable of having claims brought on its behalf.[64] This question becomes particularly relevant in fetal surgery, where the state may be obligated to ensure medical treatment is provided in utero, particularly to preserve its life or address abnormalities. While this appears paternalistic, it could erode maternal autonomy and reproductive rights.

St George's Healthcare NHS Trust v S[65] provides important insight into the legal complexities surrounding fetal interests. The court held that a competent woman's right to refuse medical treatment, even if it endangers the fetus, must be respected.[66] However, the ambiguous language used by the court, stating the fetus is 'not nothing', suggests a recognition of fetal personhood that complicates the relationship between maternal autonomy and fetal welfare. This ambiguity invites further debate about whether the fetus should be granted legal rights in medical contexts, especially given that it cannot be made a ward of the court,[67] unlike a child.[68] While this respects autonomy, it creates a gap in fetal protection, ultimately confusing accountability.

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[59] *MB (Caesarean Section), Re* [1997] 2 WLUK 313.
[60] Ibid.
[61] Patricia E Stevens, 'Marginalized women's access to health care: A feminist narrative analysis' (1993) 16(2) ANS 39.
[62] *Re An application by the Northern Ireland Human Rights Commission for Judicial Review* (Northern Ireland) [2018] UKSC 27, [92].
[63] *R (Crowther) v Secretary of State for Health and Social Care* [2021] EWHC 2536 (Admin), [62].
[64] *Paton v BPAS* [1978] 2 All ER 987.
[65] (1998) 44 BMLR 160, [163].
[66] Ibid.
[67] *Re F (In Utero)* [1988] Fam 122 (CA).
[68] Family Law Reform Act 1969, s.7.

Additionally, the legal status of embryos, as demonstrated in *Evans v Amicus,*[69] further illustrates the inconsistency in how life stages are treated under the law.[70] Embryos are not recognised as having independent rights, for instance, the right to life,[71] while fetuses are granted some degree of protection at gestational age.[72] The legal distinction between embryos and fetuses raises further ethical concerns, particularly in the context of fetal surgery and the rights of the fetus. This inconsistency not only reflects a complicated approach to the moral and legal status of potential life but also complicates the legal justification for fetal interventions, as it becomes unclear whether procedures are grounded in maternal autonomy or fetal rights. Therefore, complicating legal decision-making.

Judicial perspectives on fetal interests remain unsettled. Lady Hale in *Re NI Human Rights*[73] suggested that categorically denying fetal interests may be overly dogmatic.[74] This observation indicates a potential shift in legal thinking, perhaps opening the door to greater legal recognition of fetal interests. If the law begins to acknowledge the fetus as having a degree of legal significance in medical contexts, this could have profound implications for the regulation of fetal surgery and the balance between maternal autonomy and fetal rights. This leaves the overarching question of how potential legal reform should be balanced.

Ultimately, the legal status of the fetus is inconsistent. While the law affords fetal protections in tort and criminal contexts, it offers little to no protection when maternal autonomy is at stake. This disparity may reflect a reluctance to impose accountability on the state for pregnancy-related harm, particularly given that obstetric violence goes largely undetected and unpunished in the UK.[75] Such selective recognition of fetal interests allows intervention when others cause harm but avoids legislating instances where maternal-fetal harm is called into question, and avoids specific, unnegotiable prioritisation of maternal autonomy. As Smart argues law is inherently male,[76] and this notion persists even within the reproductive sphere. The ambiguity surrounding fetal surgery, and more broadly, the balancing of maternal autonomy against

[69] [2004] 3 All ER 1025.
[70] Ibid.
[71] European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights as amended), s.2.
[72] *Evans v Amicus* [2004] 3 All ER 1025.
[73] [2018] UKSC 27, [92].
[74] Ibid.
[75] Elaine Storkey, *Scars across humanity: Understanding and overcoming violence against women* (InterVarsity Press 2018.)
[76] Carol Smart, 'The Woman of Legal Discourse' (1992) 1(1) SLS 29.

growing fetal interests, demonstrates how legal structures continue to reflect and reinforce patriarchal assumptions.

2.2 Maternal Autonomy and the Legal Right to Choose

The concept of maternal autonomy lies at the heart of many legal and ethical debates surrounding pregnancy and fetal surgery.[77] Maternal autonomy asserts a woman's right to make medical decisions, including the right to refuse treatment,[78] which is protected under the principles of bodily integrity and informed consent.[79] However, the advancement of fetal surgery complicates this autonomy,[80] as decisions not only impact the pregnant woman's health but also the potential well-being of the fetus.[81]

Nyinawagaba affirms that women's right to choose must be exercised without external interference,[82] with informed consent at the forefront of any proposed procedure.[83] Yet, where a fully informed woman refuses life-saving treatment for her fetus, the law's stance is unsure and unclear. This is particularly damaging as maternal versus fetal interests in opposition could lead to coerced or forced interventions, eroding autonomy.

Rosamund Scott critiques the notion of 'maternal-fetal conflict', arguing that it perpetuates outdated notions of women as self-sacrificing figures whose interests are in opposition to those of the fetus.[84] Indeed, it appears to oversimplify this complex relationship.[85] Chau and Herring propose an alternative perspective, suggesting that the legal framework should consider the relationship between the fetus and pregnant woman rather than positioning them in conflict.[86] This perspective underscores the need for legal reform that balances maternal and fetal interests without diminishing a woman's right to bodily integrity. However, the presence of obstetric

[77] Davis Isaacs, 'Moral status of the fetus: Fetal rights or maternal autonomy?' (2003) 39(1) JPCH 58.
[78] Rebecca Brione, 'To What Extent Does or Should a Woman's Autonomy Overrule the Interests of Her Baby? A Study of Autonomy-Related Issues in the Context of Caesarean Section' (2015) 21(1) NB 71.
[79] Ibid.
[80] Keerthika Sampat and Paul D Losty, 'Fetal surgery' (2021) 108(6) BJS 632.
[81] Ibid.
[82] Beatrice R Nyinawagaba, 'Reproductive Rights as Fundamental Human Rights: A Feminist Perspective on Bodily Autonomy and Social Justice' (2024) 5(2) EEJHSS 9.
[83] Ibid.
[84] Rosamund Scott, *Rights, Duties and the Body: Law and Ethics of the Maternal-Fetal Conflict* (Hart Publishing 2002).
[85] Mary Ann Warren, 'The moral significance of birth' (1989) 4(3) H 46.
[86] Jonathan Herring and P-L Chau, 'My Body, Your Body, Our Bodies', (2007) 15(1) MLR 34.

violence within medical settings[87] goes undetected and is highly criticised as a faddish feminist term,[88] therefore, demonstrating the dangers of coercive practices that prioritise medical authority over maternal choice.

In the landmark case of *St George's Healthcare NHS Trust v S,*[89] the court reaffirmed the principle that a competent woman retains the right to refuse medical treatment,[90] even if such a decision may endanger the fetus. This ruling emphasised the importance of recognising maternal autonomy, asserting that the right to bodily integrity is paramount, even if causing potential harm.[91] However, the court's recognition that the fetus is 'not nothing' adds a layer of complexity to this discussion, raising the question of whether fetal interests should be considered more strongly in future frameworks.[92] Indeed, the court in *St George's* recognised that pregnancy increases the responsibilities of a woman, perhaps this is illustrative of how legal reform, in favour of the fetus, would look, for instance, an increased duty of care owed by mothers in utero. That said, this would strike an uneven balance between protections owed by mothers than by fathers, perhaps exacerbating gender inequality in law. Such an approach risks reinforcing a gendered conception of responsibility that the law has otherwise sought to avoid, suggesting that reform in favour of the fetus may come at a significant cost to women's legal autonomy.

This contradiction may also lead to a complicated compromise that displeases both sides of the maternal-fetal conflict debate; some may see it as a threat to autonomy, and some may see it as insufficient protection for the fetus. Therefore, any reform is at risk of criticism, and considering there is a tendency to over-politicise reproductive rights,[93] reform must be comprehensive, respect autonomy, and not risk oversimplification, and not perpetuate legal ambiguities.

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[87] Rachelle Chadwick, 'The battle for recognition of obstetric violence' (*Centre for Ethics and the Law in the Life Sciences: Durham University*, 1 November 2021) <gttps://www.durham.ac.uk/research/institutes-and-centres/ethics-law-life-sciences/about-us/blogs/obstetricviolence-blog/battle-for-recognition-of-obstetric-violence/> accessed 8 June 2026.
[88] Chuck Dinerstein, 'Obstetric Violence: New Legal Phrase That Hurts More Than It Helps' (*American Council on Science and Health*, 24 August 2018) <https://www.acsh.org/news/2018/08/24/obstetrical-violence-new-legal-phrase-hurts-more-helps-13349> accessed 8 June 2026.
[89] *St George's Healthcare NHS Trust v S* (Guidelines) [1999] Fam. 26.
[90] Ibid.
[91] Ibid.
[92] Ibid.
[93] Anne Marie Goetz and Sally Baden, 'Who needs [sex] when you can have [gender]?' (1997) 56(1) FR 3.

2.2.1 Mental Capacity Act and Mental Health Act Impact

Legal contradictions emerge when maternal autonomy is examined through the lens of the Mental Capacity Act 2005 (MCA) and the Mental Health Act 1983 (MHA). This inconsistency has not gone unnoticed; while the MCA protects capacity-based autonomy,[94] the MHA enables forced interventions, a contradiction critiqued by Clough,[95] who argues it disproportionately affects marginalised women.[96] Disabled women in particular are significantly disadvantaged by these frameworks.[97] If performing a physically invasive medical procedure without consent is assault.[98] The law therefore, reveals a fundamental tension in determining whether, and to what extent, medical intervention can be justified where a competent woman refuses a procedure intended to improve fetal health.

Under the MCA, if a woman lacks capacity, decisions regarding her medical treatment are made in her 'best interests,'[99] a test that considers medical, ethical and welfare factors.[100] This framework prioritises the pregnant woman's rights over fetal well-being. However, the MHA provides a different route:[101] a woman detained under mental health legislation can be compelled to undergo medical interventions,[102] even those affecting her pregnancy. This inconsistency is troubling.[103] While the MCA seeks to protect autonomy through a best interest's framework, although this act is not without scrutiny,[104] the MHA allows for compulsory treatment, thereby undermining a pregnant woman's autonomy.[105]

The tensions between these two frameworks are particularly problematic in the context of obstetric violence, where coercion and forced medical interventions disproportionally affect

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[94] Mental Capacity Act 2005.
[95] Beverley Clough, 'Mental Capacity and Decision Making' in Elisabeth Cloth Romanis et al (eds), *Diverse Voices in Health and Ethics: Important Perspectives* (Bristol University Press 2025).
[96] Ibid.
[97] Jenny Hundley et al, 'Dignity and respect during pregnancy and childbirth: a survey of the experience of disabled women' (2018) 18(1) BMCPC 328.
[98] *MB (Caesarean Section), Re* [1997] 2 WLUK 313.
[99] Mental Capacity Act 2005, s.4.
[100] Ibid.
[101] Mental Health Act 1983.
[102] Ibid.
[103] Mathew Hotopf, 'The assessment of mental capacity' (2005) 5(6) CM 580.
[104] Ibid.
[105] Mental Health Act 1983.

pregnant individuals.[106] Obstetric violence, while not legally defined in the UK,[107] includes unnecessary medical interventions, non-consensual procedures, and the dismissal of material preferences.[108] Cases of forced caesarean sections and the use of mental health legislation to justify coercive obstetric practices reveal the extent to which maternal autonomy is undermined and the dangers of doing so. For the original stance to force a caesarean in *St George's NHS Trust,*[109] was that the mother's decision was seen as 'irrational and bizarre,'[110] allowing her detention under section 2 of the MHA.[111]

Fetal surgery presents a legal grey area where medical professionals must navigate whether to prioritise maternal autonomy or fetal well-being. Perhaps creating a space where medical professionals can pressure women into procedures by appealing to the perceived 'best interests' of the fetus. This raises concerns about subtle forms of medical coercion and external pressure on women: where fetal surgery is framed as necessary for fetal survival, the line between voluntary decision-making and coerced medical intervention becomes blurred. Therefore, prioritising fetal rights could increase paternalism in obstetric care, thus undermining autonomy.

Ultimately, while *St George's NHS Trust*[112] reaffirmed that the fetus does not have independent legal personhood, the law simultaneously permits overriding maternal autonomy under mental health legislation.[113] This contradiction highlights an urgent need for legal reform to create a coherent approach that respects autonomy while addressing the complexities of fetal surgery. While the MCA and MHA offer clarity for many medical procedures, fetal surgery presents unique challenges because it involves two patients, one legally recognised (the mother) and one whose legal status is complex (the fetus). The legal prioritisation of maternal autonomy, while ethical, may obscure how subtle coercion operates in practice, especially where clinicians present fetal surgery as necessary.

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[106] Maura Lappeman and Leslie Swartz, 'How Gentle Must Violence Against Women Be in Order to Not Be Violent? Rethinking the Word "Violence"' (2021) 27(8) OS 987.
[107] AIMS, 'Obstetric Violence' (*AIMS*, 23 November 2022) <https://www.aims.org.uk/information/item/obstetric-violence> accessed 8 June 2026.
[108] Maura Lappeman and Leslie Swartz, 'How Gentle Must Violence Against Women Be in Order to Not Be Violent? Rethinking the Word "Violence"' (2021) 27(8) OS 987.
[109] *St George's Healthcare NHS Trust v S (Guidelines)* [1999] Fam. 26.
[110] Ibid.
[111] Mental Health Act 1983, s.2.
[112] *St George's Healthcare NHS Trust v S (Guidelines)* [1999] Fam. 26.
[113] Mental Health Act 1983.

