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Institute of Legal and Constitutional Research



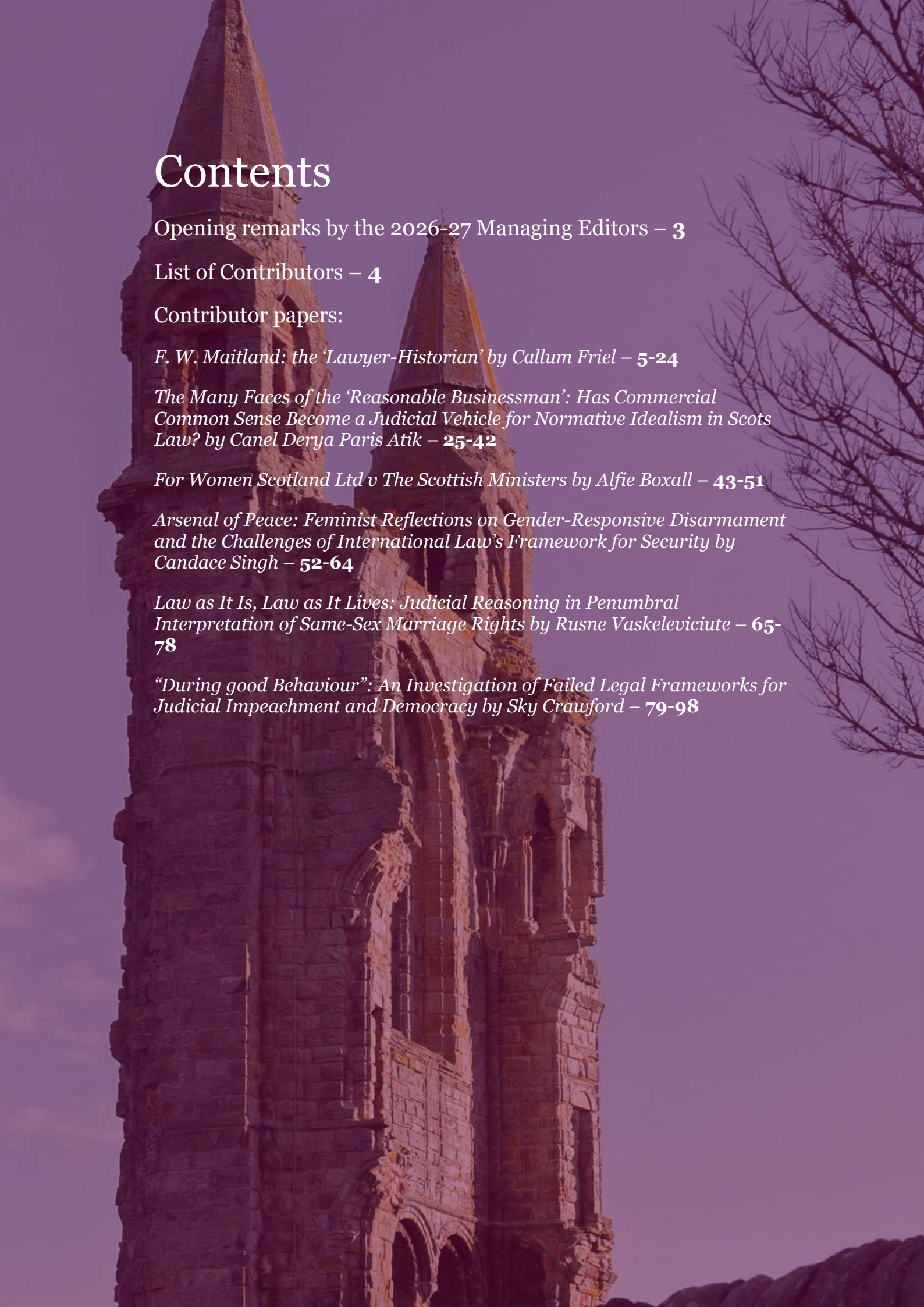
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OPENING REMARKS BY THE 2026-2027 MANAGING EDITORS

As a new academic year begins, we are proud to present the second issue of Volume 6 of the St Andrews Law Journal. Building on the work of previous editions, this issue continues the Journal's commitment to publishing ambitious scholarship that extends beyond conventional legal topics and brings legal analysis into conversation with history, politics, society and contemporary debate. In doing so, we hope to highlight areas of law that are sometimes overlooked while demonstrating the breadth of questions that can benefit from rigorous legal inquiry.

This publication also marks the beginning of our time as Managing Editors. Over the summer, we have worked to prepare the Journal for the year ahead, including through an extensive recruitment process for a new editorial team. At the centre of the Journal remains our double-blind peer review process, drawing on the work of undergraduate editors alongside postgraduate MLitt reviewers to provide authors with detailed and constructive feedback. We are extremely grateful to everyone who has contributed their time and expertise to maintaining the academic and professional standards of the Journal.

The six articles in this issue reflect the breadth of scholarship that the Journal seeks to promote. They range from examinations of legal history and jurisprudence to questions of commercial law, constitutionalism and the relationship between law and wider social and political developments. Contributions including explorations of F. W. Maitland and legal history, the role of 'commercial common sense' in legal reasoning, and the distinction between law as formally articulated and law as it operates in practice demonstrate the diverse approaches to legal scholarship represented within this edition. Taken together, the articles reflect the Journal's interdisciplinary character and its aim of encouraging legal discussion across the St Andrews community and beyond.

As we begin the year, we are also looking ahead to Volume 7 and to expanding the Journal's reach further. We hope to continue attracting contributions from authors both within and beyond St Andrews, while creating opportunities for students from a wide range of academic backgrounds to engage seriously with legal scholarship. The growing breadth of our contributors reflects an ambition for the Journal to serve not only as a publication, but as a platform for thoughtful and original legal debate.

At the beginning of our time as Managing Editors, we would like to thank those whose work has placed the Journal in such a strong position. We are particularly grateful for the continued support of the Institute of Legal and Constitutional Research and its Co-Director, Professor Caroline Humfress. We are excited to build on the Journal's progress over the coming year and look forward to seeing the scholarship, ideas and community that the next volume will bring.

Yours faithfully,

Theodore Rhally

Cadi West

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Journal Manager, 2026-27

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F. W. Maitland: the ‘Lawyer-Historian’

By Callum Friel

Introduction

F. W. Maitland, in his inaugural lecture as Downing Professor of the Laws of England at the University of Cambridge in 1888, elucidated clearly how and by whom legal history should be done. ‘There are,’ he laments, ‘large and fertile tracts of history which the historian as a rule has to avoid as they are too legal.’¹ The historian’s capacity to write comprehensive social, economic, religious, or moral history is limited by the fact that often technical legal documents are the only evidence that remains.² The lawyer, however, cannot write legal history effectively as ‘history involves comparison and the English lawyer who knew nothing and cared nothing for any system but his own hardly came in sight of the idea of legal history.’³ A warning follows: a lawyer may approach mediaeval law and legal history based on the demands of the present, and will not appreciate mediaeval law on its own terms – ‘what the lawyer wants is authority and the newer the better.’⁴

For Maitland, neither the historian nor the lawyer is suitably placed to write legal history, and the question remains as to who is best placed to undertake the task. Maitland identifies, as a prerequisite, that ‘a thorough training in modern law is almost indispensable for anyone who wishes to do good work on legal history.’⁵ This equips the scholar with an understanding of the legal nature of the source material; however, the full potential of historical legal sources can only be unlocked, Maitland argues, by comparison with other systems.

Maitland’s suggestion sparked more debate than it answered questions: rather than resolving the question of by whom legal history should be done and to what end, his formulation has become a point of departure for both those arguing in favour of the historian and the lawyer. The primary aims of what follows are twofold: first, to critique and deconstruct the designation of Maitland as either a lawyer or a historian, instead contextualising his works and arguing that the epithet of ‘lawyer-historian’ is a more apt characterisation; and second, to question why such characterisations matter and highlight their pertinence in current historiographical debates about legal history.

A brief biographical sketch of Maitland’s legal education and experience is necessary before analysing his works of legal history. After reading for the Moral and Mental Sciences Tripos at the University of Cambridge, Maitland was called to the Bar by Lincoln’s Inn in 1876.⁶ He subsequently practised in Chancery for seven years,

¹ Frederic William Maitland, “Why the History of English Law Is Not Written,” in *The Collected Papers of Frederic William Maitland, Downing Professor of the Laws of England*, ed. Herbert Albert Laurens Fisher, vol. 1 (Cambridge University Press, 1911), p. 486.

² Maitland, “Why the History,” p. 486.

³ Maitland, “Why the History,” p. 488.

⁴ Maitland, “Why the History,” p. 491.

⁵ Maitland, “Why the History,” p. 493.

⁶ Cecil Herbert Stuart Fifoot, *Frederic William Maitland: A Life* (Harvard University Press, 1971), p. 43. The Moral and Mental Sciences Tripos consisted of moral and political philosophy, mental philosophy, logic, and political economy; history and jurisprudence had been removed and instead established as a separate Tripos (see Keith Tribe, *Constructing Economic Science: The Invention of a Discipline, 1850–1950* (Oxford University Press, 2022), pp. 78, 86).

specialising in conveyancing. Given the highly technical nature of the practice, Maitland remarked that there could be no better introduction to the study of ancient *diplomata* than chancery law.⁷ Little information is available about the specific legal education Maitland received, but there is little doubt that he was an erudite and capable lawyer: his pupillage supervisor said that ‘he had not been with me a week before I found that I had in my chambers such a lawyer as I had never met before. I have forgotten, if I ever knew, where and how he acquired his mastery of law.’⁸

Legal education in the latter half of the nineteenth century primarily constituted the ‘haphazard hand-to-mouth fashion that is familiar to us under the name of “reading in chambers”’.⁹ Maitland must have learned about the law primarily during his time as a student of Lincoln’s Inn and in chambers, as it formed no part of his study at Cambridge. Universities remained on the periphery of education in the common law, primarily teaching Roman and canon law; thus there was little formal legal education in the common law.¹⁰ ‘Law students’ tended to think only that which was professionally useful was worthy of study;¹¹ history, principles of jurisprudence, and comparative law were unnecessary.¹² The increasing discontent with the content of academic courses in law reflects this opinion: Oxford offered the Law and History Tripos until 1870, when it was recommended that the subjects be studied separately, supposedly for the benefit of both disciplines.¹³ The Law Tripos at Cambridge included English constitutional history and European political history as background to the development of English law;¹⁴ however, those interested in the law found history to be a time-consuming inconvenience, believing that the only history of use to lawyers was contained in the legal record.¹⁵ This is the attitude that Maitland denounced in his inaugural lecture: lawyers who understand only their own system and know nothing of others, legal or historical, cannot effectively write the legal history of England.¹⁶

In the first section, I analyse the influence of Maitland’s legal education and practice on his works of legal history, arguing that these considerably informed his historical methodology, approach to and understanding of sources, and presentation of the English common law as organically evolving. They not only provided him with legal insight, but also informed the structure, focus and emphases of his historical scholarship. I identify two ‘lawyerly aspects’ of Maitland’s work, which I argue are the result of his legal experience. The discussion analyses the manifestation of these in Maitland’s scholarship, specifically the doctrinal organisation of *Pollock and Maitland*, which allows Maitland to write the internal history of mediaeval English legal doctrine, and the

⁷ Herbert Albert Laurens Fisher, *Frederic William Maitland, Downing Professor of the Laws of England: A Biographical Sketch* (Cambridge University Press, 1910), p. 17.

⁸ Fisher, *Frederic William Maitland*, p. 16.

⁹ Fisher, *Frederic William Maitland*, p. 16. Maitland employs the phrase to contrast the methods of legal education in the nineteenth century with the “scholastic” approach of the Middle Ages and Tudor period.