2.3 The Intersection of Abortion Law and Fetal Surgery

The relationship between fetal surgery and abortion laws is legally and ethically complex. Casper argues that the two are deeply entangled,[114] as both involve questions of fetal status, medical intervention and maternal rights.[115] However, while abortion law is based on the right to terminate, fetal surgery operates under the assumption of continued gestation and medical efforts to improve fetal outcomes. This results in inconsistent legal treatment of the fetus across medical contexts.

Scholar O'Donovan critiques the reluctance of the law to define the fetus's legal status, arguing this ambiguity stems from concerns about its implications for abortion law.[116] If the fetus were afforded stronger legal recognition in the context of fetal surgery, this could undermine the legal foundation of abortion rights.

Ultimately, the legal tension between abortion and fetal surgery illustrates how the law struggles to balance maternal autonomy, fetal interests and medical innovation.[117] However, it is important to distinguish discussions on fetal surgery from arguments that could undermine abortion rights. The recognition of fetal interests in medical advancements should not be used to restrict access to abortion but rather to clarify ethical and legal principles governing maternal consent in fetal surgery. The law should continue to prioritise the autonomy of the pregnant person, ensuring that any legal developments in this area reinforce, rather than erode, reproductive rights.

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[114] Monica J Casper, *The making of the unborn patient: A social anatomy of fetal surgery* (Rutgers University Press 1998).
[115] Ibid.
[116] Katherine O'Donovan, 'The Legal Parenthood of the Fetus: A Challenge to Feminism' in Jo Bridgeman and Daniel Monk (eds), *Feminist Perspectives on Child Law* (Routledge-Cavendish 2006).
[117] Monica J Casper, *The making of the unborn patient: A social anatomy of fetal surgery* (Rutgers University Press 1998).

3. The Fetus as a Patient? Ethical and Legal Boundaries in Fetal Surgery

3.1 The Two-Patient Model vs. One Patient Model in Fetal Surgery

As discussed, the legal framework surrounding fetal surgery predominantly adopts a one-patient model, treating the pregnant woman as the sole patient with absolute autonomy over her body.[118] However, Howe introduces the concept of a 'two-patient model', where the fetus is not just a subject of the procedure but the primary patient.[119] Despite being confined to the woman's body,[120] the invasiveness of the surgery could justify legal recognition of the fetus as a patient with some degree of personhood. This presents a significant ethical and legal dilemma, pushing boundaries between maternal autonomy and medical paternalism, raising questions about the extent to which the law should recognise fetal personhood when interests conflict. Furthermore, it raises the question of who decides in the absence of law, the pregnant woman or the medical professional?

Notably, determining patienthood based on invasiveness largely overlooks the woman's experience, particularly how invasive such procedures are for her body. Fetal surgery may entail extensive post-operative care[121] and complications affecting the woman's health and well-being. In *Attorney-General's Reference (No.3 of 1994)*,[122] the judge emphasised that when considering the mother's health, the fetus is irrelevant, reinforcing that the woman's interests should take precedence. Focusing on the fetus as the primary patient risks sidelining the woman, whose autonomy and bodily integrity are also at stake. Begović warns that women may be diminished as patients,[123] with Mclean attributing this to increased focus on the fetus's

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[118] Dunja Begović, 'Maternal–Fetal Surgery: Does Recognising Fetal Patienthood Pose a Threat to Pregnant Women's Autonomy?' (2021) 29(4) HCA 301.
[119] David Howe, 'Ethics of prenatal ultrasound' (2014) 28(3) BPRCOG 443.
[120] Dunja Begović, 'Maternal–Fetal Surgery: Does Recognising Fetal Patienthood Pose a Threat to Pregnant Women's Autonomy?' (2021) 29(4) HCA 301.
[121] NHS England, *Open Fetal Surgery to Treat Fetuses with Open Spina Bifida* (December 2018) <https://www.england.nhs.uk/commissioning/wp-content/uploads/sites/12/2018/12/Open-fetal-surgery-to-treat-fetuses-with-open-spina-bifida.pdf> accessed 8 June 2026.
[122] *Attorney-General's Reference (No. 3 of 1994)* [1998] A.C. 245.
[123] Dunja Begović, 'Maternal–Fetal Surgery: Does Recognising Fetal Patienthood Pose a Threat to Pregnant Women's Autonomy?' (2021) 29(4) HCA 301.

interests.[124] The two-patient model, therefore, risks disrupting the balance between maternal autonomy and fetal rights. While it claims to reflect medical reality, it risks bestowing a higher paternalistic role on clinicians, where they, not women, may determine best interests. This could be deceivingly coercive in practice.

That said, a middle ground may exist, one that recognises the biological interdependence of the woman and the fetus.[125] As seen in *Re A (Children) (Conjoined Twins),*[126] they are intrinsically linked; therefore,[127] separating them conceptually is problematic. Mattingly advocates a 'two patient ecosystem model',[128] arguing that the fetus being physically inside the woman prevents a clear conceptual division.[129] She cautions that fetal patienthood could reduce doctors' obligations to the woman, leading to uncertainty when duties conflict.[130]

This has serious legal implications. A model where the woman and fetus are viewed as interconnected but as having distinct legal rights offers a way to balance their competing interests. Yet, legally recognising the fetus as a separate patient, even under an ecosystem model,[131] may complicate the prioritisation of rights. A possible solution is recognising that doctors owe beneficence-based obligations to the fetus, but both beneficence and autonomy-based duties to the woman,[132] placing a higher duty of care on the latter.

While Scott argues that maternal autonomy must remain absolute to protect reproductive rights,[133] and Chervenak and McCullough contend that fetal patienthood creates legitimate moral obligations,[134] this binary framing risks oversimplifying pregnancy itself.[135] As Mattingly suggests, pregnancy does not neatly divide into two competing subjects.[136] Yet

[124] Sheila A M McLean, *Autonomy, Consent and the Law* (Dundee University Press 2009).
[125] Dunja Begović, 'Maternal–Fetal Surgery: Does Recognising Fetal Patienthood Pose a Threat to Pregnant Women's Autonomy?' (2021) 29(4) HCA 301.
[126] *Re A (Children) (Conjoined Twins)* [2000] 1 FCR 561.
[127] Ibid.
[128] Susan S Mattingly, 'The maternal-fetal dyad: Exploring the two-patient obstetric model' (1992) 22(1) HCR 13.
[129] Ibid.
[130] Ibid.
[131] Ibid.
[132] Dunja Begović, 'Maternal–Fetal Surgery: Does Recognising Fetal Patienthood Pose a Threat to Pregnant Women's Autonomy?' (2021) 29(4) HCA 301.
[133] Rosamund Scott, *Rights, Duties and the Body: Law and Ethics of the Maternal-Fetal Conflict* (Hart Publishing 2002).
[134] Frank A Chervenak and Laurence B McCullough, 'A comprehensive ethical framework for fetal research and its application to fetal surgery for spina bifida' (2002) 187(1) AMJOG 10.
[135] Susan S Mattingly, 'The maternal-fetal dyad: Exploring the two-patient obstetric model' (1992) 22(1) HCR 13.
[136] Ibid.

conceptualising the fetus as a separate patient carries significant consequences. As Lyerly warns, treating the fetus as requiring distinct medical care risks elevating its interests above the woman's,[137] a concern that becomes particularly acute in the context of obstetric violence,[138] where interventions may be imposed without full and voluntary consent. The two-patient model risks legitimising precisely this dynamic by normalising fetal-centred reasoning within clinical decision-making.

Rodrigues et al. go further in arguing that the fetus possesses independent value as the future child.[139] While this strengthens arguments for recognising fetal interests, it also raises difficult ethical and legal implications. If fetal patienthood is accepted as more than a moral metaphor, it may invite greater judicial or medical intervention when treatment is refused. This would sit uneasily with the current legal framework, which recognises the pregnant woman as the sole autonomous decision-maker. Any shift toward recognising independent fetal claims must therefore be approached cautiously, given its potential to undermine established protections for maternal autonomy.

Case law strongly affirms that a competent adult cannot be forced to undergo treatment, even if refusal may result in harm to another.[140] In *S. v Mc and M,* the court explicitly rejected the idea that it could authorise medical procedures on a competent adult without consent.[141] Similarly, in *Re F (Mental Patient: Sterilisation),* the court reaffirmed bodily autonomy, stating that treatment can be refused for any reason or none.[142] These precedents strongly suggest that fetal surgery does not justify overriding maternal consent and supports a one-patient model. Unlike cases involving incapacity, a competent pregnant woman retains full autonomy, even where fetal intervention is beneficial.

Moreover, common law imposes no duty to undergo bodily invasion for another's benefit,[143] and the fetus lacks legal personhood to claim independent rights.[144] This reinforces the

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[137] Anne Drapkin Lyerly and Mary Briody Mahowald, 'Maternal-fetal surgery: The fallacy of abstraction and the problem of equipoise' (2001) 9(2) HCA 151.
[138] Ibid.
[139] H Catarina ML Rodrigues et al., 'Dotting the I's and crossing the T's: Autonomy and/or beneficence? The 'fetus as a patient' in maternal–fetal surgery' (2013) 39(4) JME 219.
[140] *Airedale N.H.S. Trust v. Bland* [1993] A.C. 789.
[141] *S. v. McC(orse. S.) and M. (D.S. Intervener)* [1972] A.C. 24.
[142] *Re F. (Mental Patient: Sterilisation)* [1990] 2 A.C. 1.
[143] *McFall v. Shimp* [1978] 127 Pitts LJ 14.
[144] In *re F. (in utero)* [1988] Fam. 122.

onepatient model, maintaining the woman as the sole decision-maker. As Mattingly observes, most pregnant women willingly pursue treatment that benefits fetal health, recognising their interconnected well-being.[145] This suggests that the one-patient model doesn't disregard fetal interests, but ensures that interventions respect the woman's autonomy. Legal reform should reflect this balance. Still, ethical concerns, such as fetal pain, complicate this debate, raising the question of whether legal frameworks should evolve in light of emerging medical insights.

3.2 Fetal Pain and Medical Ethics—Should this Influence the Law?

The Royal College of Obstetricians and Gynaecologists' 2022 *Fetal Awareness Evidence Review* concluded that fetal pain perception before 28 weeks' gestation is unlikely,[146] aligning with the prevailing view that cortical development is necessary for conscious pain. However, this threshold remains debated. Some scholars argue pain may be perceived earlier—an argument with significant ethical and legal implications, given that fetal surgery often occurs before 28 weeks.[147] This raises the possibility that limited legal recognition around this stage could be justified, as failure to intervene may neglect viable fetuses without necessarily conflicting with maternal autonomy.

Despite the RCOG's conclusions, the British medical community recommends measures to minimise fetal pain,[148] suggesting an implicit duty of care. Rathnayake interprets this as recognition of a physician's responsibility towards the fetus during fetoscopic procedures.[149] Yet this creates a legal tension: whether such a duty can exist without infringing maternal autonomy. Prioritising fetal pain could risk justifying interference with a woman's choices, increasing scrutiny of maternal decision-making and enabling physician bias to encroach on reproductive rights.

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[145] Susan S Mattingly, 'The maternal-fetal dyad: Exploring the two-patient obstetric model' (1992) 22(1) HCR 13.
[146] Royal College of Obstetricians and Gynaecologists, 'Fetal Awareness Evidence Review' (2022) <www.rcog.org.uk/guidance/browse-all-guidance/other-guidelines-and-reports/fetal-awareness-updated-review-of-research-and-recommendations-for-practice/> accessed 8 June 2026.
[147] Roland Brusseau and Laura Myers, 'Developing consciousness: fetal anesthesia and analgesia' (2006) 25(4) SAPMP 189.
[148] British Medical Association, 'The Law and Ethics of Abortion' (March 2025) <https://www.bma.org.uk/advice-and-support/ethics/abortion/the-law-and-ethics-of-abortion> accessed 8 June 2026.
[149] Rathnayake, Ayodhya Prabhashini, *Fetoscopic procedures to treat the fetus in utero: legal concerns,* (2024). <https://ours.ou.ac.lk/wp-content/uploads/2024/12/ID-192_IRC-OUSL-2024.pdf> accessed 8 June 2026.

Further complicating matters, some researchers suggest fetal pain may occur before 20 weeks.[150] If so, current medical practices may be insufficient. Legal recognition of earlier fetal pain could extend beyond fetal surgery into abortion law, potentially prompting stricter limits or new obligations to prevent fetal pain. This risks tension between evolving science and policymaking, potentially restricting access to abortion, limiting maternal autonomy, and undermining broader human rights.

Derbyshire and Bockmann offer an important counterpoint, arguing that fetal pain need not mirror adult pain to be morally relevant.[151] Even early-stage pain, they suggest, could justify greater legal protection.[152] However, this risks reinforcing the two-patient model[153] and limiting maternal autonomy where fetal surgery is proposed to prevent suffering. Crucially, pain requires awareness,[154] not merely physiological response. Treating all fetal activity as morally significant risks conflating automatic responses with conscious experience.[155]

Although research suggests fetal consciousness develops later in pregnancy,[156] the precise point remains uncertain.[157] Using fetal pain as a basis for legal protection introduces a scientifically unstable standard that may threaten reproductive rights. It also creates inconsistencies with other legal contexts. For example, in end-of-life care,[158] pain relief may be administered even where patients lack consciousness,[159] guided by ethical considerations rather than confirmed awareness.[160] In contrast, fetal pain is often politicised, with debates shaped more by concerns about abortion than medical evidence.

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[150] Roland Brusseau and Laura Myers, ‘Developing consciousness: fetal anesthesia and analgesia’ (2006) 25(4) SAPMP 189.
[151] Dominic Wilkinson and Julian Savulescu, ‘After-Birth Abortion: Why Should the Baby Live?’ (2012) 39(5) JME 3.
[152] Ibid.
[153] David Howe, ‘Ethics of prenatal ultrasound’ (2014) 28(3) BPRCOG 443.
[154] Dong Ah Shin and Min Cheol Chang, ‘Consciousness Research Through Pain’ (2025) 13(2) H 332.
[155] Ibid.
[156] Hugo Lagercrantz and Jean-Pierre Changeux, ‘The emergence of human consciousness: from fetal to neonatal life’ (2009) 65(3) PR 255.
[157] Nancy S Jecker and Caesar Alimsinya Atuire, ‘Emergent personhood: reply to critics’ (2025) 51(4) JME 255.
[158] Diana J Wilkie and Miriam O Ezenwa, ‘Pain and symptom management in palliative care and at end of life’ (2012) 60(6) NO 357.
[159] Ibid.
[160] Ibid.

While Derbyshire and Bockmann provide a valuable ethical perspective,[161] their argument risks overstating the legal relevance of fetal pain. Grounding legal reform on this basis could inadvertently undermine maternal autonomy and shift the legal focus from the woman to the fetus.

3.3 Utilitarianism vs. Kantian Ethics—When Should Autonomy Override Medical Benefit?

Two dominant moral frameworks, utilitarianism and Kantian ethics, offer contrasting perspectives on whether autonomy should override medical benefit in fetal surgery. This tension is particularly significant when balancing maternal autonomy against potential fetal benefit. While utilitarianism may justify infringing autonomy to maximise overall welfare,[162] Kantian ethics treats respect for autonomy as a moral duty.[163]

3.3.1 Utilitarianism: Maximising Overall Well-Being

Utilitarianism, as articulated by Bentham[164] and Mill,[165] prioritises outcomes,[166] seeking the greatest good for the greatest number. In medical practice, this approach is reflected in policies such as neonatal resuscitation thresholds and the allocation of healthcare resources, where outcomes are weighed in terms of benefit and harm.[167] In fetal surgery, a utilitarian perspective may justify temporary infringements on maternal autonomy if they result in significant long-term benefits. For example, the success of fetal surgery for spina bifida,[168] resulting in improved motor function and quality of life after birth,[169] illustrates this reasoning.

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[161] Dominic Wilkinson and Julian Savulescu, 'After-Birth Abortion: Why Should the Baby Live?' (2012) 39(5) JME 3.
[162] Alvan Alviansyah Lubis and Mochammad Ra'afi Nur Azhami, 'Beyond the 'Greatest Happiness Principle': Exploring the Compatibility of Individual Rights and Utilitarian Ethics in Legal Policy Making' (2025) 3(1) EL 144.
[163] Ibid.
[164] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford University Press 1907).
[165] John Stuart Mill, *Utilitarianism* (George Routledge & Sons 1907).
[166] Emily Jackson, *Medical Law: Text, Cases, and Materials* (5th edn, Oxford University Press 2019).
[167] Ibid.
[168] University College London Hospitals NHS Foundation Trust, 'Spina Bifida – Open Fetal Surgery' (*UCLH*, updated 2024) <https://www.uclh.nhs.uk/our-services/find-service/womens-health-1/maternity-services/your-pregnancy/spina-bifida-open-fetal-surgery> accessed 8 June 2026.
[169] Anna L David, 'Improving motor function in fetal surgery for open spina bifida' (2025) 45(1) AD 38.

Utilitarianism can be subdivided into Act and Rule Utilitarianism. Act Utilitarianism, as criticised by Mandal et al.,[170] assesses individual cases in isolation, potentially neglecting broader implications.[171] In fetal surgery, this could lead to hasty or biased decisions, as clinicians weigh harms and benefits case-by-case without sufficient regard to established norms, risking inconsistent outcomes.

In contrast, Rule Utilitarianism, as described by Jackson, evaluates the consequences of following general rules.[172] Wildes suggests such rules could prioritise fetal surgery protocols with favourable outcomes.[173] However, Rule Utilitarianism could also support preserving maternal autonomy if evidence shows this leads to better overall consequences, aligning more closely with the current legal stance.[174]

Nevertheless, the distinction between Act and Rule Utilitarianism complicates decision-making, as both may produce conflicting recommendations. This raises the question of which approach should guide practice and law. Knopoff argues utilitarianism is unsuitable for fetal surgery, as its emphasis on outcomes may legitimise coercive interventions, undermining autonomy.[175] Instead, she advocates for deontological theories, particularly Kantian ethics, which centre the individual in decision-making.[176]

3.3.2 Kantian Ethics: The Duty to Respect Autonomy

Kantian Ethics differs fundamentally[177] in its insistence on autonomy (*Summum Bonum)*.[178] Kant's categorical imperative requires that persons be treated as ends in themselves, never merely as means to an end.[179] Applied to fetal surgery, this entails prioritising the pregnant woman's autonomy over fetal benefit, reinforcing a one-patient model.[180]

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[170] Jharna Mandal et al., 'Utilitarian and deontological ethics in medicine' (2016) 6(1) TP 5.
[171] Ibid.
[172] Emily Jackson, *Medical Law: Text, Cases, and Materials* (5th edn, Oxford University Press 2019).
[173] Kevin W. Wildes S.J., 'Particularism in Bioethics: Balancing Secular and Religious Concerns' (1994) 53(4) MdLR 1220.
[174] Ibid.
[175] Katherine A Knopoff, 'Can a pregnant woman morally refuse fetal surgery' 79(2) CLR 499.
[176] Ibid.
[177] George P Fletcher, 'Law and morality: A Kantian perspective' (1987) 87(3) CLR 533.
[178] Harry Van der Linden, *Kantian ethics and socialism* (Hackett Publishing 1988).
[179] Ibid.
[180] Dunja Begović, 'Maternal–Fetal Surgery: Does Recognising Fetal Patienthood Pose a Threat to Pregnant Women's Autonomy?' (2021) 29(4) HCA 301.

This ideal, however, is challenged in practice. As Gillon notes,[181] Kantian ethics underpins informed consent, requiring patients to be fully informed and give voluntary consent.[182] Yet in fetal surgery, urgent decisions may conflict with these demands, particularly where clinicians view the fetus as a second patient.[183] The shift to a two-patient model complicates this further, creating ethical problems when maternal autonomy and fetal needs diverge.[184]

Secker critiques Kantian autonomy for assuming an unrealistic level of rational decision-making.[185] In reality, medical decisions, particularly in pregnancy, are shaped by urgency, pressure, and emotional strain, which may undermine fully autonomous choice.

Moreover, while Kantian ethics protects individual rights, Mandal et al. argue it may fail to account for collective well-being.[186] However, in fetal surgery, preserving autonomy can be seen as serving broader societal interests by reinforcing legal and ethical norms. Rawls also recognises Kant's framework as a tool for balancing individual rights[187] against societal expectations.[188]

4 Comparative Legal Approaches to Fetal Surgery

International comparisons highlight commonalities and differences between jurisdictions[189] enabling better-informed legal reform and guiding more balanced solutions.[190] Each jurisdiction presents a distinct approach to balancing maternal autonomy and fetal interests, shaped by differing legal traditions, human rights commitments,[191] and societal contexts.

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[181] Raanan Gillon, 'Medical ethics: four principles plus attention to scope' (1994) 309 BMJ 184.
[182] Ibid.
[183] David Howe, 'Ethics of prenatal ultrasound' (2014) 28(3) BPRCOG 443.
[184] Emily Jackson, *Medical Law: Text, Cases, and Materials* (5th edn, Oxford University Press 2019).
[185] Barbara Secker, 'The Appearance of Kant's Deontology in Contemporary Kantianism: Concepts of Patient Autonomy in Bioethics' (1999) 24(1) JMP 43.
[186] Jharna Mandal et al., 'Utilitarian and deontological ethics in medicine' (2016) 6(1) TP 5.
[187] John Rawls, *Lectures on the History of Moral Philosophy* (Harvard University Press 2000).
[188] Ibid.
[189] Alan Watson, 'Comparative law and legal change,' (1978) 37(2) CLJ 313.
[190] Gavin Davidson et al., 'An international comparison of legal frameworks for supported and substitute decision-making in mental health services' (2016) 44 IJLP 30.
[191] Samantha Besson, 'The extraterritoriality of the European Convention on Human Rights: why human rights depend on jurisdiction and what jurisdiction amounts to' (2012) 35(4) LJIL 857.

4.1 United States: State-based Fetal Protections

The United States illustrates the dangers when fetal rights override autonomy, particularly in the absence of statutory guidance for fetal surgery. Federalism fragments the legal landscape,[192] creating constitutional uncertainty and variation across states.[193]

The overruling of *Roe v. Wade*[194] by *Dobbs v Jackson Women's Health Organisation,*[195] eliminated the federal constitutional right to abortion, dismantling fifty years of precedent.[196]

This 'politicisation'[197] of reproductive healthcare disproportionately affects people of colour, those in poverty, or with disabilities.[198] Denied abortions can lead to serious complications, long-term health issues, or death.[199] Therefore, the absence of statutory clarity, especially for fetal surgery, jeopardises human rights and sets a dangerous precedent, particularly in a country with a history of forcing caesareans.[200] Post-*Dobbs,*[201] many states disregard viability as a legal threshold,[202] treating conception as the start of fetal rights.[203] This shift threatens broader constitutional rights[204] and reshapes the U.S's international role. Once cited as a liberalising voice on abortion rights,[205] the U.S is now, as noted by Ambassador Thomas-Greenfield,[206] an

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[192] Jared Sonnicksen, *Tensions of American federal democracy: fragmentation of the state* (Routledge 2022).
[193] Ibid.
[194] *Roe v. Wade*, 410 U.S. 113 (1973).
[195] *Dobbs v. Jackson women's health org*., No. 19-1392, 2022 WL 2276808 (U.S. June 24, 2022) (majority opinion).
[196] Risa Kaufman et al., 'Global impacts of *Dobbs v. Jackson Women's Health Organization* and abortion regression in the United States' (2022) 30(1) SRHM 2135574.
[197] E Goldblatt Hyatt et al., 'I don't have a telephone to the fetus: Clinicians' conceptions of fetal patienthood in maternal-fetal surgery counselling' (2024) SSM 342 (1982).
[198] Risa Kaufman et al., 'Global impacts of *Dobbs v. Jackson Women's Health Organization* and abortion regression in the United States' (2022) 30(1) SRHM 2135574.
[199] Advancing New Standards in Reproductive Health, 'The harms of denying a woman a wanted abortion: findings from the Turnaway study' (2020) <https://www.ansirh.org/sites/default/files/publications/files/the_harms_of_denying_a_woman_a_wanted_abortion_4-16-2020.pdf> accessed 8 June 2026.
[200] Abbey El Shafei et al., 'The Rise of Pregnancy Criminalization: A Pregnancy Justice Report, Pregnancy Justice' (2023) <https://search.issuelab.org/resource/the-rise-of-pregnancy-criminalization-a-pregnancy-justice-report.html> accessed 8 June 2026.
[201] *Dobbs v. Jackson women's health org*., No. 19-1392, 2022 WL 2276808 (U.S. June 24, 2022) (majority opinion)
[202] *Roe v. Wade*, 410 U.S. 113 (1973).
[203] *Dobbs v. Jackson women's health org*., No. 19-1392, 2022 WL 2276808 (U.S. June 24, 2022) (majority opinion)
[204] Ibid
[205] Ibid.
[206] Risa Kaufman et al., 'Global impacts of *Dobbs v. Jackson Women's Health Organization* and abortion regression in the United States' (2022) 30(1) SRHM 2135574.

outlier in protecting sexual and reproductive health.[207] Despite clear international consensus that abortion access is a human right,[208] *Dobbs* risks increasing debates about disregarding maternal autonomy for fetal protection. The erosion of maternal autonomy raises particular concerns in fetal surgery, where consent and timing are crucial.

Maternal rights have often been compromised, including instances where fetuses are made wards of the court,[209] a precedent the UK is reluctant to set. In *Marlise Munoz,*[210] the court debated keeping a brain-dead pregnant woman on life support to sustain the fetus, reducing her to a vessel.[211] This issue remains current; in 2025, *Adrianna Smith,*[212] who was declared brain-dead for over 90 days, was maintained on life support due to Georgia's strict abortion laws.[213] Treating the fetus as a separate entity obscures maternal autonomy and weakens reproductive rights. To ensure consistency and align with international human rights standards, UK reform needs to take a cautious approach.

4.2 Germany: Strong Legal Fetal Protections

Germany's framework, shaped by constitutional provisions[214] and the criminal code,[215] strongly protects fetal life while attempting to uphold maternal autonomy. Germany highlights potential overemphasis on fetal personhood in law, which could limit discretion, create ethical problems, and stifle medical innovation. While Germany's protection of fetal life may stem from its constitutional history post-WWII,[216] incorporating such a model into UK law risks ignoring the distinct cultural and legal history that has prioritised bodily autonomy in the UK and internationally.

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[207] Ibid.
[208] Ibid.
[209] Wisconsin Statutes 48.135, 48.981(3) (1997).
[210] Manny Fernandez, 'Judge orders hospital to remove pregnant woman from life support' *The New York Times* (25 January 2014) <http://www.nytimes.com/2014/01/25/us/judge-orders-hospital-to-remove-life-support-from-pregnant-woman.html> accessed 8 June 2026.
[211] Ibid.
[212] Saihaj Madan, 'Who is Adriana Smith? Pregnant Woman Brain Dead for 90 Days Forced to Live Due to Georgia Abortion Law' *Times News* (14 May 2025) <https://www.timesnownews.com/world/us/us-news/who-is-adrianasmith-pregnant-woman-brain-dead-for-90-days-forced-to-live-due-to-georgia-abortion-law-article-151642000> accessed 8 June 2026.
[213] Ibid.
[214] The German Basic Law (Grundesetz), Article 2(2).
[215] German Penal Code (Strafgesetzbuch).
[216] Hashiloni-Dolev, Yael, (2007) *A life (un) worthy of living: Reproductive genetics in Israel and Germany,* Vol. 34. Springer Science & Business Media.

The Basic Law's Article 2(2)[217] upholds the right to life for both the fetus and the pregnant woman.[218] However, by granting the fetus constitutional protection from conception,[219] conflicts arise over whose rights take precedence. This is especially problematic in fetal surgery, where physicians may face legal and ethical liability when balancing competing interests. Legal reform should avoid defining personhood from conception and instead focus on practical and ethical consequences.