¹⁰ William Cornish, J. Stuart Anderson, Raymond Cocks, Michael Lobban, Patrick Polden, and Keith Smith, *The Oxford History of the Laws of England, vol. 11, 1820–1914: English Legal System* (Oxford University Press, 2010), pp. 1186–87.

¹¹ “Law students” is used for ease and consistency, rather than to invoke its modern definition of students undergoing an academic training in law. Instead, the phrase refers to those preparing for call to the Bar and undertaking pupillage.

¹² Cornish et al., *Oxford History of the Laws of England*, vol. 11, p. 1192.

¹³ Peter R. H. Slee, *Learning and a Liberal Education: The Study of Modern History in the Universities of Oxford, Cambridge and Manchester, 1800–1914* (Manchester University Press, 1986), p. 88.

¹⁴ Slee, *Learning and a Liberal Education*, p. 58.

¹⁵ Slee, *Learning and a Liberal Education*, p. 58.

¹⁶ Maitland, “Why the History,” pp. 489–90.

reconstruction of the history of mediaeval English common law on its own terms.¹⁷ This facilitates analysis of Maitland's presentation of the English common law as organically and gradually evolving, and the argument that this is a consequence of his legal experience.

I argue in the second section that Maitland's legal education and experience were not, however, the sole influence on his works of legal history, and it would be erroneous to view Maitland solely as a lawyer. Instead, he was acutely concerned with the subject matter typically treated by historians. The discussion concerns Maitland's emphasis on historical contextualisation and his use of comparison as a tool of inquiry in tracing the development of both the internal and external history of the mediaeval English common law.

Two definitions are required for the argument: 'lawyerly aspects' refers to Maitland's forensic approach to sources, his grasp of legal technicalities and terminology, and his method of analysis focused on the internal history of law. His examination of legal sources utilised the legal knowledge he had gained through his legal education and practice, enabling him to trace doctrinal and procedural developments, and argue that legal change happened not as a result of legislative action, but through a gradual evolution as a response to societal needs. This distinguishes Maitland from contemporary historians. Take constitutional history as an example: Stubbs, whose work greatly impressed Maitland, paid no attention to unprinted sources available in the Public Record Office;¹⁸ conversely, Maitland's discovery of the legal records held there is the bedrock of much of his work.¹⁹ 'Historian' refers not to the idea of a professional trained in archival research, devoid of any 'ideological stance', that was becoming standard in the latter decades of the nineteenth century;²⁰ Maitland was not trained in this way. Instead, it refers to a scholar whose approach derived partly from his earliest and formative intellectual influence, philosophy, and who spent most of his career not in a history department but in a law school.²¹

1. Maitland: Lawyer as Historian

*'The most obvious thing that historians miss if they disregard the fact that Maitland was a lawyer is the content of his mind.'*²²

Milsom's assertion captures succinctly the lawyer who existed within the author responsible for some of the most influential and enduring works of English legal history. This identity, the product of his legal education and practice, manifests in two 'lawyerly aspects': the first is the organisation of his works of legal history. Milsom

¹⁷ Michael Lobban notes that, even now, lawyers writing legal history tend to focus on the "history of legal doctrines whose contemporary manifestation they also teach," but historians "look not at the language and doctrines of those whose lives they teach in other courses." See Michael Lobban, "The Varieties of Legal History," *Clio@Thémis* 5 (2012), p. 1.

¹⁸ Maitland remarked in his obituary of Stubbs that he did not read Stubbs's *Constitutional History of England* because he had to, but because he found it interesting. Consequently, he perhaps "fell more completely under its domination than those who have passed through schools of history are likely to fall." Frederic William Maitland, "William Stubbs, Bishop of Oxford," in *Selected Historical Essays of F. W. Maitland*, ed. Helen Maud Cam (Cambridge University Press, 1957), p. 271.

¹⁹ James Campbell, "Stubbs, Maitland, and Constitutional History," in *British and German Historiography, 1750–1950: Traditions, Perceptions, and Transfers*, ed. Benedikt Stuchtey and Peter Wende (Oxford University Press, 2000), pp. 99–122.

²⁰ Campbell, "Stubbs, Maitland, and Constitutional History," p. 108.

²¹ Campbell, "Stubbs, Maitland, and Constitutional History," p. 108.

²² Stroud Francis Charles Milsom, "Pollock and Maitland: A Lawyer's Retrospect," in *The History of English Law: Centenary Essays on 'Pollock and Maitland'*, ed. John Hudson (Oxford University Press for the British Academy, 1996), p. 253.

argues that the lawyer ‘chooses between alternative perceptions of the same facts. Similarly, the lawyer legal historian is not so often concerned with single facts which can be proved or disproved as with the way in which combinations of facts were perceived and rationalised’; and here Maitland the lawyer was supremely convincing.²³

Maitland’s *magnum opus*, *The History of English Law Before the Time of Edward I* (hereafter referred to as *Pollock and Maitland*) embodies this approach.²⁴ Book II provides what ‘is still the standard picture’ of the birth of the common law, and is arranged doctrinally;²⁵ it follows a chronological sketch of early English legal history presented in Book I. Maitland states at the beginning of the first chapter of Book II that ‘we shall be primarily concerned with the evolution of legal doctrines, but shall try to illustrate by real examples some of the political and economic causes and effects of those rules that are under our examination.’²⁶ *Domesday Book and Beyond* is arranged thematically, and works retrogressively:²⁷ Essay I uses primarily eleventh-century material to write a history of England between 1066 and 1086, whilst Essay II interrogates how the circumstances of 1066 arose by analysing Anglo-Saxon law-codes and land-books, social structure, and administrative geography.²⁸

This arrangement facilitates the writing of internal doctrinal history, contrasting the usual interest of historians of Maitland’s age in writing narrative or ‘vertical’ histories.²⁹ Maitland did not claim to cover the whole field of economic and social development in the eleventh century in *Domesday Book*; instead, he approached it ‘mainly as a lawyer anxious to analyse the legal conceptions of that age.’³⁰ His interest in both *Pollock and Maitland* and *Domesday Book* is to understand legal development; historical detail is essential because of the ‘variety and lack of determinacy of legal development.’³¹ This is the legal history of undergraduate law courses, written as often by lawyers as by historians.³² The question of to whom this approach may be attractive emerges: tracing the history of legal concepts aligns with positivist jurisprudence, which is largely unhistorical and ‘more concerned with identifying valid rules than debating their age.’³³ It is a means to an end for lawyers, providing a more rigorous understanding of a modern legal concept; there is little desire to understand the past on its own terms or for its own sake, but instead only to inform the needs of the present. An irony here emerges, that this is the criticism Maitland levels at lawyers who might undertake legal history.

The second ‘lawyerly aspect’ of Maitland’s work is his emphasis on the importance of correctly interpreting

²³ Milsom, “Pollock and Maitland: A Lawyer’s Retrospect,” p. 254. Whilst this could be argued to be true of historians too, Maitland’s lack of professional historical training suggests that this approach emerges from his legal background.

²⁴ Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I*, 2 vols. (Liberty Fund, 2009), reprint of the 2nd ed., 1898. Hereafter *Pollock and Maitland*. Maitland authored all but Chapter II of Book I, “Anglo-Saxon Law,” so the work provides invaluable insight into Maitland’s legal-historical scholarship; Pollock’s influence is widely recognised as minimal.

²⁵ John Hudson, *The Formation of the English Common Law: Law and Society in England from the Norman Conquest to Magna Carta* (Longman, 1996), p. 19.

²⁶ Pollock and Maitland, *History of English Law*, vol. 1, p. 210.

²⁷ Frederic William Maitland, *Domesday Book and Beyond: Three Essays in the Early History of England* (Cambridge University Press, 1996), reprint of the 1987 ed. Hereafter *Domesday Book*.

²⁸ James Clarke Holt, “Foreword,” in Frederic William Maitland, *Domesday Book and Beyond: Three Essays in the Early History of England* (Cambridge University Press, 1996), p. v. Essay III deals with the issue of the Hide, and is of little relevance to the argument.

²⁹ David M. Rabban, *Law’s History: American Legal Thought and the Transatlantic Turn to History* (Cambridge University Press, 2012), p. 384; Milsom, “Pollock and Maitland: A Lawyer’s Retrospect,” p. 254.

³⁰ Fisher, *Frederic William Maitland*, p. 91.

³¹ John Hudson, “Maitland and Austin: Legal History and Legal Thought in the Late Nineteenth Century,” in *Law and Authority in British Legal History, 1200–1900*, ed. Mark Godfrey (Cambridge University Press, 2016), p. 322.

³² David Ibbetson, “What Is Legal History a History Of?,” in *Law and History: Current Legal Issues 2003, Volume 6*, ed. Andrew Lewis and Michael Lobban (Oxford University Press, 2004), p. 34.

³³ Michael Lobban, “Introduction: The Tools and the Tasks of the Legal Historian,” in *Law and History: Current Legal Issues 2003, Volume 6*, ed. Andrew Lewis and Michael Lobban (Oxford University Press, 2004).

legal terminology. Unwilling to disregard the language of the people and laws he was studying, he sought not single definitions or a definite statement of proper usage but instead acknowledged the flexibility and variation of the meaning of terms.³⁴ The components of this ‘lawyerly aspect’ are twofold. First, he was concerned with understanding the origins of legal vocabulary and their implications. Maitland argues that it would be a futile endeavour to attempt to express a doctrine using only English words, as the language does not have the requisite resources to convey the nuances of a concept, as compared to German, which can present Roman law in genuinely German words.³⁵ The influence of the French language on English legal vocabulary is, Maitland argues, considerable. He follows this with an extensive account of the history of the Latin terms in English law.³⁶ The noteworthy aspect that emerges from Maitland’s focus on the languages of law is the importance of understanding the nuances of legal terminology, both in their specific meanings and in the ways terms in different languages may refer to similar but not identical concepts, instruments, or categories of men. The plurilingual nature of post-Conquest England naturally led to a legal system characterised by the same. Understanding the terminology of Anglo-Saxon law adds a further element which it is necessary to understand to write a history of mediaeval English law.

Maitland’s legal education equipped him well to grapple with the patchwork of languages in use, even though it did not help him understand the languages themselves: Identifying and situating legal terms in their appropriate context is not dissimilar to a lawyer identifying the facts of a case most pertinent to a legal principle; nor are grasping their significance in relation to other terms, assessing coherence or lack thereof between terms in different languages, and determining their relevance to a particular situation.

The second part of this ‘lawyerly aspect’ emerges from the first: interpreting technical legal terms is necessary to write the internal history of law and evaluate the consequences of doctrinal developments on wider historical themes. Essay I of *Domesday Book* opens with a warning that ‘we ought not to look to Domesday Book for a settled and stable scheme of technical terms.’³⁷ Maitland instead describes the legal language of late mediaeval England as one in which French and English terms are ‘rudely intermixed’.³⁸ Ambiguity and uncertainty sometimes emerge: for example, ‘we cannot tell how the English jurors would have expressed the distinction between *bordarii* and *cotarii*, for while the *cot* is English, the *borde* is French.’³⁹ Similarly, Maitland’s analysis of the distinction between *servus* and *villanus* illustrates both the complexities of legal terminology, and why Maitland the lawyer was well-placed to write such a history: in numerous entries across counties in Domesday Book, *servi* are kept separate from *villani*, *bordarii*, and *cotarii*; nonetheless, it is not possible to say that the *villanus* has a different status from the *bordarius*.⁴⁰ The *Leges Henrici Primi* categorises both under *villani*, and refers to all who are not *servi* but are not of noble status by the same term.⁴¹ Maitland’s forensic scrutiny of these sources appreciates the fluid nature of the categories of men in the years after the Conquest; he seeks not to

³⁴ Hudson, ‘Maitland and Austin,’ p. 317.