The Embryo Protection Act 1990 regulates reproductive technologies and embryos.[220] Deutsch argues it reflects a strong societal consensus on fetal status.[221] Yet, it avoids explicitly prioritising maternal or fetal interests, implying that fetal protections may be stronger. This creates a risk of overstating and interpreting autonomy versus fetal interests in fetal surgery. Instead, a more balanced framework would better account for the practical and emotional impact on all involved.

4.3 Canada: Balanced Maternal-Fetal Framework

Canada prioritises maternal autonomy and informed consent, while recognising ethical considerations of fetal interests.[222] Under the *Criminal Code,*[223] fetuses gain legal personhood only at birth, a legal definition upheld by courts.[224] Attempts to redefine fetal status have been rejected as violations of Section 7 of the Charter of Rights and Freedoms,[225] which protects life, liberty and security.[226]

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[217] *Basic Law for the Federal Republic of Germany* (Grundgesetz), art 2(2).
[218] BVerfGE 39, 1 (1975) – Abortion I.
[219] Ibid.
[220] Erwin Deutsch, 'Fetus in Germany: the Fetus Protection Law of 12.13.1990' (1992) 3(2) JIB 85.
[221] Ibid.
[222] Abortion Rights Coalition of Canada, 'Fetal Rights in Canada' (2019) <https://www.arcc-cdac.ca/media/position-papers/63-fetal-rights-in-canada.pdf> accessed 8 June 2026.
[223] Criminal Code of Canada, R.S.C., 1985, c. C-46, s.223(1).
[224] Ibid.
[225] *R. v. Morgentaler* [1988] 1 S.C.R. 30.
[226] Ibid.

However, systemic discrimination exists.[227] Coercive sterilisation,[228] especially among indigenous, disabled, and racialised women,[229] undermines reproductive autonomy.[230] Current investigations involve about 100 affected women,[231] raising urgent concerns about informed consent and the need for rights-based legal protections,[232] particularly in fetal surgery contexts.

While Canada's legal framework appears balanced, in practice, vulnerable women still face discriminatory practices.[233] Legal reform must address these gaps, reinforcing autonomy through safeguards against coercion.

Cases like *R v Sullivan*[234] and *Dobson v Dobson*[235] reject the legal separation of maternal and fetal interests,[236] protecting bodily integrity by recognising their indivisibility.[237] This counters the maternal vs. fetal framing underlying the majority of ethical tensions in fetal surgery. Still, anti-choice critics argue that focusing solely on maternal autonomy may underplay fetal interests.[238] Reluctance to acknowledge fetal rights risks preventing legal development alongside medical innovation. Therefore, any reform needs to effectively weigh the risks associated with the legal stance.

Canada's framework, favouring autonomy yet allowing ethical space for fetal interests, offers a useful contrast to the U.S and Germany. It may serve as a valuable model for UK reform in balancing competing interests in fetal surgery.

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[227] Sharol Malekobane Maila et al., 'Informed consent and ethical issues pertaining to female sterilization—Scoping review' (2025) 169(3) IJGO 1037.
[228] Mirabel Akbari, 'Forced Sterilization of Indigenous Women: An Act of Genocide or Policing Women's Bodies?' (2021) 3(1) YUCR 1.
[229] Sharol Malekobane Maila et al., 'Informed consent and ethical issues pertaining to female sterilization—Scoping review' (2025) 169(3) IJGO 1037.
[230] Ibid.
[231] Chaneesa Ryan et al., 'Forced or coerced sterilization in Canada: an overview of recommendations for moving forward' 16(1) IJIH 275.
[232] Sharol Malekobane Maila et al., 'Informed consent and ethical issues pertaining to female sterilization—Scoping review' (2025) 169(3) IJGO 1037.
[233] Ibid.
[234] *R. v. Sullivan* [1991] 1 S.C.R. 489.
[235] *Dobson (Litigation Guardian of) v. Dobson* [1999] 2 SCR 753.
[236] *R. v. Sullivan* [1991] 1 S.C.R. 489.
[237] *Dobson (Litigation Guardian of) v. Dobson* [1999] 2 SCR 753.
[238] Abortion Rights Coalition of Canada, 'Fetal Rights in Canada' (2019) <https://www.arcc-cdac.ca/media/position-papers/63-fetal-rights-in-canada.pdf> accessed 8 June 2026.

4.4 Lessons for the UK

Together, these approaches inform how the UK might develop a more consistent, ethically balanced legal framework for fetal surgery. Unlike the U.S and Germany, where fetal protections may override autonomy, Canada's model treats autonomy as non-negotiable. This distinction is instructive for UK lawmakers, where codifying a clear stance or legal mechanisms ensuring informed consent would benefit ethical complexity in fetal surgery. Therefore, preventing the ambiguity seen in Germany's framework.

5 Reforming the Legal Framework

5.1 Fetal Surgery Act

While the absence of legal clarity around fetal surgery urges statutory reform, a distinct 'Fetal Surgery Act' may not be the most suitable option. A better alternative may involve embedding a framework into existing legislation, for instance, amending the General Medical Council's professional standards,[239] the MCA[240] or the Human Tissue Act.[241] Adding a dedicated section for fetal surgery in existing frameworks would aim to maintain flexibility while improving clarity. However, it could potentially further enhance the ambiguous legal status of the fetus.

Indeed, the creation of a single act creates the opportunity to offer clarity for practitioners and patients in one place, for instance, by defining legal thresholds such as viability and risks. It would aim to effectively guide decision-making and improve the regulation of the procedures. However, it could symbolically risk granting legal personhood to the fetus, perhaps giving interest groups, like anti-abortion supporters, a tool to push for stricter laws, which would obscure reproductive autonomy. Moreover, it could lead to legal rigidity, limiting discretion in time-sensitive cases, which could contribute to more harm than good. Ultimately, by embedding the fetal surgery framework into existing policy or legislation, it ensures a more

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[239] General Medical Council, 'Good Medical Practice' (2024) <https://www.gmc-uk.org/ethical-guidance/ethicalguidance-for-doctors/good-medical-practice accessed 1 May 2025> accessed 8 June 2026.
[240] Mental Capacity Act 2005.
[241] Human Tissue Act 2004.

balanced approach, and importantly, one that allows for specific regulation of fetal interventions, without altering the status of the fetus or creating unintended precedents.

The comparative analysis supports this cautious approach. While the United States shows the dangers of fragmented and politically charged fetal protection post-*Dobbs*,[242] Germany demonstrates how strong legal protections constrain maternal choice.[243] In contrast, Canada offers a more balanced approach that emphasises maternal autonomy,[244] while incorporating ethical review and professional guidance without legally recognising the fetus as having personhood.[245] The UK could integrate clear safeguards and regulatory oversight while maintaining that autonomy and reproductive rights should be prioritised. Ultimately, legal reform needs to extend beyond ensuring clarity, but also actively avoid granting the fetus rights that could overshadow maternal rights.

5.2 Regulation and Protection of Autonomy

Legal reform must centre maternal autonomy, even when fetal surgery may offer significant benefit to the fetus, as might be emphasised under utilitarianism.[246] Any proposed regulatory framework needs to protect informed, uncoerced consent as, ultimately, it should support, not restrict, pregnant individuals' decision-making. This aligns with either a one-patient model[247] or an ecosystem approach,[248] both of which preserve the pregnant woman's autonomy while recognising the interdependence between the woman and the fetus.

Current UK law, *Montgomery v Lanarkshire,*[249] already requires doctors to describe material risks to patients,[250] but fetal surgery has unique risks that justify even stronger protections.

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[242] Risa Kaufman et al., 'Global impacts of *Dobbs v. Jackson Women's Health Organization* and abortion regression in the United States' (2022) 30(1) SRHM 2135574.
[243] Erwin Deutsch, 'Fetus in Germany: the Fetus Protection Law of 12.13.1990' (1992) 3(2) JIB 85.
[244] Abortion Rights Coalition of Canada, 'Fetal Rights in Canada' (2019) <https://www.arcc-cdac.ca/media/position-papers/63-fetal-rights-in-canada.pdf> accessed 8 June 2026.
[245] Ibid.
[246] Alvan Alviansyah Lubis and Mochammad Ra'afi Nur Azhami, 'Beyond the 'Greatest Happiness Principle': Exploring the Compatibility of Individual Rights and Utilitarian Ethics in Legal Policy Making' (2025) 3(1) EL 144.
[247] Dunja Begović, 'Maternal–Fetal Surgery: Does Recognising Fetal Patienthood Pose a Threat to Pregnant Women's Autonomy?' (2021) 29(4) HCA 301.
[248] Susan S Mattingly, 'The maternal-fetal dyad: Exploring the two-patient obstetric model' (1992) 22(1) HCR 13.
[249] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11.
[250] Ibid.

Perhaps a Fetal Surgery Consent protocol could be introduced, requiring full disclosures, mandatory multiple consultations to avoid rushed decisions and required formal ethics reviews before experimental procedures are performed. This would ensure fully informed decision-making and does not impose obligations on pregnant women to act in the fetus's best interest over their own.

There are serious ethical concerns about the risk of women being pressured into fetal surgery. To address this, amendments to the MCA[251] could be introduced to account for the specific vulnerabilities pregnant women may face in this context. While the MCA[252] provides basic safeguards to ensure that consent is given voluntarily and with capacity, it does not currently reflect the nuanced pressures that may arise in the case of fetal surgery,[253] including coercion from family members, medical professionals or even societal expectations.[254] The case of *Re A (Capacity: Refusal of Contraception)*[255] illustrates that the courts are willing to consider contextual factors and introduce additional protections for those who may be particularly vulnerable, namely, in this case, those lacking capacity.[256] Similarly, fetal surgery cases may need enhanced legal safeguards to prevent vulnerability from being taken advantage of. Explicitly recognising that coercion or undue influence exists in cases of fetal surgery, and by increasing legal protections, such as requiring an independent advocate for women in suspected cases, may help to reduce instances of coerced consent and ensure women are empowered to make autonomous decisions.

In any instance of reform, there needs to be a formal statement that separates fetal surgery law from that of Abortion law. This distinction is necessary to affirm that fetal surgery is for the pregnant woman's health and the future child's benefit, not for the legal recognition of personhood for the fetus. The Abortion Act should remain untouched; they are two separate medical procedures that need to be governed by separate legal principles. This distinction will prevent any legal reform from being misused to restrict reproductive rights.

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[251] Mental Capacity Act 2005.
[252] Ibid.
[253] *Re T (Adult: Refusal of Treatment)* [1993] Fam 95 (CA Civ) 113 (Lord Donaldson MR).
[254] Ibid.
[255] *Re A (Capacity: Refusal of Contraception)* [2020] EWCOP 39, [73].
[256] Ibid.

5.3 Policy and Legal Reform Recommendations

A coherent framework for fetal surgery in the UK requires statutory and policy reform that prioritises clarity, consistency and respect for maternal autonomy.[257] Reform could be achieved through amendments to existing legislation, as well as updates to GMC guidance[258] or NHS policy. In April 2025, the NHS updated its 'Saving Babies Care Bundle', aiming to reduce prenatal mortality through surveillance and earlier risk assessment.[259] While not legally binding, it demonstrates how internal policy changes can support decision-making in fetal surgery cases. Similar approaches could be implemented to better support women.

These reforms should clarify that fetal surgery is a unique and complex innovation requiring specific safeguards and guidelines that respect the pregnant woman as the primary decision-maker. In cases where the individual lacks capacity,[260] amendments and stricter regulation of the 'best interests'[261] test may be necessary to ensure it reflects her wishes and needs,[262] rather than external influences.

Alongside this, professional bodies should adopt national standards outlining eligibility criteria and thresholds, such as gestational viability and procedures involving significant maternal or fetal risk and require multiple consultations to ensure transparency and reduce error. Hospitals could also incorporate clinical ethics committees into decision-making,[263] allowing for greater oversight where ethical tensions arise, particularly in high-risk cases. Ultimately, legal reform requires a comprehensive reassessment of how legislation and policy can better reflect the unique ethical and legal challenges posed by fetal surgery.

[257] William H Clune III, 'A political model of implementation and implications of the model for public policy, research, and the changing roles of law and lawyers' 11(1) BJBB 20.
[258] General Medical Council, 'Good Medical Practice' (2024) <https://www.gmc-uk.org/ethical-guidance/ethicalguidance-for-doctors/good-medical-practice accessed 1 May 2025> accessed 8 June 2026.
[259] NHS England, 'Saving Babies' Lives Version 3.2: A Care Bundle for Reducing Perinatal Mortality' (April 2025) <https://www.england.nhs.uk/long-read/saving-babies-lives-version-3-2/> accessed 8 June 2026.
[260] Mental Capacity Act 2005.
[261] Ibid, s.4.
[262] Ibid.
[263] Chiara Crico et al., 'Evaluating the effectiveness of clinical ethics committees: a systematic review' (2021) 24(1) MHCP 135.

6 Conclusion

While fetal surgery complicates ethical and legal boundaries, reform must centre maternal autonomy, resist fetal personhood, and provide clearer regulatory protections without compromising reproductive rights.

While the UK prioritises maternal autonomy[264] over fetal interests,[265] its lack of a consistent framework for surgery carried out for the fetus's benefit creates uncertainty for medical professionals and pregnant women.[266] The lack of clear guidance causes professionals to operate in medically grey areas, and women to not fully understand their rights.[267] There is significant debate over gestational age,[268] whether the law should recognise fetal pain,[269] and whether the fetus should be granted separate legal rights.[270] In practice, medical professionals treat the fetus as a patient,[271] often using fetal surgery to correct abnormalities or offer life-saving treatment, however, they are unclear of their legal obligation, especially where ethical tensions arise.

Ethical perspectives, such as those arising from a one-patient versus two-patient model,[272] were evaluated and applied to Utilitarian[273] and Kantian theories. This revealed tensions between respecting autonomy and acknowledging fetal interests. Comparative analysis supports a

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264 Beatrice R Nyinawagaba, 'Reproductive Rights as Fundamental Human Rights: A Feminist Perspective on Bodily Autonomy and Social Justice' (2024) 5(2) EEJHSS 9.
265 *Attorney-General Reference (No.3 of 1994)* [1998] AC 245.
266 Frank A Chervenak and Laurence B McCullough, 'A comprehensive ethical framework for fetal research and its application to fetal surgery for spina bifida' (2002) 187(1) AMJOG 10.
267 Jonathan Herring, *Medical Law and Ethics* (9th edn, OUP 2022).
268 Royal College of Obstetricians and Gynaecologists, 'Fetal Awareness Evidence Review' (2022) <www.rcog.org.uk/guidance/browse-all-guidance/other-guidelines-and-reports/fetal-awareness-updated-review-of-research-and-recommendations-for-practice/> accessed 8 June 2026.
269 Roland Brusseau and Laura Myers, 'Developing consciousness: fetal anesthesia and analgesia' (2006) 25(4) SAPMP 189.
270 *Dobson (Litigation Guardian of) v. Dobson* [1999] 2 SCR 753.
271 David Howe, 'Ethics of prenatal ultrasound' (2014) 28(3) BPRCOG 443.
272 Ibid.
273 Alvan Alviansyah Lubis and Mochammad Ra'afi Nur Azhami, 'Beyond the 'Greatest Happiness Principle': Exploring the Compatibility of Individual Rights and Utilitarian Ethics in Legal Policy Making' (2025) 3(1) EL 144.

cautious, non-personhood approach to reform, as demonstrated by Canada's model[274] and the legal rigidity in Germany[275] and the US.[276]

This paper concludes that the UK legal framework requires reform to regulate fetal surgery and protect reproductive rights and autonomy, but not through a standalone 'Fetal Surgery Act.' Instead, amendments to existing legislation and policy would provide appropriate regulation while safeguarding reproductive rights. Reform must centre autonomy, with an emphasis on informed and uncoercive consent and safeguards to prevent vulnerable women from being subjected to obstetric harm.

Looking forward, continued medical advancements,[277] such as artificial womb technology[278] and developments in fetal viability, may further challenge current legal frameworks.[279] Following the emergence of Artificial Intelligence, there has been increased use in healthcare, contributing to innovation worldwide.[280] The law must keep pace,[281] and ensure that any legal framework remains adaptive and underpinned by ethical commitments to autonomy, fairness and transparency. This urges higher focus on reproductive justice, which enables not just consent, but empowerment. Ultimately, the law must be capable of evolving with medical advancement,[282] like fetal surgery, without compromising the rights of individuals, especially in this case, pregnant women.

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[274] Abortion Rights Coalition of Canada, 'Fetal Rights in Canada' (2019) <https://www.arcc-cdac.ca/media/position-papers/63-fetal-rights-in-canada.pdf> accessed 8 June 2026.
[275] German Penal Code (Strafgesetzbuch).
[276] Jared Sonnicksen, *Tensions of American federal democracy: fragmentation of the state, (*Routledge 2022).
[277] Kevin Doxzen, 'Future Technological Advancements' in Diana Bowman et al. (eds), *Reproduction Reborn: How Science, Ethics, and Law Shape Mitochondrial Replacement Therapies* (Oxford University Press 2023).
[278] Seppe Segers and Elizabeth Chloe Romanis, 'Ethical, translational, and legal issues surrounding the novel adoption of ectogestative technologies' (2022) 24(15) RMHP 2207.
[279] Kevin Doxzen, 'Future Technological Advancements' in Diana Bowman et al. (eds), *Reproduction Reborn: How Science, Ethics, and Law Shape Mitochondrial Replacement Therapies* (Oxford University Press 2023).
[280] Carey Beth Goldberg et al., 'To do no harm—and the most good—with AI in health care' (2024) 30(3) NM 623.
[281] Steven M. Williamson and Victor Prybutok, 'Balancing privacy and progress: a review of privacy challenges, systemic oversight, and patient perceptions in AI-driven healthcare' (2024) 14(2) AS 675.
[282] Ibid.

Rana Plaza to Regulation: Rethinking Voluntary CSR in Global Supply Chains

Charley Rice

Abstract

A critical watershed in Corporate Social Responsibility (CSR) and business accountability debates was marked on 24 April 2013 when the Rana Plaza building collapsed, killing over 1,100 garment workers. This is a profound example of a power imbalance driving the prioritisation of profit over human rights. When the weak governance frameworks relying on self-regulation are considered, the disaster should be perceived as foreseeable. The structural limitations of voluntary CSR mechanisms used to prevent systemic labour and safety violations in global supply chains, which persisted within these frameworks, were exposed.

Using the Rana Plaza case study, this article places the conduct of Bangladeshi state authorities within the framework of international human rights law and the UN Guiding Principles on Business and Human Rights (UNGPs) by examining the distribution of responsibility between factory owners and multinational brands. The analysis demonstrates how state regulatory failure, corporate practices, and the suppression of collective labour rights combined to create the conditions in which employers coerced workers into life-threatening environments. It further analyses post-Rana Plaza regulatory developments, including the Bangladesh Accord on Fire and Building Safety and mandatory Human Rights Due Diligence (HRDD) regimes emerging in Europe. Whilst the progress these initiatives represent is acknowledged, for workers' rights to be adequately protected in global supply chains, there must be a decisive shift from voluntary CSR to binding, enforceable legal accountability.

1 Introduction

On 24 April 2013, the collapse of the eight-storey Rana Plaza building, which housed multiple garment factories supplying multinational fashion brands, in Dhaka, Bangladesh, killed over 1,100 garment workers and injured thousands more.[1] The building collapsed due to overlooked structural failures, even though visible warning signs had emerged the day before the disaster. Despite the appearance of large cracks and the evacuation of commercial tenants, garment workers were instructed to return to work under threat of dismissal and wage withholding.[2] Beyond its immediate human cost, Rana Plaza exposed fundamental weaknesses in the governance of global supply chains and prompted renewed scrutiny of the capacity of Corporate Social Responsibility (CSR) to prevent severe human rights violations.

Although previous discussions have often treated the disaster as a discrete regulatory failure within Bangladesh,[3] this article seeks to steer the discussion away from this by reframing Rana Plaza as a systemic critique of voluntarist governance. Part 2 documents the immediate human rights violations in global supply chains, exemplified Rana Plaza, and gaps in state-level protection. Part 3 critiques the fragmented accountability landscape and limitations of voluntary governance and CSR. Part 4 examines the pivot to binding HRDD as a potential regulatory solution, analysing recent legislative efforts. Then, the critical examination of current accountability reform in Part 5 argues that without parent company legal liability and empowered workers, current reforms risk becoming a legal facade. The conclusion reasserts the need for a fundamental re-engineering of global governance to centre binding legal mechanisms over voluntary codes.

2 Human Rights Violations at Rana Plaza

The Rana Plaza collapse revealed an intersection of human rights violations rooted in unsafe working conditions, suppressed collective labour rights, economic coercion and exploitation.

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[1] Clean Clothes Campaign, 'Rana Plaza' (Clean Clothes Campaign) <https://cleanclothes.org/campaigns/past/rana-plaza> accessed 8 June 2026.
[2] Ibid.
[3] William Gomes, 'Reason and Responsibility: The Rana Plaza Collapse' *OpenDemocracy* (May 2013) <https://www.opendemocracy.net/en/opensecurity/reason-and-responsibility-rana-plaza-collapse/> accessed 8 June 2026.

The most immediate violation was the denial of workers' right to a safe working environment through unsafe conditions.[4] The Rana Plaza building was constructed for commercial use and subsequently modified to accommodate heavy industrial machinery without appropriate authorisation, making it structurally unsound and subsequently falling below safety code standards.[5] Large structural cracks in the building were discovered the day before the collapse, which prompted the evacuation of commercial tenants. Yet, garment workers were heartlessly ordered by the factory owners to return to work the following day.[6] However, the broader context of worker vulnerability in Bangladesh's garment sector (namely sub-living wages, significant debts, and absence of effective social protection) reveals that employees lacked real ability to refuse unsafe work. This coercive environment undermined workers' rights and their autonomy to generate self-regulated decisions about their safety. The collapse, therefore, stemmed from more than structural instability. It was not an unforeseeable accident but the predictable result of systemic disregard for safety, driven by intense production pressures and sustained by weak regulatory oversight. Workers entered the building under these persistent threats of withheld pay, while minimum wages left many trapped in debt, particularly in the expensive city of Dhaka.[7]

Trade union repression further exacerbated these conditions. The structural cracks appeared, workers raised concerns about their safety, but their voices were not heard due to the lack of collective bargaining agents and trade unions. Although most trade union leaders stated freedom of association and collective bargaining are part of company codes of conduct, audits and inspections conducted by company agents prior to the Rana Plaza collapse had regularly overlooked these issues or addressed them only superficially.[8]

Factory owners have historically repressed trade unions, often resulting in the disappearance

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[4] Javed Siddiqui, Kenneth McPhail, and Sharmin Shabnam Rahman, 'Private Governance Responsibilisation in Global Supply Chains: The Case of Rana Plaza' (2020) 33(7) AAAJ 1569.
[5] Transparency International Bangladesh, 'The Readymade Garment Sector: Governance Problems and Way Forward – Executive Summary' (2013) <https://ti-bangladesh.org/images/max_file/es_rmg_en_07112013.pdf> accessed 8 June 2026.
[6] Clean Clothes Campaign, 'Rana Plaza' (Clean Clothes Campaign) <https://cleanclothes.org/campaigns/past/rana-plaza> accessed 8 June 2026.
[7] Institute for Human Rights and Business (IHRB), 'Rana Plaza 10 Years On: Lessons for Human Rights and Business' (2023). <https://ihrb-org.files.svdcdn.com/production/assets/uploads/Rana-Plaza-10-Years-on-IHRB_Briefing_v4.pdf> accessed 8 June 2026.
[8] Human Rights Watch, 'Whoever Raises Their Head Suffers Most: Workers' Rights in Bangladesh's Garment Factories' (2015) <https://www.hrw.org/report/2015/04/22/whoever-raises-their-head-suffers-most/workers-rights-bangladeshs-garment> accessed 8 June 2026.

or death of leaders advocating for reforms. For instance, the killing and detainment of union leader Aminul Islam occurred while he was working with the Bangladesh Centre for Workers Solidarity to negotiate a national minimum wage for garment workers.[9] This lack of effective collective representation removed a vital mechanism through which safety issues could have been raised and addressed.

3 Fragmented Accountability and State Failure

When exercised properly, accountability requires holding all stakeholders accountable for respecting workers' rights.[10] Although the State must protect its citizens from third parties threatening to abuse their human rights, policymakers are also part of this profit-making business.[11] However, the distribution of responsibility for the Rana Plaza disaster across multiple stakeholders has allowed each to evade effective liability.[12]

Foremost, Bangladesh authorities failed in their positive state-level obligation to protect workers' rights through adequate regulation and enforcement in an exercise of their primary responsibility to enact and enforce robust labour laws.[13] The regulatory bodies responsible for building safety and labour inspection possessed formal authority to intervene, yet these safeguards were rendered ineffective by under-resourcing and corruption. Before Rana Plaza, the Department of Inspection for Factories and Establishment (responsible for labour inspections in Bangladesh and enforcing the Bangladesh Labour Act 2006 provisions)[14] was

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[9] Human Rights Watch, 'Bangladesh: Investigate Killing of Labor Activist' (2012) <https://www.hrw.org/news/2012/04/11/bangladesh-investigate-killing-labor-activist> accessed 8 June 2026.
[10] Human Rights Watch, 'Whoever Raises Their Head Suffers Most: Workers' Rights in Bangladesh's Garment Factories' (2015) <https://www.hrw.org/report/2015/04/22/whoever-raises-their-head-suffers-most/workers-rights-bangladeshs-garment> accessed 8 June 2026.
[11] William Gomes, 'Reason and Responsibility: The Rana Plaza Collapse' (*OpenDemocracy,* May 2013) <https://www.opendemocracy.net/en/opensecurity/reason-and-responsibility-rana-plaza-collapse/> accessed 8 June 2026.
[12] FIDH, 'One Year After the Rana Plaza Catastrophe: Slow Progress and Insufficient Compensation' (2014) <https://www.fidh.org/en/issues/business-human-rights-environment/15179-one-year-after-the-rana-plaza-catastrophe-slow-progress-and-insufficient> accessed 8 June 2026; William Gomes, 'Reason and Responsibility: The Rana Plaza Collapse' (*OpenDemocracy,* May 2013) <https://www.opendemocracy.net/en/opensecurity/reason-and-responsibility-rana-plaza-collapse/> accessed 8 June 2026.
[13] Islam Channel, 'Rana Plaza Disaster, Ten Years On, Victims Still Wait for Justice' <https://www.islamchannel.tv/blog-posts/rana-plaza-disaster-ten-years-on-victims-still-wait-for-justice> accessed 8 June 2026; United Nations, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) UN Doc A/HRC/17/31.
[14] International Labour Organisation, 'Labour Inspection Governance in Bangladesh' (2020).

reported as ‘chronically under-resourced’.[15] For example, in June 2012, the government inspection department was reported to have 18 inspectors and assistant inspectors to monitor an estimated 100,000 factories in Dhaka district.[16] Consequently, unsafe working conditions persisted due to Bangladesh’s weak labour regulations and inadequate enforcement.