³⁵ Pollock and Maitland, *History of English Law*, vol. 1, p. 58.

³⁶ Pollock and Maitland, *History of English Law*, vol. 1, pp. 59–66.

³⁷ Maitland, *Domesday Book and Beyond*, p. 8.

³⁸ Maitland, *Domesday Book and Beyond*, pp. 8–9.

³⁹ Maitland, *Domesday Book and Beyond*, p. 39.

⁴⁰ Maitland, *Domesday Book and Beyond*, p. 39.

⁴¹ Maitland, *Domesday Book and Beyond*, p. 39.

superimpose rigid categories where they did not exist, but instead to appreciate the situation as it was through interrogation of the available material. His legal training heightened his sensitivity to nuances within and distinctions between vague legal concepts, enabling him to see how these could have informed legal relationships and affected doctrinal substance.

Maitland's extensive analysis of the meaning of *sake* and *soke* suggests the same: he starts by considering the two terms, remarking that *soke* 'is by far the commoner; indeed we hardly ever find *sake* except in connection with *soke*, and when we do, it seems just an equivalent for *soke*.'⁴² He rigorously analyses the meaning of *sake* and *soke* before turning to his main interest, the development of jurisdiction by 1086. This conceptual interrogation is an effective prelude which precedes the rich fugue discussing the concepts in practice – the argument Maitland advances about the intricacies of and contexts in which the concepts are relevant depends to a large extent on a clear definition of the terms. Maitland's legal education gave him an understanding of procedure and jurisdiction, which he applies to his task of reconstructing mediaeval jurisdiction and understanding the doctrinal evolution of *sake* and *soke*.

These 'lawyerly aspects' of Maitland's work underlie his presentation of the mediaeval English common law as organically evolving. David Rabban argues that Maitland 'often conveyed his evolutionary thought through metaphors of organic growth, portraying a continuous process of national development, often tied to race, from early origins to maturity.'⁴³ Maitland's sustained analysis of doctrinal development in *Pollock and Maitland* illustrates this. For example, the courts of the twelfth century, Maitland observes, have varied roots – the king, the church, feudal tenure, ancient communities.⁴⁴ These courts maintain different jurisdictions, emerging from the division of England into counties, further divided into hundreds, then into vills or townships.⁴⁵ Maitland argues that as these courts were the basis of community organisation, it is necessary 'to describe the nature of these communities and to consider why some of them are, whilst others of them are not, attaining personality.'⁴⁶

Take the county and its court: the term *comitatus* refers both to persons who inhabit the land and to the judicial assembly. The whole county had convened routinely since before the Conquest and, from the early twelfth century, on occasions of a visit by a royal justice in eyre, although it is unclear whether these were specially summoned courts.⁴⁷ The community, therefore, affects the function of the court. The sheriff sits in routine meetings of the court as its president; his appointment is royal, and he is directly accountable to the Exchequer.⁴⁸ Maitland asserts that twelfth-century sheriffs were great men with several functions, some of which were judicial, although these functions did not extend to making legal judgments; however, these powers were gradually declining by the beginning of the thirteenth century, and by the end of that century 'we see the germs of an institution which is destined to grow at his expense, the knights assigned to keep the peace of the county whose

⁴² Maitland, *Domesday Book and Beyond*, p. 84.

⁴³ Rabban, *Law's History*, p. 384.

⁴⁴ Pollock and Maitland, *History of English Law*, vol. 1, p. 513.

⁴⁵ Pollock and Maitland, *History of English Law*, vol. 1, p. 514.

⁴⁶ Pollock and Maitland, *History of English Law*, vol. 1, p. 513.

⁴⁷ Pollock and Maitland, *History of English Law*, vol. 1, pp. 521–22. Maitland does not explicitly date this development, nor does he develop the process by which the court was convened for justices in eyre: see John Hudson, *The Oxford History of the Laws of England*, vol. 2, 871–1216 (Oxford University Press, 2012), pp. 276–80, for historical contextualisation.

⁴⁸ Pollock and Maitland, *History of English Law*, vol. 1, p. 519. The justice in eyre would preside over cases when present; this need not be developed further for the present purpose but is nonetheless an important observation.

successors will be justices of the peace.’⁴⁹ The metaphor of organic growth that Rabban identifies is present here: the reference to ‘germs of an institution’ suggests that no moment can be identified as that at which the system of justices of the peace supplanted the sheriff; instead, the system evolved organically and gradually as justice became increasingly centralised under the king’s jurisdiction. This notion corresponds to the theoretical unity present in *Bracton*, that all temporal justice is the king’s: Maitland concedes that *Bracton* does not elucidate the extent to which reality reflected theory, but that ‘the assertion is important... it has been making itself good as against other principles which in part were older, in part were newer.’⁵⁰ Maitland’s legal education and experience again facilitate this argument, enabling the use of legal sources such as *Bracton* which may be inaccessible to an individual without developed legal knowledge; moreover, Maitland’s understanding of modern legal procedure and jurisdiction gained through this equipped him to interpret and understand technical mediaeval legal sources, as well as to apply the theory expounded therein to the legal records detailing the actions of courts. He did this, however, aware that he should not project on the past the needs of the present, separating himself from the caricature of the modern lawyer presented in his inaugural lecture.

Matters of procedure, Maitland argues, and their relationship to developments in the law, are central to both law and legal history:⁵¹ the study of the mediaeval forms of action, for example, would enable a work which analyses the conceptions underpinning various aspects of the law.⁵² Maitland’s emphasis on procedure underscores the importance he attached to its influence on the development of the common law. The growth of the writ system in England serves as a lucid example, about which Maitland remarks that ‘when we boast of the rule of law in England... we shall do well to remember that the rule of law was the rule of writs.’⁵³ He presents this as an evolving system, with the chancery issuing writs ‘one by one’.⁵⁴ In the age of Glanvill, law was not made through legislative effort but ‘rather by decisions of the courts and by writs penned in the chancery.’⁵⁵ Henry II’s legal reforms, according to Maitland, were administrative, and have left little documentary evidence.⁵⁶ Writ issuing to those who believed they had suffered an injustice increased rapidly during the reign of Henry III, enabling them to have their complaint heard before the court.⁵⁷ The writ system’s growth was more rapid than the development of the sheriff’s role in the county court, with Maitland attributing ‘the age of rapid growth’ of the writ system to the period between 1154 and 1272.⁵⁸ The latter, he concludes, is the time by which ‘the law of the king’s court has become the common law.’⁵⁹

The evolution of the writ system is not, however, a linear process, nor are the forms of action ‘the outcome of a classificatory process that has been applied to pre-existing materials. They are institutes of the law; they are – we say it without scruple – living things.’⁶⁰ Maitland considers the last years of Henry III’s reign to be the ‘golden

⁴⁹ Pollock and Maitland, *History of English Law*, vol. 1, p. 519.

⁵⁰ Pollock and Maitland, *History of English Law*, vol. 1, p. 514.

⁵¹ Hudson, “Maitland and Austin,” p. 304.

⁵² Rabban, *Law’s History*, p. 392.

⁵³ Pollock and Maitland, *History of English Law*, vol. 2, p. 561.

⁵⁴ Pollock and Maitland, *History of English Law*, vol. 2, p. 557.

⁵⁵ Pollock and Maitland, *History of English Law*, vol. 1, pp. 115, 149.

⁵⁶ Pollock and Maitland, *History of English Law*, vol. 1, p. 149.

⁵⁷ Pollock and Maitland, *History of English Law*, vol. 1, p. 174.

⁵⁸ Pollock and Maitland, *History of English Law*, vol. 1, p. 174.

⁵⁹ Pollock and Maitland, *History of English Law*, vol. 1, p. 203.

⁶⁰ Pollock and Maitland, *History of English Law*, vol. 2, p. 559.

age of the forms', as few of the writs that had been invented had fallen from use, but the 'common law's power of producing new forms was almost exhausted.'⁶¹ Each writ had its own rules, and it is in this that Maitland locates a key distinction between mediaeval and modern procedure: there is much to say about a specific action in the Middle Ages, but little to say about actions in general; the opposite is true of modern procedure.⁶² There are two noteworthy aspects here: first, the metaphor of organic growth is once again present, in that writs are 'living things'. This characterisation of writs reveals how Maitland approaches what he considers central to the mediaeval legal system. Further, it also resonates with the approach to legal history which Maitland describes in his inaugural lecture, that it is essential to understand specific details about procedure, at any one moment and as it evolved, to understand the development of substantive law.⁶³ This approach suggests that Maitland 'the lawyer' was not the sole author of these enduring works of legal history; his interest in the development of legal procedure does not align with his notion that the lawyer is only interested in what serves contemporary needs. Whilst his legal education and experience enabled his examination of mediaeval legal sources, he did not approach these necessarily with the intention and perspective of a lawyer.

Maitland's approach influenced and inspired much of the scholarship of future generations. Milsom extends Maitland's argument with regard to legal history as a whole, stating that 'the lawyer legal historian's version... must be consistent in itself and with all the known facts: but it does not normally depend on a single fact. Arguments focused on particulars do not necessarily work with generalisations, and the law is always a generalisation.'⁶⁴ Maitland's presentation of the development of procedure partly satisfies Milsom's prescription – it uses all the known facts, acquired from sources that Maitland expended considerable energy interrogating; however, the consistency extends only to the conclusion that each writ has its own function, and whilst many writs may intersect at points, connections between forms may be contrary to those which seem most natural to modern perception.⁶⁵ This is not a flaw, and is consistent with Maitland's approach: he knew the laws, procedures, and thinking of the twelfth and thirteenth centuries, but would not make generalisations if the sources did not suggest that such a clear statement reflected the reality.⁶⁶ Hudson's observation that for Maitland 'historical detail and historical process could be crucially connected' captures Maitland's presentation of procedure as evolutionary more convincingly than Milsom's.⁶⁷ Milsom may accept this, but would likely see it not as a mode of thinking, but simply as a mode of presenting an argument. This is the focus of Section II.

2. Maitland: the 'Lawyer-Historian'

'History involves comparison, and the English lawyer who knew nothing and cared nothing for any

⁶¹ Pollock and Maitland, *History of English Law*, vol. 2, p. 562.

⁶² Pollock and Maitland, *History of English Law*, vol. 2, p. 560.

⁶³ Rabban, *Law's History*, p. 405.

⁶⁴ Milsom, "'Pollock and Maitland': A Lawyer's Retrospect," p. 256.

⁶⁵ Pollock and Maitland, *History of English Law*, vol. 2, p. 597.

⁶⁶ Fisher, *Frederic William Maitland*, p. 78.

⁶⁷ Hudson, "Maitland and Austin," p. 307.

*system but his own hardly came in sight of the idea of legal history.*⁶⁸

Maitland's emphasis on the importance of comparison has already been sketched in the introduction, but this remark from his inaugural lecture provides a sensible point of departure to analyse how he employs it in his works of legal history. Maitland uses this method not simply to highlight similarities or divergencies, but to argue why the English common law developed distinctively from Continental legal systems. The main discussion is twofold: first, Maitland's use of comparison to argue why there was no reception of Roman law in England at two moments when this might have been possible, the twelfth and the sixteenth centuries; second, Maitland's broad discussion about the divergence between practices in England and on the Continent, focusing on the development of the jury as an English peculiarity and his argument that feudalism was not a monolithic European phenomenon, as feudal law in England cannot be held to be distinct from the ordinary law of the land.⁶⁹

There is an important distinction to make between 'comparison' as a method of historical inquiry and 'comparative history' as a discipline: the former has long been employed in scholarship about legal developments, particularly between common law and civil law;⁷⁰ the latter is more complex to define and continues to emerge and develop as a discipline.⁷¹ Maitland states in *Pollock and Maitland* that he will make considered but limited use of comparative legal history, aligning with the sentiment of his inaugural lecture that the things that are to be compared must first be known in isolation.⁷² He is primarily concerned with writing the legal history of England and employs comparison to achieve this – this is the focus of the section.