The failure of authorities to intervene, despite the building lacking proper construction permits and the unlawful addition of floors to accommodate heavy industrial machinery, illustrates how regulatory gaps translated directly into life-threatening risks. Initially constructed for commercial purposes and without proper permission for expansions, the building was structurally unsound and fell drastically below the safety code standards.[17] Furthermore, the governmental agency Rajdhani Unnayan Kotripokkho (RAJUK) provides that ‘no commercial building may be built in or around Dhaka without its permission’.[18] Although Rana Plaza owners had not received a construction permit, RAJUK did not act on this, making RAJUK one of the government authorities responsible for the collapse. These omissions, which constitute breaches of the state’s duty to protect workers’ rights, exemplify how weak governance structures can convert economic development into systemic human rights harm.

However, contributing private actors must also bear significant responsibility. For instance, the owners of the Rana Plaza building and the garment factories housed in it prioritised profit over human lives. Additionally, the Multi-National Corporations (MNCs) that sourced from these garment factories contributed to the problem through their continuing demand for low-cost production. This put pressure on suppliers to overlook safety standards and reduce wages as much as possible, which was the case at Rana Plaza.[19] Ultimately, corruption and weak governance allowed such unsafe practices to continue unchecked, as evidenced by the local authority’s failure to enforce building codes and labour laws.

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[15] Human Rights Watch, ‘Bangladesh Tragedy Shows Urgency of Worker Protections’ (2013) <https://www.hrw.org/news/2013/04/25/bangladesh-tragedy-shows-urgency-worker-protections> accessed 8 June 2026.
[16] Ibid.
[17] Transparency International Bangladesh, ‘The Readymade Garment Sector: Governance Problems and Way Forward – Executive Summary’ (2013) <https://ti-bangladesh.org/images/max_file/es_rmg_en_07112013.pdf> accessed 8 June 2026.
[18] FIDH, ‘One Year After the Rana Plaza Catastrophe: Slow Progress and Insufficient Compensation’ (2014) <https://www.fidh.org/en/issues/business-human-rights-environment/15179-one-year-after-the-rana-plaza-catastrophe-slow-progress-and-insufficient> accessed 8 June 2026.
[19] FIDH, ‘Bangladesh: One Year After the Rana Plaza Catastrophe, Slow Progress and Insufficient Reforms’ (April 2014) <https://www.europarl.europa.eu/meetdocs/2014_2019/d,whichocuments/droi/dv/46_fidhbdranaplaza_/46_fidhbdranaplaza_/46_fidhbdranaplaza_en.pdf> accessed 8 June 2026.

4 The Limits of the Corporate Social Responsibility Structure

CSR, despite its aim to integrate ethics and human rights, has historically been exploited. Frameworks like Carroll's Pyramid[20] are used to prioritise profit while treating social obligations as secondary. This allows corporations to avoid substantive responsibility for abuses and thus undermining CSR's goal of genuine compliance.

However, Rana Plaza revealed profound limitations to voluntary CSR in preventing systemic labour and safety violations within global supply chains. MNCs sourcing from Rana Plaza heavily relied on self-designed codes of conduct and auditing programs to monitor working conditions.[21] These mechanisms failed to identify or address serious structural and labour risks. Most audits, narrowly based on checklist compliance rather than substantive risk assessment, were pre-announced and mediated by factory management.[22] As a result, they were poorly suited to detecting deeper governance failures, structural defects, coercive labour practices, and collective worker voice suppression.

Again, these drastic corporate failures must be viewed alongside the structural vulnerability of garment workers in Bangladesh. Workers were compelled to continue labour despite visible safety risks due to factors including sub-living-wages, significant debts, and persistent threats of withheld pay. Notably, the key obstacles to Bangladesh's economic development are identified as a dysfunctional political system, family politics and a lack of transparency and accountability.[23] By treating fundamental safety as a technical compliance issue rather than a problem of political economy, voluntary CSR disregarded the conditions that made the disaster foreseeable.

The fragmented application of voluntary CSR practices further undermines CSR's

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[20] Archie B Carroll, 'The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organisational Stakeholders' (1991) 34 BH 39.

[21] Mark Anner, Jennifer Bair, and Jeremy Blasi, 'Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labour Violations in International Subcontracting Networks' (2013) 35 CLLPJ 1.

[22] Genevieve LeBaron and Jane Lister, 'Ethical Audits and the Supply Chains of Global Corporations' (2015) 24 GN 1.

[23] Javed Siddiqui and Shahzad Uddin, 'Human rights disasters, corporate accountability and the state: Lessons learned from Rana Plaza' (2016) 29(4) AAAJ 679.

effectiveness. As each multinational buyer imposed its own standards and auditing requirements, factories selectively complied with the least demanding standards to conceal violations across audit cycles. This created inconsistent expectations rather than the intended upward pressure on labour and safety conditions as CSR auditing programmes often incentivised superficial compliance and safety document manipulation. The extensive use of subcontracting compounded these failures by creating distance between lead firms and legal responsibility for working conditions.[24] MNCs exercised economic control through pricing and production volumes whilst simultaneously disclaiming liability for labour rights violations in supplier factories. By separating economic power from legal accountability, employers retained the benefits of global sourcing while externalising the risks endured by workers.

Crucially, these corporate governance failures operated within a context of weak state regulation. Enforcement of the Bangladesh Labour Act 2006 was inconsistent, and oversight of building safety was inadequate despite it being one of the state's primary responsibilities to enact and enforce robust labour laws.[25] In such an environment, where neither private codes nor public regulation effectively protected workers, voluntary CSR lacked the coercive force necessary to compensate for institutional fragility.

Thus, Rana Plaza illustrates that voluntary CSR often fails to function as an effective accountability tool, underscoring the need for a system of enforceable accountability. As voluntary commitments remain subordinate to commercial imperatives, they lack the coercive force necessary to prevent harm in contexts characterised by severe worker vulnerability and weak state regulation.

5 The Pivot towards Binding Due Diligence

The dangerous limitations of voluntary CSR, as exposed by the Rana Plaza disaster, must be positioned within the broader framework of international business and human rights law. The UNGPs articulates the duty of the state to protect human rights, the corporate responsibility to

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[24] John Ruggie, *Just Business: Multinational Corporations and Human Rights* (Norton, 2013), Ch. 3.
[25] Institute for Human Rights and Business (IHRB), 'Rana Plaza 10 Years On: Lessons for Human Rights and Business' (2023) <https://ihrb-org.files.svdcdn.com/production/assets/uploads/Rana-Plaza-10-Years-on-IHRB_Briefing_v4.pdf> accessed 8 June 2026.

respect human rights, and the victims' access to remedy.[26] These principles intersect with foundational instruments such as the Universal Declaration of Human Rights (UDHR) and core ILO Conventions, which protect freedom of association,[27] prohibit forced labour,[28] and affirm the right to just and favourable remuneration.[29] However, the UNGPs operate as soft law. This means their guidance, although authoritative, does not impose any legally binding obligations on corporations.

While the UNGPs marked a normative advance by clarifying corporate human rights responsibilities, their reliance on voluntary corporate implementation has proven inadequate. The discretionary nature of HRDD has led to inconsistent and reactive practices. Many brands sourcing from Bangladesh formally endorsed the UNGPs while failing to conduct meaningful assessments of structural safety risks or to adjust purchasing practices that incentivised excessive production demands. This divergence between formal commitments and actual operational conduct highlights the limitations of voluntary standards within inherently high-risk supply chains.

The regulatory and contractual models that emerged departed from traditional CSR soft-law commitments towards binding obligations. Most notably, the Bangladesh Accord on Fire and Building Safety represented a legally binding, transnational regulation between MNCs, global trade unions, and civil society organisations.[30] Unlike the previous voluntary frameworks, the Accord imposed enforceable obligations on participating companies to finance independent inspections, publicly disclose safety findings, and remediate identified hazards.[31] Geographic and economic differences within global supply chains suggest moving towards working collaboratively and moving away from unilateral approaches.[32] Its geographic scope did not

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[26] UN Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' UN Doc A/HRC/17/31 (21 March 2011).
[27] Universal Declaration of Human Rights (adopted 10 December 1948), Art. 23; Freedom of Association and Protection of the Right to Organise Convention 1948 (No 87) & Right to Organise and Collective Bargaining Convention 1949 (No 98).
[28] Universal Declaration of Human Rights (adopted 10 December 1948), Art. 4; Forced Labour Convention 1930 (No 29) & Abolition of Forced Labour Convention 1957 (No 105).
[30] Universal Declaration of Human Rights (adopted 10 December 1948), Art. 23; Equal Remuneration Convention 1951 (No 100).
[29] Ibid.
[30] International Labour Organization, Report on the Rana Plaza Accident and Follow-up (ILO 2013).
[31] ACCORD, 'Bangladesh Accord on Fire and Building Safety' (2013) <https://bangladeshaccord.org> accessed 8 June 2026.
[32] Juliane Reinecke and Jimmy Donaghey, 'After Rana Plaza: Building Coalitional Power for Labour Rights Between Unions and (Consumption-Based) Social Movement Organisations' (2015) 22 O 720.

limit the legally binding Accord's ability to demonstrate that enforceable mechanisms could operate across borders and generate tangible improvements in factory safety. To address the silencing of labour voices that had negatively characterised governance prior to the collapse, the Bangladesh government fostered worker participation and complaint mechanisms. These incentives materialised through increased factory inspections, a strengthened labour inspectorate, improved fire services, enhanced occupational health and safety, the 'Better Work' programme, an employee injury insurance scheme, and enhanced workers' rights.

The Rana Plaza disaster also accelerated momentum beyond Bangladesh toward mandatory HRDD legislation at national and regional levels. This growing recognition is evidenced by Western legal instruments, including early major legislation such as the UK Modern Slavery Act 2015 and, more recently, Germany's Supply Chain Due Diligence Act 2021. Nevertheless, many due diligence frameworks focus primarily on reporting obligations rather than substantive liability. Without robust enforcement mechanisms, meaningful sanctions and access to remedies for affected workers, mandatory due diligence risks replicating the procedural limitations of CSR under a legal facade.

In this light, Rana Plaza serves as both a catalyst for reform and a warning against inadequate reforms. Corporate economic power must be aligned with binding legal accountability, effective state enforcement, and genuine worker empowerment.

6 Limits of Accountability Reform

While post-Rana Plaza initiatives represent genuine progress, they also reveal the limits of reform efforts that focus predominantly on procedural compliance. Binding due diligence obligations are necessary but not sufficient if the underlying power asymmetries within global supply chains are not addressed.

To ensure effective accountability, mechanisms must be introduced to redistribute power within supply chains. Economic coercion persists and is perpetuated by minimum wages in Bangladesh remaining far below living-wage benchmarks, stripping workers of their practical ability to refuse unsafe work.[33] Multinational buyers sourcing from garment factories continue to demand low-cost production, which puts pressure on suppliers to overlook safety standards and reduce wages as much as possible, as was the case at Rana Plaza. Recalibrating these dynamics is necessary to address the underlying structural causes of the problem, rather than just treating the symptoms.

Despite formal prohibitions,[34] union repression and the capacity to escalate grievances persist, as legal reforms expanding unionisation, collective bargaining, and protection against retaliation have been inadequate. Voluntary initiatives rarely address these power imbalances or advocate for robust worker rights. Accountability mechanisms must therefore extend to multinational brand parent companies, moving beyond inspections to incorporate legally protected worker participation and worker-centric metrics. The criticism that current audits are insufficient invites a shift to unannounced, worker-centred audits that incorporate employee feedback rather than relying solely on management-provided information.

Furthermore, to prioritise impartiality, audits should require third-party oversight by independent organisations to enhance the current superficial compliance. A new worker-centric framework, prioritising worker empowerment is essential because ethical supply chain management now requires corporations to establish fair wages, protect union rights, and implement grievance mechanisms. Thus, worker well-being is increasingly being viewed as integral to business sustainability and performance metrics. Furthermore, the rise of ethical consumerism and ESG investing compels companies to adopt responsible practices. Furthermore, the rise of ethical consumerism and ESG investing compels companies to adopt responsible practices. Legal responsibility should be conferred on parent companies due to their capacity to redistribute power, regardless of subcontracting arrangements. Thus, human rights protection fundamentally requires enforcing labour rights and empowering workers, not just focusing on corporate processes.

Ultimately, sustainable reform depends on global collaborative governance of all stakeholders. To prevent tragedies assimilated to the Rana Plaza collapse, factory owners in developing countries must receive appropriate funding, training, and technical assistance to adopt safer

[33] Human Rights Watch, "Whoever Raises their Head Suffers the Most": Workers' Rights in Bangladesh's Garment Factories (HRW 2015).
[34] International Trade Union Confederation, Bangladesh: Workers' Rights Under Threat (ITUC 2023).

working practices. Effective ongoing monitoring requires reforms to be flexible and responsive, evolving global dynamics, technological progress, and emerging supply chain risks. Producer country states must strengthen their capacity for labour law enforcement, while consumer-market regulators must impose unambiguous extraterritorial obligations. Overall, accountability is maximised when legal mandates, market incentives, and worker empowerment operate in alignment rather than in isolation.

7 Conclusion

The Rana Plaza disaster exposed the structural inadequacy of voluntary CSR, revealing deeper misalignment between corporate economic power and legal responsibility. This was a predictable outcome of production pressures, weak enforcement, and fragmented accountability, not an isolated incident. Garment workers faced unsafe conditions, economic coercion, and suppressed labour rights without meaningful protection.

To prevent such harm, supply chain accountability must transition from voluntary measures, which were inadequate due to power imbalances, to binding obligations. When the fundamental mechanisms that rebalance power within supply chains (such as living wages and legally protected worker participation) operate together, global supply chains can move beyond mere symbolic responsibility toward the effective protection of workers' human rights.