Before embarking upon this discussion, Maitland's emphasis that law and legal development should be understood on their own terms must be considered. He lauds the vast quantities of written legal records available for interrogation in the Plea Rolls and Year Books as the 'most glorious store of material for legal history that has ever been collected in one place.'⁷³ He writes in the introduction to volume I of the Year Books of Edward II that:

*'[H]ave we not in these ancient reports too much logic and too little life? On the contrary, we should claim that on behalf of the Year Books that, when we consider that they were written by mediaeval lawyers for mediaeval lawyers, they show us a marvellous deal of the play of those moral and economic forces of which legal logic is the instrument, and often, if we may so say, the reluctant instrument... indeed it will some day seem a wonderful thing that men once thought they could write the history of mediaeval England without using the Year Books.'*⁷⁴

⁶⁸ Maitland, "Why the History," p. 488.

⁶⁹ Pollock and Maitland, *History of English Law*, vol. 1, pp. 213–14.

⁷⁰ John Hudson and William Eves, "Introduction: Situating, Researching, and Writing Comparative Legal History," in *Common Law, Civil Law, and Colonial Law: Essays in Comparative Legal History from the Twelfth to the Twentieth Centuries*, ed. William Eves, John Hudson, Ingrid Ivarsen, and Sarah B. White (Cambridge University Press, 2021), p. 2. Sustained treatment of "comparative history" is beyond the remit of the present analysis; however, it is important to note that Maitland did not purport to write history of this genre.

⁷¹ Hudson and Eves, "Situating, Researching, and Writing Comparative Legal History," pp. 4–8.

⁷² Maitland, "Why the History," p. 489.

⁷³ Maitland, "Why the History," p. 496.

⁷⁴ Frederic William Maitland, "The Year Books and Their Origin," in *Frederic William Maitland, Historian: Selections from His Writings*, ed. Robert Livingston Schuyler (University of California Press, 1960), pp. 241–42. One must question whether Maitland perceived the absence of Year Books for the period covered by *Pollock and Maitland* as a weakness, as the first records begin in 1268, near the end date of the work.

Maitland's appreciation of the value of the Year Books is clear: they allow legal historians to reconstruct the external history of law by examining social factors. They also facilitate attempts to understand mediaeval legal thinking on its own terms, given that they were written by lawyers, for lawyers. James Campbell's observation that Maitland saw 'the history of English law as one of complex intellectual development in which progress, the contribution of successive generations of men, could be demonstrated' resonates:⁷⁵ the 'life' of mediaeval legal records is of interest to Maitland, both for what they can reveal about the internal history of the common law and for their value in constructing a broader history of England.

Maitland's approach to these sources, however, was not solely lawyerly: he suggests that the insular approach by lawyers to English law, complemented by a 'consecrated ignorance of French and German law', is the reason that its history has not been written.⁷⁶ Whilst English lawyers boast of 'the independence and extreme antiquity of their system,' they do not attempt to understand its development.⁷⁷ Maitland's importance as a historian emerges here: by understanding the historical development of other legal systems, meaningful work can be done on English legal history. Maitland was not alone in his approach to historical sources: prominent legal contemporaries of Maitland such as Sir Frederick Pollock and Oliver Wendell Holmes Jr shared this approach, particularly in their historical works.⁷⁸ Largely, however, they were concerned with the internal, doctrinal development of the law.

Similarly, Maitland's approach to the thirteenth-century treatise known as *Bracton*, which he characterises as 'the crown and flower of mediaeval jurisprudence', and the compilation known as *Bracton's Notebook* reflects his emphasis on historical contextualisation.⁷⁹ He is conscious of Bracton's self-identified purpose in the treatise, that 'he has told us how he set himself to peruse the ancient judgments of the just because his ignorant and uneducated contemporaries were misrepresenting the law.'⁸⁰ Maitland notes that the author of *Bracton* 'had not our modern notions of "authority"';⁸¹ similarly, the nineteenth-century conception of 'case law' was far from his mind.⁸² Nonetheless, Maitland does describe the cases compiled in *Bracton's Notebook* as 'case law', although he comments on how infrequently a typical mediaeval writer cites a case.⁸³ This suggests that Maitland found value in both thirteenth-century sources, but he was careful not to realise the concern he expresses in his inaugural lecture and project the needs of the present on the material. Additionally, he was aware of the limitations of the treatise and stressed that it is necessary to distinguish between Bracton's statement of thirteenth-century law and his cosmopolitan jurisprudence.⁸⁴ It was, in brief, essential to interrogate the sources on their terms.

⁷⁵ Campbell, "Stubbs, Maitland, and Constitutional History," pp. 110–11.

⁷⁶ Maitland, "Why the History," pp. 489–90.

⁷⁷ Frederic William Maitland, "English Law and the Renaissance," in *Selected Historical Essays of F. W. Maitland*, ed. Helen Maud Cam (Cambridge University Press, 1957), pp. 145–46.

⁷⁸ See Oliver Wendell Holmes Jr., *The Common Law* (Belknap Press of Harvard University Press, 2009), in particular lecture 1, "Early Forms of Liability," pp. 3–36.

⁷⁹ See Paul Brand, "The Age of Bracton," in *The History of English Law: Centenary Essays on 'Pollock and Maitland'*, ed. John Hudson (Oxford University Press for the British Academy, 1996), pp. 65–89.

⁸⁰ Pollock and Maitland, *History of English Law*, vol. 1, p. 162.

⁸¹ Pollock and Maitland, *History of English Law*, vol. 1, p. 162.

⁸² Pollock and Maitland, *History of English Law*, vol. 1, p. 187.

⁸³ Frederic William Maitland, *Bracton's Note Book: A Collection of Cases Decided in the King's Courts during the Reign of Henry the Third*, 3 vols. (C. J. Clay & Sons, 1887), p. 11.

⁸⁴ Pollock and Maitland, *History of English Law*, vol. 1, p. 189.

The resistance of the English common law to the reception of Roman law has been well treated in historical scholarship. Maitland contributed to this debate, arguing that the common law became increasingly insular. In constructing this argument, he identifies two junctures at which there was a serious possibility of Roman law supplanting the English common law. First, the period of civil war in the mid-twelfth century, when the common law was still nascent—a moment at which ‘the future of English law looks very uncertain. If English law survives at all, it may break into a hundred local customs, and if it does so, the ultimate triumph of Roman law is assured.’⁸⁵ Second, the sixteenth century, when Roman law appealed to Tudor monarchs, particularly Henry VIII, who resolved to be Head of the Church as well as of State, as a way of ensuring stronger governance.⁸⁶

Maitland says that ‘of all the centuries the twelfth is the most legal. In no other age, since the classical days of Roman law, has so large a part of the sum total of intellectual endeavour been devoted to jurisprudence.’⁸⁷ This he applies not only to English law but also to the development of canon law and the treatment of Roman law as a ‘living law’, entwined with the continuity of the empire.⁸⁸ In part, this is a consequence of the drastic increase in the number of available manuscripts containing classical texts. Roman law was studied in England in the twelfth century, and a school of Roman law flourished at Oxford during the thirteenth century.⁸⁹ Critically, though, this scholarly treatment of Roman law ‘found a small, homogenous, well conquered, much governed kingdom, a strong, a legislating kingship’ which protected the status of the English common law.⁹⁰

Maitland emphasises the English situation through comparison: in Italy, the influence of Justinian’s works was secured by the theoretical continuity of the empire; it was desirable to appeal to the classical tradition to anchor its authority in the contemporary context. But this was not the case for England: there was no group who had lived a vulgar form of an old law since lost, and would thus seek their law in the newly rediscovered Roman texts.⁹¹ Similarly in France, the Roman texts ‘gave their powerful aid to the centripetal and monarchical forces’ during the attempt to reconstitute a national unity.⁹² Maitland’s presentation of the English political context demonstrates the differences between the unity created by the strength of the Crown as an entity in England and the instability resulting from protracted fragmentation on the Continent. This use of comparison underscores why Roman law did not supplant the English common law: by highlighting certain differences between England and other territories, the unique situation in England is made clear; it is more convincing than an argument which simply describes the situation in England, but fails to illustrate why this is unique. Maitland’s argument is inherently linked to its historical context; he not only analyses its internal history, focusing on doctrinal development, but also examines the effect of external factors. This is outside the remit of the lawyer, as defined by Maitland in his inaugural lecture; it expands the insular approach assigned to the lawyer, employing historical inquiry as an analytical tool to enable better understanding of legal history.

⁸⁵ Pollock and Maitland, *History of English Law*, vol. 1, p. 108.

⁸⁶ John Hudson, *F. W. Maitland and the Englishness of English Law* (Selden Society, 2009), p. 13. Cited with thanks to Professor Hudson for providing a transcript of this lecture.

⁸⁷ Pollock and Maitland, *History of English Law*, vol. 1, p. 88.

⁸⁸ Pollock and Maitland, *History of English Law*, vol. 1, pp. 89–90.

⁸⁹ Pollock and Maitland, *History of English Law*, vol. 1, p. 100.

⁹⁰ Pollock and Maitland, *History of English Law*, vol. 1, p. 28.

⁹¹ Pollock and Maitland, *History of English Law*, vol. 1, p. 28.

⁹² Pollock and Maitland, *History of English Law*, vol. 1, p. 28.

Maitland similarly compares English legal education with instruction methods elsewhere, arguing in his 1901 Rede Lecture that the ‘schools of national law’ had ‘marked off England from the rest of the world’ and resisted the intrusion of Roman law.⁹³ Concluding the lecture with a reference to the success of these institutions, Maitland expressed the hope that the Inns of Court, ‘proud of a past that is unique in the history of the world’, might ‘become fully conscious of the heavy weight of responsibility that was assumed when English law schools saved, but isolated, English law in the days of the Reception.’⁹⁴ This outcome was, however, far from certain. Maitland highlights that, in the sixteenth century, Roman law was supplanting German law in Germany, and Henry VIII had founded professorships at Oxford and Cambridge to encourage the study of civil law.⁹⁵ ‘Codification was in the air’ by Edward VI’s reign, with calls both in France and in Germany ‘for a new Justinian’.⁹⁶ He speculates whether the Council, the Star Chamber, and the Court of Requests in England might have done ‘the Romanising work that was done in Germany by the Imperial Chamber Court’ and observes, although without development, that James V of Scotland was contemporaneously establishing the College of Justice.⁹⁷ Maitland employs the comparative approach detailed in his inaugural lecture in this discussion, and finds similarities between the government institutions of England and other countries. Although comparison in this vein is important, Maitland’s comparison between England and other legal traditions to identify crucial differences is of far more significance. His identification of the Inns of Court as a uniquely English entity allows him to highlight a key difference between England and other countries and argue that they insulated the common law from Roman influence.

Using comparison, Maitland argues that the development of the jury system is a peculiarity of mediaeval England.⁹⁸ He describes trial by jury as ‘that which modern Englishmen will be apt to think the most distinctive.’⁹⁹ Maitland posits that ‘what made it possible was the subjection of the England of the Angevin time to a strong central government, the like of which was to be found in no other land.’¹⁰⁰ By outlining the practices which preceded the jury trial, then the divergent developments in England and on the Continent, Maitland identifies a similarity between English and canonical procedure in the eleventh and twelfth centuries, in that, amongst others, both employed oath-helpers who could help the accused to ‘swear away’ the charge.¹⁰¹ By the end of the twelfth century, however, these similarities faded, and the introduction of the inquisition in 1199 marked a clear rupture.

As with the argument about the lack of reception of Roman law in England, comparison is more useful for understanding why England did not adopt this new procedure, rather than to draw parallels. In England, Maitland

⁹³ Maitland, “English Law and the Renaissance,” p. 145. Maitland here refers to the Inns of Court: for historical contextualisation, see Wilfrid R. Prest, *The Inns of Court under Elizabeth I and the Early Stuarts, 1590–1640* (Longman, 1972) and the bibliography therein. Maitland’s argument and conclusion have been refuted (see John Hamilton Baker, *The Oxford History of the Laws of England, vol. 6, 1483–1558* (Oxford University Press, 2003), pp. 3–13, for extensive discussion of Maitland’s arguments); nevertheless, the lecture effectively illustrates Maitland’s use of comparison.

⁹⁴ Maitland, “English Law and the Renaissance,” p. 148.

⁹⁵ Maitland, “English Law and the Renaissance,” pp. 137–38.

⁹⁶ Maitland, “English Law and the Renaissance,” p. 143.

⁹⁷ Maitland, “English Law and the Renaissance,” p. 142.

⁹⁸ See Pollock and Maitland, *History of English Law*, vol. 1, pp. 119–20, for Maitland’s discussion of the jury’s Frankish origins.

⁹⁹ Pollock and Maitland, *History of English Law*, vol. 1, p. 117.

¹⁰⁰ Pollock and Maitland, *History of English Law*, vol. 2, pp. 629–30.

¹⁰¹ Pollock and Maitland, *History of English Law*, vol. 2, p. 654. There is divergence in the practical use of oath-helpers in English and canonical procedure, particularly their use by the plaintiff to deny an affirmative plea (see Pollock and Maitland, *History of English Law*, vol. 2, p. 632). The comparison is nevertheless useful to demonstrate a similarity between the two procedural traditions.

writes, ‘the escape was narrow’ as the system, in which the prosecution of offences was left to the grieved party, was insufficient.¹⁰² He identifies the genesis of a new inquisitory procedure, placed alongside the existing modes of proof; however, the reforms of Henry II were introduced before the development of the canonical inquisition, and the English procedure gradually became accusatory.¹⁰³ Maitland draws upon Norman procedure to illustrate this uniquely English development: the Norman process of the ‘jury’ entailed secret questioning of twenty-four men who might know the facts; the evidence collected was shared in public, and each witness was asked whether he maintained his statement. This is the basis of divergence: Maitland argues that this is not found in England and that the *iurea patriae* ‘was at one time a plastic institution which might take different forms in two sister lands.’¹⁰⁴ Maitland considers comparison vital to understand these separate developments; he uses it to strengthen the argument that the jury is an English peculiarity in the late Middle Ages, demonstrably absent elsewhere on the Continent. His remark that ‘history involves comparison’ rings true, and his emphasis on historical contextualisation is evident. It is, however, an incomplete picture.

An extended discussion of the modes of proof follows the Norman comparison, in which Maitland directly compares English and continental perceptions of crime and methods of procedure that led to the respective procedural developments. By so doing, Maitland traces the internal history of proof, again embodying the interests typical of a lawyer. This comparison is the basis of Maitland’s argument about why trial by jury became standard procedure in England; he not only analyses the origins of the jury but also rejects any simple causal deterministic explanation.¹⁰⁵ Maitland’s concluding remarks capture this succinctly:

‘Foreign criminalists in the middle ages and in later times are for ever dwelling on the weakness of the law, and on the difficulty of obtaining convictions unless the state takes to itself every advantage in its struggle with the prisoner. Of this we hear little in England, though we can see that an enormous quantity of crime went unpunished. Our law seems to think itself quite strong enough. This difference was in great measure due to the absence of any ‘theory of legal proofs’ such as that which hampered our neighbours.’¹⁰⁶

Campbell’s argument, that Maitland considered it the historian’s duty to recover the thoughts of common men, is evidenced by Maitland’s comments about contemporaries’ perception of the strength of their law.¹⁰⁷ The interest in the internal history of theories of proof, however, resembles the ‘lawyerly’ concern with doctrinal development discussed. It concerns the contextualisation of twelfth-century procedure, and requires an understanding of emerging canonical jurisprudence, again tasks best tackled by the historian with a grasp of law; the historian pure has not the requisite tools. The ‘lawyer-historian’ again must be credited.

Maitland employs comparative analysis to explain why English law was never codified. He says that

¹⁰² Pollock and Maitland, *History of English Law*, vol. 2, p. 655.

¹⁰³ Pollock and Maitland, *History of English Law*, vol. 2, p. 655.

¹⁰⁴ Pollock and Maitland, *History of English Law*, vol. 2, p. 656.

¹⁰⁵ Hudson, *F. W. Maitland and the Englishness of English Law*, p. 8.

¹⁰⁶ Pollock and Maitland, *History of English Law*, vol. 2, p. 657.

¹⁰⁷ Campbell, “Stubbs, Maitland, and Constitutional History,” p. 110.

German codification is ‘among the great things that he [the German] has done’, that ‘he has set his legal house in order; he has swept away the rubbish into the dustbin; he has striven to make his legal system rational, coherent, modern, worthy of his country and our century.’¹⁰⁸ He attributes the desire for and success of German codification to ‘special reasons’, by which he means those that ‘cannot move us in England, though as a matter of fact they have at various times come into play in most European countries.’¹⁰⁹ He argues that as England ‘from a very remote time’ had had a uniform law, established in the twelfth and secured in the thirteenth century, there was little need to codify the law;¹¹⁰ conversely, the patchwork nature of the German legal system, as had existed for centuries, made codification desirable.¹¹¹ Maitland argues that the ‘past history of Germany had made German jurisprudence a highly controversial science.’¹¹² Any attempt to codify German law would have to balance competing schools of jurisprudence; such an endeavour in England would not have to take a side as there was one law common to the whole country.¹¹³

Maitland’s use of comparison here is not essential to make the argument as to why English law was never codified but is useful to strengthen it. He contrasts the nature of legal development on the Continent and in England by comparing their respective political contexts: English law had been centralised and unified during the reign of Henry II by a permanent court of professional judges, frequent visits by itinerant judges to other courts, and various procedural developments;¹¹⁴ Germany had no such centralisation during the Middle Ages, and there remained three or four legal systems after the unification of 1870, each with its own territory.¹¹⁵ Maitland’s approach here resembles that expressed in his inaugural lecture: to understand why England never codified her law, he explores the circumstances in which other countries did codify their law. By making this comparison, Maitland can assert that England’s early centralisation of justice, unique in Europe, contributed significantly to the nature of English legal development and the lack of desire for codification. This argument underscores effectively the notion of the ‘lawyer-historian’ as it combines the skills of each approach: Maitland engages with jurisprudential arguments about the question of codification, a task for which his legal experience will have been undoubtedly useful; his understanding of the broader English and German political contexts, which is the basis of his comparison, aligns with the approach of the nineteenth-century historian.¹¹⁶ These approaches fuse, and thus the ‘lawyer-historian’ is again responsible for the work.

Maitland employs comparison to construct his arguments about English legal history; he uses this method not simply to highlight similarities or divergencies, but to argue why English common law developed distinctly from Continental systems by resisting the reception of Roman law and the adoption of the inquisition. His rejection of feudalism as a monolithic European phenomenon similarly relies on a key difference between the

¹⁰⁸ Frederic William Maitland, “The Making of the German Civil Code,” in *The Collected Papers of Frederic William Maitland*, *Downing Professor of the Laws of England*, ed. Herbert Albert Laurens Fisher, vol. 3 (Cambridge University Press, 1911), pp. 475–76.

¹⁰⁹ Maitland, “Making of the German Civil Code,” p. 476.

¹¹⁰ Maitland, “Making of the German Civil Code,” p. 476.

¹¹¹ Maitland, “Making of the German Civil Code,” p. 478.

¹¹² Maitland, “Making of the German Civil Code,” p. 479.

¹¹³ Maitland, “Making of the German Civil Code,” p. 479.

¹¹⁴ Pollock and Maitland, *History of English Law*, vol. 1, p. 117. Maitland states in “The Making of the German Civil Code,” p. 476, that he will not go into “the geographical and historical causes... of the uniformity of mediaeval English law,” hence the reliance on *Pollock and Maitland*.

¹¹⁵ Maitland, “Making of the German Civil Code,” p. 478.

¹¹⁶ Hudson and Eves, “Situating, Researching, and Writing Comparative Legal History,” p. 9.

English doctrine of tenure and Continental land law traditions. Maitland's purpose is not to write comparative legal history, but instead he uses comparison to underscore his presentation of English common law as a peculiarity. He rarely departs from his principal concern of writing the legal history of England; even in broader works such as the *Constitutional History* and his Rede Lecture, the focus primarily remains on the exceptional development of English legal institutions.

Comparison is, for Maitland, both a method of and a tool for writing history, rather than the ultimate goal – his statement that his work is 'preliminary labour' as the 'first step towards an answer' suggests that he sought not to write broader comparisons of English and continental legal systems as an exercise in comparative history.¹¹⁷ Maitland's legal education and experience, in particular the 'lawyerly aspects' of his work identified in Section I, complement this: the approach of the lawyer and the tool of the historian are employed together, thus producing works of which the author is Maitland the 'lawyer-historian'.

Conclusion

*'The study of English legal history was revolutionised by his toil.'*¹¹⁸

Fisher's remark aptly conveys the legacy of F. W. Maitland in English historical scholarship: his conclusions have been challenged, but he remains universally admired.¹¹⁹ I have argued that Maitland's legal history needs to be understood through the lens of the dual identity of the author – that of the 'lawyer-historian' – as this significantly influenced his conception of history and methodology.

Maitland's legal experience distinctively manifests in his historical scholarship. The doctrinal organisation of his work and his emphasis on understanding legal terminology, which I have characterised as 'lawyerly aspects', are, I argue, the result of his legal education and practice. His presentation of English common law as a gradually evolving entity is similarly a product of his legal experience.

The discussion of Maitland as a 'lawyer-historian' develops this, arguing that characterising Maitland only as a lawyer fails to consider the historical aspects of his work. The second section analysed Maitland's use of comparison as a tool, focusing on his contextualisation of English law within broader European legal developments. I conclude that identifying Maitland as a historian, either instead of or as well as a lawyer, is an oversimplified and reductive dichotomy: Maitland's scholarship can only be fully appreciated by considering him as a 'lawyer-historian'.

Some 130 years after the publication of *Pollock and Maitland*, one would be forgiven for asking whether the most appropriate characterisation of Maitland deserves attention. Milsom remarked in his address at the unveiling of a memorial tablet for Maitland in 2001 that 'my tribute must be to the extraordinary man with whom

¹¹⁷ Rabban, *Law's History*, p. 395.

¹¹⁸ Fisher, *Frederic William Maitland*, p. 27.

¹¹⁹ Rabban, *Law's History*, p. 383.