A Mad Dash to Orbit: The Regulatory Question of Satellite Mega-Constellations in Low Earth Orbit

Rohit Jayade

Abstract

The proliferation of satellite mega-constellations in Low Earth Orbit (LEO) has created significant regulatory challenges for existing international space law. Private operators, including Starlink, OneWeb and Amazon LEO, are deploying satellites at a scale and pace that existing legal frameworks were not designed to accommodate. This paper examines two interrelated consequences: the escalating accumulation of space debris in LEO and the absence of an effective Space Traffic Management (STM) regime. Drawing on an analysis of the Outer Space Treaty 1967 and its successor instruments, alongside a case study of the Swarm Technologies incident, the paper identifies structural deficiencies in the current regime, including its state-centric liability framework, fragmented national licensing systems, and non-binding debris mitigation guidelines. The paper argues that addressing these deficiencies requires coordinated international action on two fronts: the formal recognition of LEO as a global commons consistent with existing non-appropriation principles, and the establishment of a binding centralised STM regime alongside a liability system capable of extending direct regulatory accountability to private operators of satellite mega-constellations. It further contends that any such reform must integrate equity considerations to ensure that the long-term viability of LEO is preserved for future spacefaring nations.

1 Introduction

Aerospace America recently published an article about the rising instances of the National Aeronautics and Space Agency (NASA) purchasing hardware for its missions from independent third-party contractors.[1] Experts in this article called it an essential move to ensure the organisation can remain competitive in this 'Second Space Age' against rival geopolitical entities that have developed impressive space programs of their own.[2] The article also lays particular emphasis on the particulars of this Second Space Age, which has been characterised by an influx of private players backed by multi-billion dollar investments enabling a greater risk-taking appetite to produce cheaper, faster and more easily reusable alternatives to traditional payload delivery mechanisms into the planetary orbit.[3] Arguably, the most promising outcome of this age has been the development of low-latency telecommunication satellite constellations built by private companies that seek to occupy lower earth orbital shells.[4] As of 2026, 15,000 satellites operate in the planet's orbit, with the majority of these being satellites in Lower Earth Orbit (LEO), or at approximately under 2000 kilometres above terrestrial surface.[5] With thousands more satellites having achieved regulatory approval in coming years,[6] it raises natural questions about disruptions to existing legal orders that govern the deployment and use of objects in orbital space.

This paper examines the expansion of mega-constellations through the lens of two interrelated space law issues: the absence of an effective space traffic management (STM) regime and the escalating risks posed by space debris in Lower Earth Orbit. Herein, this paper argues that ensuring long-term space sustainability requires strengthened international cooperation and coordinated state action to more effectively regulate private space activities. This paper covers in brief, a background to Satellite Mega-constellations and existing Space Law. This is followed by a case study examination of the governance rules that plague this sector and how they are exacerbating issues with Space debris. Finally, the paper will posit two possible

[1] Jon Kelvey, 'In the Age of Commercial Space, Who Should Own the Hardware?' (*Aerospace America*, 2026) <https://aerospaceamerica.aiaa.org/departments/in-the-age-of-commercial-space-who-should-own-the-hardware/accessed> accessed 8 June 2026.
[2] Ibid.
[3] Ibid.
[4] Aslan Abashidze, Irina Chernykh and Maria Mednikova, 'Satellite Constellations: International Legal and Technical Aspects' (2022) 196 AA 176.
[5] Steven E Grotch, 'Mega-Constellations: Disrupting the Space Legal Order' (2022) 37 EILR.
[6] Ibid.

regulatory responses: first, the formal recognition of Lower Earth Orbit as a global commons grounding reform in existing non-appropriation principles; and second, the institution of a binding space traffic management regime that extends direct accountability to private operators.

2 A Primer to Satellite Mega-Constellations in Low Earth Orbit

A satellite refers to any object that orbits an object with a larger gravitational pull, akin to a moon with its planet for example.[7] Artificial satellites constitute man-made objects and are launched into orbit around the planet.[8] Depending on orbital distance, these satellites can perform a number of different functions. Since the first active communications satellite launch in 1962, satellites have increased in technical advancement and lowered in production expense and overall weight, allowing the deployment of large payloads of multiple hundreds of satellites in LEO at the same time.[9] A Satellite Constellation is a collection of multiple orbiting satellites that operate in a single controlled cluster. In a technical sense, these satellites are not just part of a single cluster, but also perform a similar function, further defined by an ability to perform autonomous navigation of cluster configurations.[10] Hence, a more encompassing definition would be 'a group of satellites that function together in such a way as to complement each other due to pre-selected orbital-frequency positions at which they are located and provide appropriate ground coverage for various specified purposes, for example, provision of communication, high speed broadband Internet, navigation or monitoring.'[11]

Satellite Mega-Constellations operate in clusters of many hundreds, sometimes thousands of individual satellites that work together to handle bandwidth requests from devices on earth (processed via strategically placed on-ground telemetry centres) in providing internet

[7] Avery Hurt, 'About 15,000 Satellites Are Circling Earth — And They're Disrupting the Sky' (*Discover*, 2026) <https://www.discovermagazine.com/about-15-000-satellites-are-circling-earth-and-they-re-disrupting-the-sky-48550> accessed 8 June 2026.
[8] Ibid.
[9] Steven E Grotch, 'Mega-Constellations: Disrupting the Space Legal Order' (2022) 37 EILR.
[10] Aslan Abashidze, Irina Chernykh and Maria Mednikova, 'Satellite Constellations: International Legal and Technical Aspects' (2022) 196 AA 176.
[11] Ibid.

connectivity.[12] A number of prominent tech giants are involved in the creation, and deployment of their own directly competing constellations, the most prominent including the likes of Starlink, OneWeb and Amazon LEO.[13] Their design is necessitated to provide key improvements in service deployment.[14] Firstly, their relatively shorter distance to the surface greatly reduces the time needed to communicate with devices on the ground (i.e. communication latency) as compared to a more traditional satellite in Geo-Synchronous orbit.[15] This however, means that satellites operating in LEO have much quicker, roughly 20 minute orbit times around the planet, thus requiring a large number of individual units to maximize coverage of a sizable area of the planet at any given point.[16] Secondly, satellite mega constellations offer satellite connectivity to Earth areas that otherwise would have no feasible way of connecting fibre optic cables to their communities, allowing information dissemination and its tools to be accessible to some of the most remote underserved communities on Earth.[17] A recent example of the value of these satellites was the continued internet connection provided to Ukrainian civilians under Russian siege throughout their induced internet blackouts, which was made possible through Starlink's routers.[18] These satellites however, rest in an uneasy space in both regulation and the wider geo-orbital environment, as will be seen next.

3 A Primer to Space Law

Space Law, as a branch of Public International Law, exists to govern the use and appropriation of Outer Space, and elements of it thereof as a resource. The remit of this branch of law naturally encompasses a wide array of current spacefaring nations and is in the tricky spot of balancing their interests with those of future prospective nations with similar interests.[19] Developed in a desperate haste to provide legal grounding to the aftermath of the Soviet

[12] Devanshu Jha and others, 'Safeguarding the Final Frontier: Analyzing the Legal and Technical Challenges to Mega-Constellations' (2022) 9 JSSE 636.
[13] Aaron C Boley and Michael Byers, 'Satellite Mega-Constellations Create Risks in Low Earth Orbit, the Atmosphere and on Earth' (2021) 11 SR 10642.
[14] Sven Bilén, 'The next Frontier in Space Is Closer than You Think – Welcome to the World of Very Low Earth Orbit Satellites' (*The Conversation*, 16 December 2025) <https://theconversation.com/the-next-frontier-in-space-is-closer-than-you-think-welcome-to-the-world-of-very-low-earth-orbit-satellites-258252> accessed 8 June 2026.
[15] Ibid.
[16] Devanshu Jha and others, 'Safeguarding the Final Frontier: Analyzing the Legal and Technical Challenges to Mega-Constellations' (2022) 9 JSSE 636.
[17] Ibid.
[18] Steven E Grotch, 'Mega-Constellations: Disrupting the Space Legal Order' (2022) 37 EILR.
[19] Frans von der Dunk, *Handbook of Space Law* (Edward Elgar Publishing 2015).

Union's Sputnik 1 launch, Space Law was first etched in the Treaty on the Principles Governing the Activities of States in Outer Space, on the Moon and Other Celestial Bodies of 1967 (otherwise known as the Outer Space Treaty [OST] of 1967) based on basic fundamental tenets.[20] These are that 1) Space is a shared 'province for all mankind', 2) that space exploration between nations is to be a non-discriminatory affair and 3) that outer space is not to be appropriated by any one nation for its own purposes.[21] These tenets informed negotiations that brokered the creation of a set of five international declarations and five primary legislations drafted through consensus under the UN Committee on the Peaceful Uses of Outer Space (UNCOPUOS), which constitute the bulk of the frameworks that seek to regulate spacefaring activity.[22]

When it comes to the overarching law dictating the use of satellite Constellations, the OST 1967 first applies as an instructive document for nation states.[23] It lays primary emphasis on state actors as enablers of spacefaring activity and this approach is enshrined in three broad-based founding articles. Firstly, Art. VI decrees that nation states bear international responsibility for all state-led space activity.[24] Secondly, Art. VIII decrees that states will continue to retain sovereignty over any and all objects launched by them into space.[25] Finally, Art. VII crucially also declares that, should a space object near the Earth, moon or any other celestial bodies perform damage to anything else in its vicinity, that the 'state party' is to be held internationally liable for any and all object launches conducted by it and/or from its territory.[26] Foundational documents like this have been further expanded upon in bilateral and/or multiparty conventions that further dictate a complete full fault liability based system[27] constituting a 'soft law' regime for space exploration on an international level.[28] This soft law approach results in a mosaic patchwork of regulation, which nonetheless requires nation states

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[20] Joanne Irene Gabrynowicz, 'Space Law: Its Cold War Origins and Challenges in the Era of Globalization', (2004) 37 SULR.
[21] Steven E Grotch, 'Mega-Constellations: Disrupting the Space Legal Order' (2022) 37 EILR.
[22] Ibid.
[23] Frans G von der Dunk, 'National Space Legislation in Europe: Issues of Authorisation of Private Space Activities in the Light of Developments in European Space Cooperation' in Frans G von der Dunk (ed), *National Space Legislation in Europe: Issues of Authorisation of Private Space Activities in the Light of Developments in European Space Cooperation, Studies in Space Law*, volume 6 (Martinus Nijhoff Publishers 2011).
[24] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies 1967.
[25] Ibid.
[26] Ibid.
[27] Yun Zhao, 'International Regulatory Regime for MegaConstellations: A Path to Equitable Access to Outer Space' (2025) 50 ASL 591.
[28] PJ Blount, 'Renovating Space: The Future of International Space Law' (2011) 40 DJILP.

to exercise judgement when creating their own space law regimes as to how they wish to interpret any directives that they choose to be party to.[29] *Opinio Juris* across individual states can widely vary in what they consider to be adequate to the spirit of the OST.[30] Although some international bodies, such as the International Telecommunications Union (ITU), govern high level, equitable bandwidth allocation for Geo Stationary Orbits—herein too, there is a standing loophole as this body in particular does not handle allocation for Mega-Constellations that are privately managed.[31] States effectively deciding how they regulate themselves and which activities they wish to be held liable for, unsurprisingly creates governance gaps across mixed systems of spacefaring especially when dealing with private actors, as was most recently demonstrated in the case of Swarm Technologies.

4 Spacefaring and Space Law- The Swarm Technologies case

March of 2018, Silicon-valley startup Swarm Technologies was accused of conducting the first ever unauthorized launch of transmission satellites into orbit by the US Federal Communications Commission (FCC), the body legislating and granting authority to conduct all telecommunications satellite activity in the US. Swarm had been rejected for a license application from the FCC for its SpaceBEE satellites on account of their minuscule sizes and the issues this presented in tracking them in LEO.[32] Following this, the four satellites were launched by an independent broker named Spaceflight via an Indian state-owned launch company named Antrix using their indigenously built PSLV rockets. When this was discovered, space agencies used to actioning solely state-led launches driven by stricter government bureaucracy were blindsided by a company that found loopholes to exploit, in what reportage has since claimed is emblematic of a typical silicon-valley startup's 'seek forgiveness, not

[29] Frans G von der Dunk, 'National Space Legislation in Europe: Issues of Authorisation of Private Space Activities in the Light of Developments in European Space Cooperation' in Frans G von der Dunk (ed), *National Space Legislation in Europe: Issues of Authorisation of Private Space Activities in the Light of Developments in European Space Cooperation, Studies in Space Law*, volume 6 (Martinus Nijhoff Publishers 2011).
[30] Ibid.
[31] Christopher D Johnson, 'The Legal Status of MegaLEO Constellations and Concerns About Appropriation of Large Swaths of Earth Orbit' in Joseph N. Pelton and Scott Madry (eds.), *Handbook of Small Satellites* (Springer 2020).
[32] Tim Fernholz, 'The US Government Said No. Swarm Technologies Launched Its Satellites Anyway' (*Quartz*, 20 March 2018) <https://qz.com/1230354/swarm-technologies-how-the-silicon-valley-start-up-launched-satellites-without-government-permission> accessed 8 June 2026.

permission' style of working. [33] The primary issue stemmed from the fact that the FCC could only grant satellite clearance and not launch clearance, which was handled by the Federal Aviation Administration (FAA), and their independent launch clearance was considered sufficient by Spaceflight which failed to conduct further due diligence about the FCC license before engaging with Antrix- who further absolved themselves of any responsibility to confirm the veracity of any launch licenses.[34]

The Swarm case illuminates a fundamental issue of existing Space Law, that much like most other international law, it is rendered toothless due to an emphasis on non-interference and upholding of national sovereignty as a guiding principle.[35] In the absence of any binding legislation governing mega constellations, it is individual state bodies like the FCC that become primary filters to determine legitimate and illegitimate space ventures- this hinges spacefaring as a whole largely upon the sensibilities of individual states and their governance practices. This expectedly results in geopolitical faultlines acting as an enabler for regulatory loopholes, with incidents like the Swarm case hinting towards an emerging economy of states willing to conduct launches from foreign companies for cheaper and with fewer checks.[36] However, even when these satellites meet criteria, national bodies have a prior use history of awarding their licenses on a first come first served basis, with evidence of inadequate regard given to the health and long term viability of other countries' space programs or missions to access and traverse the orbital shells these satellites occupy.[37] This also manifests in the form of major liability gaps, also seen within the Swarm case where the only meaningful liability allotted was a menial $900K settlement fine with the FCC, and a requirement for greater scrutiny in their future launches.[38] Individual countries engaging in self-policed spacefaring have a free hand in dictating their own launch patterns and how they are regulated. Beyond liability gaps, this decentralization forms an existential threat to spacefaring as a whole, namely through the impact this activity has on increasing the number of space debris pieces in LEO.