I have argued for much of my life, not to the superhuman myth engulfing him.’¹²⁰ Baker, in his inaugural lecture after taking the same Chair as Maitland some 110 years later, acknowledges the extent to which scholars have benefited from Maitland’s work:¹²¹ his conclusions may have been challenged and revised, particularly by Milsom, whom Rabban identifies as Maitland’s ‘most important late-twentieth century critic’, but this does not diminish the value of his scholarship.¹²² Hudson says that Maitland’s work ‘is still the standard picture’ of the birth of the common law.¹²³

The ‘superhuman myth’ to which Milsom alludes refers partly to the reliance on and authority of Maitland’s publications in the first half of the twentieth century.¹²⁴ Maitland warned against historical orthodoxy, yet his work attained such status; historians in the following decades assumed his framework.¹²⁵ Maitland’s reputation as a historian partly sustains this, even now. Milsom argues that ‘historians have long sought to expunge the lawyer’:¹²⁶ the plaque unveiled categorises Maitland as ‘historian’, and G. R. Elton nominates him as the patron saint of historians.¹²⁷ Such characterisation perpetuates misunderstanding: all interested in mediaeval English legal history must engage with, supplement and refine Maitland’s work, whether they focus on his ‘lawyerly’ approach or his employment of historical comparison.

A scholar with extensive legal understanding, modern and mediaeval alike, and historical knowledge rivalled by few is a rarity; both influences deserve recognition. The epithet ‘lawyer-historian’ here emerges.

¹²⁰ Stroud Francis Charles Milsom, “Maitland,” *Cambridge Law Journal* 60, no. 2 (2001), p. 265.

¹²¹ John Hamilton Baker, “Why the History of English Law Has Not Been Finished,” *Cambridge Law Journal* 59, no. 1 (2000), p. 64.

¹²² Rabban, *Law’s History*, p. 384.

¹²³ Hudson, *Formation of the English Common Law*, p. 19.

¹²⁴ Milsom, “Maitland,” p. 269.

¹²⁵ John Hudson, “Milsom’s Legal Structure: Interpreting Twelfth-Century Law,” *Legal History Review* 59, nos. 1–2 (1991), p. 65.

¹²⁶ Milsom, “Maitland,” p. 267.

¹²⁷ Geoffrey Rudolph Elton, *F. W. Maitland* (Weidenfeld & Nicolson, 1986), p. 97.

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The Many Faces of the ‘Reasonable Businessman’: Has Commercial Common Sense Become a Judicial Vehicle for Normative Idealism in Scots Law?

By Canel Derya Paris Atik¹²⁸

Introduction

Lord President Dunedin once asserted: ‘commercial contracts cannot be arranged by what people think in their inmost minds. Commercial contracts are made according to what people say’.¹²⁹ Nonetheless, complications arise where the language of a contractual document, intended to give legal effect to the parties’ agreement, admits more than one possible interpretation. ‘Commercial common sense’ (CCS) is one of the interpretative tools employed by Scottish courts when ascertaining the intention of the contracting parties and is most prominently employed in the interpretation of commercial contracts.¹³⁰ Broadly, judicial employment of CCS involves consideration of the rival interpretations advanced by the respective parties, seeking to reach ‘a view as to which construction is more consistent with business common sense’.¹³¹ In other words, the court asks which party’s interpretation better reflects the commercial purpose and context of the parties’ agreement. It is only when one turns to the substantive foundations of CCS that the doctrine’s apparent coherence begins to fracture. The difficulty lies in identifying what ‘commercial sensibility’ means, and whether its composite principles are sufficiently common or determinate to guide judicial reasoning.

The article’s argument is developed in two stages. To commence, Part One traces the evolution of CCS’s purpose as a tool of contractual interpretation. It demonstrates that, while CCS was initially devised to assist in determining the parties’ objective intention, recent developments risk displacing that function. Authoritative Scottish cases such as *Grove v Cape* and *Ashtead v Granton* reveal an expanded conception of CCS, under which considerations of commercial fairness, equivalence and proportionality may inform the construction of commercial agreements. This development, it is argued, jeopardises CCS’s credibility as a doctrine originally concerned with ascertaining the parties’ commercial intention. Having outlined these judicial developments, Part One concludes that the judiciary has yet to articulate a stable normative framework by which CCS may be appraised, leaving CCS insufficiently settled to provide meaningful guidance to judges, solicitors or contracting parties.

Part Two then turns to the legal, jurisprudential and policy implications of this doctrinal instability. Central to this article’s argument is the distinction between two manifestations of CCS: a principled, intention-

¹²⁸ Law finalist at the University of Edinburgh (2026). I wish to thank the Editorial Board for their thoughtful engagement with this article throughout the pre-publication process. I also extend my sincerest gratitude to my dearest friend and peer, Aisha Marie Johannessen, for her meticulous and attentive feedback on earlier versions of this work. All errors that remain are my own.

¹²⁹ *Muirhead & Turnbull v Dickson* (1905) 7 F 686.

¹³⁰ Patrick Hodge, Lord Hodge, “Can Judges Use Business Common Sense in Interpreting Contracts?,” in *Comparative Contract Law: British and American Perspectives*, ed. Larry A. DiMatteo and Martin Hogg (Oxford University Press, 2015), p. 274.

¹³¹ *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 [11]–[12].

based formulation, which serves the discernment of the contract's commercial purpose, and a broader, values-based iteration, which risks venturing beyond interpretation into the prescriptive adjustment of contractual outcomes. Rather than advocating for the discontinuation of the doctrine, however, this article proposes that CCS be returned to its historic boundaries and confined to its narrower, interpretative function. That position is defended on the basis that such restoration promotes legal certainty and interpretative predictability and, most significantly, reinstates intention as the organising principle of contractual interpretation.

1. The Meaning and Purpose of Commercial Common Sense

1.1. Purpose, Origins and Deviations

In matters of contractual interpretation, the overarching objective of the judiciary is to identify the intention of the parties. The relevant legal position concerning contractual interpretation was comprehensively articulated by the UK Supreme Court in *Rainy Sky*, which has since been affirmed and adapted by the Inner House of the Court of Session (CSIH) in a series of Scottish cases, including *Grove v Cape*,¹³² *@SIPP v Insight*,¹³³ *Hoe v Andersen*,¹³⁴ *Ashtead v Granton*,¹³⁵ and *Paterson v Angelline*.¹³⁶ Seeking to ascertain the parties' objective intention, the interpretative exercise will involve a close examination of the language used by the parties, and will seek to discern:

*'what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant.'*¹³⁷

Beyond the language itself, relevant surrounding circumstances should be considered alongside the language. Where such an examination reveals two plausible interpretations, 'the court is entitled to prefer the construction which is consistent with business common sense and to reject the other'.¹³⁸ Thus, CCS must not be applied in all cases engaging contractual interpretation; rather, it is applied where the contractual language is objectively equivocal and, accordingly, admits more than one plausible interpretation.¹³⁹

CCS is therefore best understood as one among several interpretative tools available to the court, all of which serve the shared purpose of identifying the parties' objectively discerned contractual intention. Though articulated in the English context, Lord Steyn's reasoning in the House of Lords case of *Mannai Investment* clarifies judicial rationale for applying CCS, observing that:

¹³² *Grove Investments Ltd v Cape Building Products Ltd* [2014] CSIH 43 [9].

¹³³ *@SIPP Pension Trustees v Insight Travel Services Ltd* [2015] CSIH 91, 2016 SC 243 [17].

¹³⁴ *Hoe International Ltd v Andersen* [2017] CSIH 9, 2017 SC 313 [19].

¹³⁵ *Ashtead Plant Hire Co Ltd v Granton Central Developments Ltd* [2020] CSIH 2, 2020 SC 244 [12].

¹³⁶ *Paterson v Angelline (Scotland) Ltd* [2022] CSIH 33, 2022 SC 240 [21].

¹³⁷ *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900 [21].

¹³⁸ *Rainy Sky* (n 137) [21].

¹³⁹ *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 [17]–[18].

*[...] a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them.*¹⁴⁰

Thus, the concept of CCS was formulated to ensure that ‘semantic niceties’ would not be favoured at the expense of the parties’ true commercial intention.¹⁴¹ Historically, critics of an excessively literalist approach to contractual interpretation feared that an ‘over-refined and nitpicking semantic analysis’ might prejudice commercial agents and businessmen in the interpretation of their own contracts.¹⁴² This issue is pertinent given that, as opposed to businessmen themselves, it is judges and legal professionals who ultimately construe and juridically settle the meaning of a commercial contract. Furthermore, concerns were raised that a ‘pedantic lawyer’¹⁴³ might bypass the reasonable implications of commercial clauses, by focusing too closely on the linguistic minutiae at the expense of the broader aims of the commercial agreement. CCS provided a solution to this predicament. Where strict adherence to a literalist interpretative technique guided the interpreter toward a conclusion reflective of an ‘improbable and unbusinesslike intention’,¹⁴⁴ the interpreter of the ambiguous contract was entitled to prefer the commercially sensible interpretation, as the latter could be presumed to represent the intention of the parties more faithfully. Thus, the application of CCS sought to ensure that the contract would be construed alongside its contextual periphery, as well as against its commercial background,¹⁴⁵ to ensure that the commercial objectives of the agreement were adequately considered throughout the interpretative exercise. It is this restrained, intention-centred iteration of CCS that this article distinguishes from the more expansive and normatively charged form the doctrine has assumed in contemporary case law.

While a purpose-centric approach to the interpretative exercise may be favourable, contemporary adaptations of CCS no longer retain their footing in the discernible intentions or purposes devised by the parties. Cautioning against a judicial venture into the realm of contractual rectification, Mr Justice Briggs warned:

*‘The dictates of common sense may enable the court to choose between alternative interpretations [...] But this does not [...] subject the parties to the individual judge’s own notions of what might have been the most sensible solution to the parties’ conundrum.’*¹⁴⁶

This article contends that recent developments embody precisely this risk: rather than remaining anchored in the parties’ objectively ascertained intentions, CCS’s conceptual boundaries have increasingly been expanded so as to accommodate considerations of commercial fairness, cooperation and proportionality within the interpretative

¹⁴⁰ *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, 771A–B (Lord Steyn).

¹⁴¹ *Sinochem International Oil (London) Co Ltd v Mobil Sales and Supply Corp* [2000] 1 Lloyd’s Rep 339 [23] (Mance LJ), citing *Mitsui Construction Co Ltd v Attorney-General of Hong Kong* (1986) 33 BLR 1 (PC).

¹⁴² Neil Andrews, “Interpretation of Contracts and ‘Commercial Common Sense’: Do Not Overplay This Useful Criterion,” *Cambridge Law Journal* 76, no. 1 (2017), p. 42.

¹⁴³ *Jumbo King Ltd v Faithful Properties Ltd* (1999) 2 HKCFAR 279 [59] (Lord Hoffmann).

¹⁴⁴ *Sinochem International Oil (London) Co Ltd v Mobil Sales and Supply Corp* (n 141) [23] (Mance LJ), citing *Mitsui Construction Co Ltd v Attorney-General of Hong Kong* (n 141).

¹⁴⁵ *Ravennavi SpA v New Century Shipbuilding Co Ltd* [2007] EWCA Civ 58, [2007] 2 Lloyd’s Rep 24 [12] (Moore-Bick LJ).

¹⁴⁶ *Jackson v Dear* [2012] EWHC 2060 (Ch) [40] (Briggs J), affd *BMA Special Opportunity Hub Fund Ltd v African Minerals Finance Ltd* [2013] EWCA Civ 416 [24].

exercise. While the earlier approach derived legitimacy from its grounding in the parties' intention, the latter risks conferring excessive interpretative discretion on courts, thereby permitting the contractual bargain to be displaced by judicial assessments of commercial reasonableness. These developments will be considered in greater depth in the ensuing section, which examines the meaning of CCS in the Scottish context, and asks what, in contemporary case law, is understood to substantiate a commercially sensible contract.