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[33] Ibid.
[34] Aslan Abashidze, Irina Chernykh and Maria Mednikova, 'Satellite Constellations: International Legal and Technical Aspects' (2022) 196 AA 176.
[35] Yun Zhao, 'International Regulatory Regime for MegaConstellations: A Path to Equitable Access to Outer Space' (2025) 50 ASL 591.
[36] Aaron C Boley and Michael Byers, 'Satellite Mega-Constellations Create Risks in Low Earth Orbit, the Atmosphere and on Earth' (2021) 11 SR 10642.
[37] Ibid.
[38] fcc.gov, 'FCC Reaches $900,000 Settlement for Unauthorized Satellite Launch', (*Federal Communications Commission*, 20 December 2018) <https://www.fcc.gov/document/fcc-reaches-900000-settlement-unauthorized-satellite-launch> accessed 8 June 2026.

5 Space Debris

The first known object to break up in orbital space was a Thor-Ablestar rocket in 1961 that sent more than 200 catalogued ship fragments hurtling into LEO.[39] Subsequent spacefaring activity has driven this number of fragments in orbit up by an order of magnitude. This mass of orbiting material in upper atmospheric space is referred to as space debris. Debris itself can range in two types—constituting tracked pieces and stray, individual pieces of junk that were discarded from previous missions or collisions. As of 2026, the European Space Agency estimates that approximately 40,000 objects are tracked in orbital space, with 11,000 being active payloads. However, they further estimate a vast swathe of nearly 1.2 million individual objects larger than 1 centimetre, capable of causing irrevocable damage to satellites and human missions alongside some 50,000 objects larger than 10 cm, that can collide with other objects with the force of a large bomb.[40] The large influx of satellite units in Mega-Constellations from national and private players operating in the Ka and Ku communication frequency bands risk overcrowding Lower Earth Orbit.[41]

Satellite Mega-constellations themselves have inherent problems in their makeup that make them prone to producing debris. Their vast cluster sizes that ensure multiple fail safes, protecting against a single satellite becoming inoperable, comes at the cost of manoeuvrability.[42] Additionally, they are built for shorter lifespans, meaning more of these satellites will be made redundant quicker than traditional satellites. Add to this the fact that tracking objects in orbital shells (as shown by Swarm's SpaceBEE CubeSats) is not precise and generally work on probabilistic predictions, and the risk of collisions increases by orders of magnitude even if one or a few satellites in a Mega cluster encounter a stray piece of debris or lose functionality altogether.[43] Amazon for instance estimated that a loss in collision manoeuvring capabilities in one in ten satellites of its proposed cluster will increase the chances

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[39] aerospace.org, 'A Brief History of Space Debris' (*Aerospace Corporation*, 2 November 2022) <https://aerospace.org/article/brief-history-space-debris> accessed 8 June 2026.

[40] European Space Agency, *ESA Space Environment Report 2025* (2025) <https://www.esa.int/Space_Safety/Space_Debris/ESA_Space_Environment_Report_2025> accessed 8 June 2026.

[41] Nikita Bhakare, 'The Need for Evolving Legal Framework for Regulation of Space Debris Caused by Satellite Constellations' (2021) 8 ESA Space Debris Office.

[42] Christopher D Johnson, 'The Legal Status of MegaLEO Constellations and Concerns About Appropriation of Large Swaths of Earth Orbit' in Joseph N. Pelton and Scott Madry (eds.), *Handbook of Small Satellites* (Springer 2020).

[43] Steven E Grotch, 'Mega-Constellations: Disrupting the Space Legal Order' (2022) 37 EILR.

of one of these satellites colliding with an object of 10 centimetres or larger by at least twelve percent.[44] Even in best case scenarios, collision avoidance manoeuvres are expensive and time intensive affairs that require at least hours, if not days of notice.[45] Experts estimate that a third of all debris in space today is the result of just two past collisions.[46] A scenario where multiple such collisions occur simultaneously risks starting a chain reaction. This doomsday scenario for spacefaring was first proposed by Dr Donald J Kessler and has been eponymously dubbed the 'Kessler Syndrome' wherein, a cascading series of collisions in orbital space ejects so much debris that it renders our orbit hostile to any space flight for multiple generations.[47]

6 Where do we go from here? The Legal Answers

The phenomenon which describes multiple actors performing in self-interest, leading to the unviability of a shared resource is known in political science as 'the tragedy of the commons'. Historical examples of this include the common atmospheric aerosol dumping that led to the depletion of the ozone layer.[48] It took universal ratification from individual national parties to the Montreal Protocol of 1987 to begin the process of successfully banning the emission of hydrocarbons and naturally restoring the ozone. Similarly, the international legal regime has a defining role to play in ensuring the long-term sustainability of space faring for future generations. This involves a combined effort that first works towards establishing a framework universally recognising the LEO as a 'global commons', in line with non-appropriation principles in Art. II of the OST.[49] Following this, extensive technological safeguards must be instituted on units being sent into space alongside a robust legal mechanism that holds them accountable. The ESA predicts that despite increasing adherence of debris-mitigation protocols and charters drafted by individual space agencies as well as UNCOPUOS, more debris is being

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[44] Mark Harris, 'Amazon Reports Collision Risk for Mega-Constellation of Kuiper Internet Satellites', *IEEE Spectrum* (16 October 2019) <https://spectrum.ieee.org/amazon-reports-collision-risk-for-its-megaconstellation-of-kuiper-internet-satellites> accessed 27 March 2026.

[45] Steven E Grotch, 'Mega-Constellations: Disrupting the Space Legal Order' (2022) 37 EILR.

[46] Mark Harris, 'Amazon Reports Collision Risk for Mega-Constellation of Kuiper Internet Satellites' (*IEEE Spectrum*, 16 October 2019) <https://spectrum.ieee.org/amazon-reports-collision-risk-for-its-megaconstellation-of-kuiper-internet-satellites>accessed 8 June 2026.

[47] Nikita Bhakare, 'The Need for Evolving Legal Framework for Regulation of Space Debris Caused by Satellite Constellations' (2021) 8 ESA Space Debris Office.

[48] Garrett Hardin, 'Tragedy of the Commons' (*Econlib*, 5 February 2018) <https://www.econlib.org/library/Enc/TragedyoftheCommons.html> accessed 8 June 2026.

[49] Pauline Pic, Philippe Evoy and Jean-Frédéric Morin, 'Outer Space as a Global Commons: An Empirical Study of Space Arrangements' (2023) 17 IJC 288.

added to orbits than is being disposed of via atmospheric re-entry.[50] While the current levels of unaccountable space debris have suffered unsuccessful attempts to be limited, the natural course of action is to greatly regulate future spaceflight to ensure minimal new debris is added to the list. This makes it incumbent on international coalitions like the Inter-Agency Debris Coordination Committee [IADC] to push for its member nations to adopt robust collision detection technologies as part of their licensing requirements and crucially, mandate a more stringent de-orbiting requirement for individual operators beyond the 25 year cycle prescribed to date.[51] This timeframe remains woefully short in case of satellite Mega-constellations, whose units remain in orbit for an average of 5 to 7 years, and therefore must be deorbited quicker.[52] These actions constitute a broader action towards instituting a binding, centralized system of Space Traffic Management (STM).[53]

In 2021, China issued formal notice to UNCOPUOS regarding two instances of its space station Tianhe having to engage in collision mitigation procedures to avoid Starlink satellites who came within 3 kilometres of it.[54] The ESA further estimates that at the current rate of debris injection, such procedures will become impossible to conduct without the aid of machine learning systems.[55] This stems from the lack of an international body, and recognised standards towards monitoring and regulating the assignment of orbital shells to spacefaring parties.[56] Multiple proposals exist to take cognizance of the issue and gain inspiration from existing international agreements relating to sea faring in international waters, such as the International Regulations for Preventing Collisions at Sea, 1977 and the U.N. Convention on the Law of the Seas (UNCLOS) 1982 to begin deployment on a three step centralization effort which must

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[50] European Space Agency, *ESA Space Environment Report 2025* (2025) <https://www.esa.int/Space_Safety/Space_Debris/ESA_Space_Environment_Report_2025> accessed 8 June 2026.

[51] Aaron C Boley and Michael Byers, 'Satellite Mega-Constellations Create Risks in Low Earth Orbit, the Atmosphere and on Earth' (2021) 11 SR 10642.

[52] The FCC's recent adoption of a 5-year deorbiting directive for Satellite Mega-Constellation provides a promising step towards this. See Federal Communications Commission, 'FCC Adopts New "5-Year Rule" for Deorbiting Satellites' (*Federal Communications Commission*, 30 September 2022) <https://www.fcc.gov/document/fcc-adopts-new-5-year-rule-deorbiting-satellites-0> accessed 8 June 2026.

[53] Steven E Grotch, 'Mega-Constellations: Disrupting the Space Legal Order' (2022) 37 EILR.

[54] Mike Wall, 'China's Tianhe Space Station Module Dodged SpaceX Starlink Satellites Twice This Year' (*Space*, 30 December 2021) <https://www.space.com/china-tianhe-space-station-maneuvers-spacex-starlink> accessed 8 June 2026.

[55] European Space Agency, *ESA Space Environment Report 2025* (2025) <https://www.esa.int/Space_Safety/Space_Debris/ESA_Space_Environment_Report_2025> accessed 8 June 2026.

[56] Christopher D Johnson, 'The Legal Status of MegaLEO Constellations and Concerns About Appropriation of Large Swaths of Earth Orbit' in Joseph N. Pelton and Scott Madry (eds.), *Handbook of Small Satellites* (Springer 2020).

perform three basic functions—a) establishing agreed upon standards of behaviour in collision avoidance; b) SOPs for greater sharing of space situational awareness information; and c) an expanded market for conjunction assessment and alerting services.[57]

On a legislation level, the OST is widely considered inadequate and will require further interpretation from UNCOPUOS regarding the remit of Art. IX with the aim of combining traditionalist understandings of mutual assistance to include the relationships between Space Agencies, Mega-constellation operators and their actions in preventing undue contamination of orbital space.[58] Further cases and arbitration will have to contend with the definition of the 'launching state' as prescribed within 1972 Convention on International Liability for Damage Caused by Space Objects and the 1976 Convention on Registration of Objects Launched into Outer Space, and which backwardly recognise only nation states as actionable entities of Spacefaring.[59] Their recognition of direct liability for private players engaging in Space Activities, whilst necessary, will enshrine an additional independent space faring authority capable of competing with countries for orbital space, and it is imperative that this is integrated alongside the OST's Non-Appropriation principles.[60] More material liabilities may be in order too, including novel ideas surrounding a tax levied on operators for every satellite that is put into orbit (an 'Orbit Tax') with the aim of driving efficiency in cluster planning and management.[61] Despite its overall cost on operators, proponents estimate that establishing effective space traffic management systems to prevent functionally irreversible damage to the planet's orbital space is far outweighed by the value they will produce in the long term. Presenting a business case, estimates place an orbital commons with basic regulation to drive up initial value estimates of the satellite market from $600bn by 2040, to $3tn.[62]

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[57] Ruth Stilwell, *Space Situational Awareness: Key Issues in an Evolving Landscape* Hearing Before the Subcommittee on Space and Aeronautics of the Committee on Science, Space & Technology (February 2020) <https://www.congress.gov/116/chrg/CHRG-116hhrg39617/CHRG-116hhrg39617.pdf> accessed 8 June 2026.

[58] Ibid.

[59] Aslan Abashidze, Irina Chernykh and Maria Mednikova, 'Satellite Constellations: International Legal and Technical Aspects' (2022) 196 AA 176.

[60] Frans G von der Dunk, 'National Space Legislation in Europe: Issues of Authorisation of Private Space Activities in the Light of Developments in European Space Cooperation' in Frans G von der Dunk (ed), *National Space Legislation in Europe: Issues of Authorisation of Private Space Activities in the Light of Developments in European Space Cooperation, Studies in Space Law*, volume 6 (Martinus Nijhoff Publishers 2011).

[61] Sky News, '"Orbit Tax" Proposed to Tackle Growing Problem of Space Junk' *Sky News* (26 May 2020) <https://news.sky.com/story/orbit-tax-proposed-to-tackle-growing-problem-of-spacejunk-11994748> accessed 8 June 2026.

[62] Ibid.

7 Conclusion

The rapid proliferation of satellite mega-constellations in LEO represents one of the defining regulatory and sustainability challenges of the Second Space Age. As this paper has demonstrated, the existing framework of international space law—rooted in the Outer Space Treaty of 1967 and supplemented by fragmented national licensing regimes—was designed for an era of state-led, infrequent space activity and is increasingly inadequate for governing modern private-enterprise led space activity. Addressing this requires action on two fronts: the formal recognition of LEO as a global commons grounded in the OST's non-appropriation principles, ensuring equitable access for future spacefaring nations; and the institution of a binding STM regime extending direct accountability to private operators through reformed liability frameworks and mechanisms such as the Orbit Tax.

Beyond this, the institution of space as a shared global common resource will ensure its living viability for coming generations of researchers, artists, explorers and entrepreneurs. By the time the Tragedy of the Commons has struck in other sectors, the social cost has been enormous, with policy and the biosphere still catching up to its effects today. Space, as the final frontier, presents the latest and perhaps the ultimate example of a shared resource with immense growth potential for our increasingly technocratic species and its continued preservation demands immediate, proactive steps. We embarked on a mission with mega-constellations to bring information and power to those who have none. Every generation deserves a chance to do the same.