1.2. The Meaning: CCS and its Substantive Framework

This section will demonstrate that, despite an abundance of authoritative case law, the judiciary remains divided as to the normative margins of CCS as a legal tool. A closer examination of leading cases reveals two principal ramifications of that indeterminacy. First, it has generated variation among the judicial approaches taken to the application of CCS. Second, it has facilitated the emergence of a broader substantive framework through which considerations of transactional fairness, proportionality, and equitable burden allocation may exert influence on the interpretative exercise. These developments are analysed further below.

a. *Grove v Cape* [2014]

The highly scrutinised case of *Grove v Cape* [2014]¹⁴⁷ concerned a dispute over the meaning of dilapidation provisions in a commercial lease.¹⁴⁸ The tenants contended that the relevant provision served to compensate the landlord in the event of a contractual breach, with respect to its severity and its resulting losses, whereas the landlord asserted that the clause provided for a fixed payment, irrespective of losses *actually* incurred.¹⁴⁹ Ultimately, the tenants' construction was upheld on the basis that it best accorded with CCS.¹⁵⁰

In delivering the opinion of the CSIH, Lord Drummond Young identified factors to be considered when determining whether an agreement may be characterised as commercially sensible. Affirmative indicators included (a) a cooperative and mutually beneficial nature,¹⁵¹ whereas negative indicators included terms that were (b) excessively or disproportionately burdensome;¹⁵² (c) commercially unpredictable;¹⁵³ or, in the instance of subsidiary terms, (d) radically at odds with common law rules.¹⁵⁴ Furthermore, Lord Drummond Young articulated that the landlord's construction could not succeed for the following reasons: (a) when evaluating the contract's context and the provision's purpose, the clause sought to provide a remedy for the tenants' breach of contract, which a sum covering the landlord's true loss (as a result of the tenants' breach) was best positioned to achieve;¹⁵⁵ (b) the landlord's decision to estimate costs, rather than calculate costs after the necessary works had been carried out, appeared to defy CCS as estimated costs could not accurately represent losses actually

¹⁴⁷ On academic scrutiny, see Laura Macgregor, "Crossing the Line between Business Common Sense and Perceived Fairness in Contractual Interpretation," *Edinburgh Law Review* 19, no. 3 (2015), pp. 378–83.

¹⁴⁸ *Grove Investments* (n 132) [1].

¹⁴⁹ *Grove Investments* (n 132) [3]–[4].

¹⁵⁰ *Grove Investments* (n 132) [16]–[19].

¹⁵¹ *Grove Investments* (n 132) [11].

¹⁵² *Grove Investments* (n 132) [11].

¹⁵³ *Grove Investments* (n 132) [11].

¹⁵⁴ *Grove Investments* (n 132) [12].

¹⁵⁵ *Grove Investments* (n 132) [17].

incurred;¹⁵⁶ (c) had the landlord concluded that reconstruction or demolition of the building constituted the most economically advantageous course, this would have imposed a disproportionate and arbitrary burden on the tenants, thereby opposing CCS;¹⁵⁷ and (d) the tenants' interpretation provided total compensation to the landlord for the loss it suffered, thereby reflecting CCS.¹⁵⁸

As identified above, in its truest form, CCS serves as an interpretative tool that aids in the discernment of the commercial purpose of an agreement. In this respect, the earlier approach sought to uphold the intention and consent of the parties, and ultimately, enforce the object of their mutual bargain. The judicial reasoning in *Grove*, however, arguably reflects a broader conception of CCS. Rather than foregrounding the parties' contractual intention, CCS is framed as encompassing expectations of commercial cooperation, equitable distributions of burden and transactional predictability. Not only, then, is party intention at risk of being relegated, but the interpretative exercise itself becomes receptive to normative and evaluative standards that are not easily reconciled with the doctrine's original function.

The consequences of this normative shift are twofold. First, Lord Drummond Young identified four characteristics understood to substantiate, or otherwise indicate the absence of, CCS, thereby complicating the earlier and narrower understanding of the doctrine. Second, the decision introduced additional normative hurdles to be overcome by judges attempting subsequent application. For instance, a judge would now be required to consider whether a clause is too commercially unpredictable to accord with CCS, notwithstanding the absence of any clear jurisprudential basis for treating commercial unpredictability as a freestanding objection in contractual principle. Nor is such an inquiry one that admits mechanical application. On this account, *Grove* left the scope and substantive content of CCS in a less settled doctrinal position.

b. *@SIPP v Insight* [2015]

The subsequent case of *@SIPP* [2015] once more concerned the interpretation of a commercial lease.¹⁵⁹ The Inner House found in favour of the party whose construction better aligned with the natural meaning of both contested clauses, thus leaving 'no room' for the other party's constructions.¹⁶⁰ Drawing on the guidance provided by the UKSC case of *Arnold v Britton*, the Inner House concluded that CCS could not operate where its application would involve a 'substantial and unjustified departure from [the] natural meaning' of the contract.¹⁶¹

More pertinent for the purposes of this article, *@SIPP* was one of the first cases to meaningfully qualify *Grove*'s expansive and arguably idealistic characterisation of CCS. In delivering the opinion of the Inner House, Lady Smith emphasised that as a matter of law: (a) expectations of cooperation and mutuality should not be applied indiscriminately across all kinds of contractual relationships; (b) commercial contracts may be 'hard fought' and entered into for individual gain; (c) commercial contracts need not be fair; and (d) the fact that the parties had gambled on prospective outcomes does not warrant judicial intervention where the commercially

¹⁵⁶ *Grove Investments* (n 132) [17].

¹⁵⁷ *Grove Investments* (n 132) [18].

¹⁵⁸ *Grove Investments* (n 132) [19].

¹⁵⁹ *@SIPP* (n 133) [1].

¹⁶⁰ *@SIPP* (n 133) [44].

¹⁶¹ *@SIPP* (n 133) [19].

preferable outcome did not materialise.¹⁶²

Following *Grove*, CCS's scope had been materially broadened, such that it could no longer be said to serve the sole purpose of discerning the commercial objective of an agreement. However, Lady Smith had forewarned the judiciary against excessive reliance on the commercial principles established by its predecessors in *Grove*. Whether or not one agrees with the facets of CCS as established in *Grove*, it appears that @SIPP's subsequent qualification of these facets rendered the substantive foundations of CCS both unsettled and doctrinally opaque. While the CSH's retreat from the expansive approach embraced in *Grove* may have been a welcome development for practitioners and academics alike, it exposed an underlying difficulty: uncertainty at the appellate level as to the nature and operational scope of CCS itself. @SIPP therefore signalled an emerging tension in the judiciary's treatment of CCS: the absence of judicial consensus as to the doctrine's scope, with consequential implications for legal certainty both for subsequent courts and for the commercial parties whose disputes came before them.

c. *Ashtead v Granton* [2020]

Finally, the dispute in *Ashtead* arose as a result of disagreement surrounding a rent review clause, which established the scope of matters to be regarded in the calculation of the open market rent for the purposes of a prospective rent review.¹⁶³ The tenants contended that all constructions and improvements carried out with respect to the leased subjects should be disregarded, including those financed by the landlord, whereas the landlord asserted that the clause only excluded those undertaken by the tenant or the tenant's predecessors.¹⁶⁴ Having taken CCS into account, the CSH concluded that the clause was intended to apply to improvements undertaken or buildings constructed by the tenant at their own expense, or by the landlord following the tenancy start-date.¹⁶⁵

Delivering the opinion of the CSH, Lord Drummond Young once more articulated a rationale akin to that which he provided in *Grove*, asserting that CCS should be measured with reference to: (a) the 'principle of equivalence',¹⁶⁶ which asserts that the parties' obligations should be 'broadly equivalent';¹⁶⁷ (b) the principle of *pacta sunt servanda*, whereby parties will 'normally' avoid unreasonable or disproportionate burdens seeing as they will be bound to these obligations thereafter; and (c) commercial predictability, which permits one to assume that parties would 'normally' evade arbitrary windfalls.¹⁶⁸ Cumulatively, these three features constitute the normative framework whereby CCS might be appraised. Additionally, Lord Drummond Young indicated that further features may be considered, as the stated principles did not substantiate 'an exhaustive list'.¹⁶⁹ The objective observer would likely recognise the striking similarities between Lord Drummond Young's accounts of CCS between *Grove* and *Ashtead*¹⁷⁰, thereby rendering it questionable to what degree the cautions voiced by Lady

¹⁶² @SIPP (n 133) [44].

¹⁶³ *Ashtead* (n 135) [6].

¹⁶⁴ *Ashtead* (n 135) [1].

¹⁶⁵ *Ashtead* (n 135) [34].

¹⁶⁶ *Ashtead* (n 135) [34].

¹⁶⁷ *Ashtead* (n 135) [16].

¹⁶⁸ *Ashtead* (n 135) [16].

¹⁶⁹ *Ashtead* (n 135) [16].

¹⁷⁰ Contrast *Ashtead* (n 135) [16], [34] with *Grove Investments* (n 132) [11].

Smith in *@SIPP* were indeed heeded. Furthermore, Lord Drummond Young's characterisation of the aforementioned list as non-exhaustive raises *prima facie* concerns as to how much the scope of CCS may be expanded before it ceases to qualify as an interpretative instrument and begins to act solely as a facilitator of contractual rectification.

Beyond reasserting the normative framework initially presented in *Grove*, the CSIH in *Ashtead* sought to further clarify the deductive process by which commercially sensible constructions may be identified. Lord Drummond Young described the deductive exercise as dual-pronged. As a starting point, the interpreter should inquire whether the 'conclusion, [that is, a deduction or inference, is] one that is widely held by those with a knowledge of the particular field under consideration.' Subsequently, one must evaluate how sensible the 'converse of the conclusion' is. If it is insensible, then one's initial conclusion is 'likely' correct. CCS involves the application of this deductive exercise to business transactions 'with the addition of elementary microeconomics', but not such as to substantiate a 'full professional economic analysis.' Finally, one ought to inquire whether a 'reasonable businessman' would have conducted their affairs in such a manner, given the case's unique circumstances.¹⁷¹

Two rather significant implications arose following *Ashtead*. On one account, *Ashtead* reaffirmed judicial rationale which paralleled that of *Grove*, thereby undermining both the conservative approach taken by the court in *@SIPP* and that of the UKSC in *Arnold v Britton*. Moreover, *Ashtead* introduced an additional dimension of analysis into the interpretative exercise, thereby further complicating an already convoluted normative framework by which CCS may be construed. In particular, the complexity of the analytical framework to be applied in cases engaging CCS warrants closer examination. Following *Ashtead*, a court seeking to interpret an ambiguous contract in accordance with CCS must consider the following elements: (a) to what degree the terms of the agreement are "broadly equivalent"; (b) the reasonableness and proportionality of burden allocation; (c) the commercial predictability of rival terms; (d) whether a construction reflects microeconomic "common sense" as per the test identified above; and (e) whether reasonable businessmen would have contracted in such a manner.

The judicial rationale employed in *Ashtead*, as well as its derivative commercial principles, has since been affirmatively applied by the Outer House in the subsequent cases of *Coal v Technip* [2021],¹⁷² *Mast v Chalmers* [2022],¹⁷³ and *Scottish Ministers v Scot Roads* [2022].¹⁷⁴ *Ashtead* most overtly exhibits the growing dissonance between CCS's origins as an interpretative tool grounded in the parties' contractual intention and its modern, norm-laden counterpart. Whereas contractual intention formerly occupied the doctrine's foremost position, contemporary adaptations risk allowing evaluative assessments of commercial fairness, proportionality, and predictability to assume an elevated role in the construction of commercial agreements. Judicial discretion represents a derivative risk within this paradigm, as these concepts are construed and appraised by reference to judicial understandings of commercial rationality. This development is significant, as it risks obscuring CCS's substantive meaning, diluting its historical purpose and undermining its reliability as a guiding principle in

¹⁷¹ *Ashtead* (n 135) [14].

¹⁷² *Coal Pension Properties Ltd v Technip UK Ltd* [2021] CSOH 39, 2021 SLT 1224 [22].

¹⁷³ *Mast Group Ltd v Chalmers* [2022] CSOH 43 [38].

¹⁷⁴ *Scottish Ministers v Scot Roads Partnership Project Ltd* [2022] CSOH 19 [10].

contractual interpretation. Notwithstanding the objective complexity of the assessment framework advanced in *Ashtead*, the true difficulty with the approach lies in its apparent incompatibility with the intention-centric foundations of contractual doctrine and, secondarily, in the instability it generates for a legal order committed to contractual certainty.

d. Concluding Remarks

CCS may have once served the justifiable purpose of identifying and upholding the parties' objectively ascertained intention. However, as the preceding section has demonstrated, the contemporary common law position indicates that CCS has since absorbed further functions. In particular, the Scottish judiciary has increasingly treated CCS as requiring consideration of normative factors that extend beyond the doctrine's foundational purpose of discerning the commercial object of the agreement at hand. On this understanding, what was once a principally intention-centred interpretative aid risks becoming an evaluative framework concerned with ensuring commercial fairness, proportionality and reasonableness in contractual relations. This reorientation carries consequential jurisprudential, legal and policy implications. Within the Scottish legal system, freedom of contract remains a principle of indispensable significance; yet, that freedom cannot be meaningful if it is merely formal or deontological. The conceptual weight of contractual freedom is substantially curtailed if the legal consequences of consensual bargains are not subsequently upheld in court. These legal, ethical and policy-oriented shortcomings will be examined further below.

2. The Case for Restoration

2.1. The Jurisprudential Argument: A Scots Law Perspective on Contract-Policing

The preceding section analysed the judicial treatment of CCS in the CSIH cases of *Grove v Cape* and *Ashtead v Granton*, against the backdrop of the more conservative approaches taken in *@SIPP* and the authoritative UKSC case of *Arnold v Britton*. It observed that the Inner House recognised characteristics of equivalence, proportionality and reasonableness, *inter alia*, as markers of commercial sensibility. Accordingly, disputed commercial contracts that come before the courts may be vulnerable to construction by reference to these expectations, rendering non-conforming interpretations susceptible to normative realignment. As Richardson has persuasively contended, the Inner House's emphasis on equivalence, fairness and commercial predictability may be overstated given the otherwise individualistic nature of Scots contract law.¹⁷⁵ Particularly in relation to the principle of equivalence, Scots law does not impose a requirement of consideration akin to that of English law, thereby making its prominence appear incongruous within the broader Scottish legal framework.

Furthermore, an analogy may be drawn between CCS and a broader principle of 'good faith' within Scots contract law. Both concepts uncover a jurisprudential tension between, on one hand, a judicial inclination to

¹⁷⁵ Lorna Richardson, "Commercial Common Sense' Again: What Role in Contract Interpretation?," *Edinburgh Law Review* 25, no. 1 (2021), p. 93.

establish overarching contractual principles and, on the other, the maintenance of an individualistic, consent-based contractual framework. However, the Scottish judiciary has a long-standing history of resisting the application of a generic principle of ‘good faith’ in Scots law, due to unfavourable consequences it has been said to yield for the broader legal system.¹⁷⁶ MacQueen identifies that, while a positive requirement of good faith may appear desirable at face value, it has thus far been opposed by the Scottish judiciary on the basis that it may adversely affect legal certainty and require contracting parties to take account of each other’s bargaining positions at the expense of their own interests.¹⁷⁷ Additionally, to embrace a principle as expansive as good faith may undermine the freedom of contract, as it may ‘overwhelm the enforcement of express contractual terms’.¹⁷⁸ Ultimately, the costs borne by legal certainty, contractual freedom, and individualism within contract theory are the same, whether they arise through CCS or through the introduction of an overarching duty of good faith. In light of the Scottish courts’ enduring resistance to a comprehensive good faith principle, the judiciary’s willingness to accommodate analogous commercial principles through CCS appears difficult to reconcile with the existing doctrinal position.

3. The Broader Legal Framework: CCS and Its Practical Implications for Contractual Certainty

3.1. Anti-Literalism, Commercial Purpose and ‘Absurdity Prevention’

Historically, CCS was devised to ensure that the interpretative exercise would not stagnate in the face of textual absurdities. As noted by Andrews, this provides commercial parties with a valuable safeguard. Where the written terms admit competing interpretations, the judiciary may seek to discern the parties’ commercial aim and uphold the construction which best supports its materialisation.¹⁷⁹ Defending the merits of CCS in this domain, Lord Bingham stated: ‘the instrument must speak for itself, but it must do so *in situ* and not be transported to the laboratory for microscopic analysis.’¹⁸⁰ In addition to ensuring that the discernment of the parties’ intention is not distorted by linguistic niceties, Andrews asserts that judicial consideration of CCS also contributes to procedural efficiency and lowers transaction costs. In this respect, the application of CCS ensures that lower courts do not place undue emphasis on grammatical accuracy or linguistic minutiae, thereby lowering the likelihood of such cases being retried at the appellate level.¹⁸¹

Mitchell further notes that the application of the tool may enable the courts to adopt a fact-sensitive approach to their judicial reasoning. In facilitating a thorough analysis of the case’s commercial background, both power and information asymmetries may be identified and corrected.¹⁸² Moreover, such an analysis enriches the

¹⁷⁶ Hector Lewis MacQueen, “Good Faith in the Scots Law of Contract: An Undisclosed Principle?,” University of Edinburgh School of Law Working Paper Series (2011), p. 7.

¹⁷⁷ MacQueen, “Good Faith in the Scots Law of Contract,” p. 5.

¹⁷⁸ Hector Lewis MacQueen and Shannon O’Byrne, “The Principle of Good Faith in Contractual Performance: A Scottish-Canadian Comparison,” *Edinburgh Law Review* 23, no. 3 (2019), p. 327.

¹⁷⁹ Andrews, “Interpretation of Contracts,” p. 41.

¹⁸⁰ *Arbuthnot v Fagan* [1995] CLC 1396, 1400 (Sir Thomas Bingham MR), cited in *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396, [2017] 1 All ER (Comm) 601 [59] (Beatson LJ).

¹⁸¹ Andrews, “Interpretation of Contracts,” pp. 41–42.

¹⁸² Catherine Mitchell, “Interpreting Commercial Contracts: The Policing Role of Context in English Law,” in *Comparative Contract Law:*

courts' understanding of the parties' relationship, thereby enhancing their ability to reach faithful conclusions about what the parties truly agreed.¹⁸³ One might therefore argue that such an approach is fairer than that favoured by literalists, given its capacity to accommodate peripheral facts relevant to the interpretative exercise. On this understanding, the employment of CCS may be thought to enhance the court's understanding of the commercial circumstances that gave rise to the parties' contract, thereby rendering the resulting interpretations truer to the parties' intentions.

These arguments are compelling, but their cogency draws strength from theory, rather than present practice. As exhibited in the preceding analysis, and as legal scholarship has observed, common law developments have increasingly characterised CCS as encompassing broader principles of equivalence, proportionality and reasonableness.¹⁸⁴ These principles may align with the terms to which the parties have consensually bound themselves; however, they may also exert pressure on those terms where the parties' bargain does not accord with the court's conception of commercial rationality. In such circumstances, the integrity of the bargain is jeopardised; indeed, the interpretation most consistent with the parties' intention may be displaced by that which best adheres to judicially identified standards of commercial reasonableness. Such a development poses a plausible threat to contractual certainty but, more significantly, it rests uneasily with the consent-based foundations of contract law, a tension to be examined further below.

3.2. Legal Certainty

Should the Scottish judiciary pursue its current trajectory of straining the foundational underpinnings of CCS, as exemplified in *Grove* and *Ashtead*, legal certainty is likely to bear the most acute cost. Contractual certainty may be said to exist where there is discernible continuity in the normative rules applied to matters of contractual interpretation. Speaking extra-judicially on the subject of contractual certainty, Lord Neuberger stated:

*'If the judge is so swayed [by their sympathies for an unlucky litigant], the danger is that the resulting decision will muddy the clear water of certainty which is such an important ingredient in the rule of law.'*¹⁸⁵

The passage captures the inherent tension that persists between the law's normative commitment to justice and the legal system's reliance on institutional predictability. Legal certainty may sometimes necessitate outcomes that appear inequitable in their particular circumstances; however, while case-by-case equity may secure justice for the parties before the court, doctrinal stability cultivates the conditions under which parties in analogous circumstances can arrange their contractual affairs with confidence. Since contract law relies upon parties'

British and American Perspectives, ed. Larry A. DiMatteo and Martin Hogg (Oxford University Press, 2015), p. 234.

¹⁸³ Mitchell, "Interpreting Commercial Contracts," p. 233.

¹⁸⁴ Richardson, "'Commercial Common Sense' Again," p. 93.

¹⁸⁵ David Neuberger, Lord Neuberger of Abbotsbury, "Express and Implied Terms in Contracts," speech at the School of Law, Singapore Management University, August 19, 2016, [18].

informed understanding of the legal status quo, interpretative latitude must remain restrained by stable legal principles if parties are to undertake and allocate commercial risks. Indeed, equity remains relevant to adjudication; the point of the present argument is not to reject this premise, but to emphasise that equity cannot exist in a state of perpetual doctrinal flux; it must operate within a known and dependable legal framework if the law is to remain consistent, replicable and compatible with the rule of law.

In a speech on contractual interpretation, Lord Hamblen identified the three institutionally vital functions performed by legal certainty: (1) a consistent normative framework enhances fairness by ensuring that varying parties receive similar outcomes in materially comparable cases;¹⁸⁶ (2) should a dispute arise as to the meaning of the contract, the parties and their legal representatives should be able to anticipate the judiciary's response to the questions engaged by the dispute;¹⁸⁷ and (3) there is a public policy interest in the procedural efficiency of contract-related litigation, where excessive time and resources should not be allocated to what 'should be a limited interpretative task'.¹⁸⁸ Having established the overarching significance of legal certainty, we will now consider how the Scottish judiciary's open-textured and under-specified approach to CCS may operate to its detriment.

i. Judicial Knowledge

A necessary condition of legal certainty, as identified by Lord Hamblen, is the preservation of continuity within the normative framework employed in cases of a comparable nature. Yet, can one be certain that all judges at varying levels of the judicial hierarchy are equally well-versed in the subtleties of commercial practices, thereby qualifying them to authoritatively discern the 'commercially sensible' interpretation from the 'insensible' one? Such is the concern raised across a diverse body of legal scholarship, including McLauchlan who cautioned:

*'a judge's idea of commercial common sense may be [...] as reliable as a businessman's idea of legal principle.'*¹⁸⁹

Richardson contends that the issue may be one of experience, where judges with greater cumulative experience presiding over commercial courts may be better positioned to recognise a commercially sensible construction than judges lacking such experience.¹⁹⁰ Similarly, Robertson acknowledges that while judges may regularly be called upon to adjudicate on ill-defined legal principles such as 'good faith', these matters remain reasonably familiar to a judge whose deliberations frequently engage concepts derived from broader notions of justice and fairness. On the contrary, a well-founded judgement concerning CCS is predicated on knowledge of the relevant commercial circumstances, objectives, expertise, experience and acumen of the parties, all of which a judge may not possess or have had sufficient exposure to throughout their professional career.¹⁹¹ Furthermore, Lord Neuberger identifies

¹⁸⁶ Nicholas Hamblen, Lord Hamblen of Kersey, "Contractual Interpretation—An Anglo/Australian Journey," Lehan Lecture, September 3, 2024, [2](a).

¹⁸⁷ Hamblen, "Contractual Interpretation—An Anglo/Australian Journey," [2](b).

¹⁸⁸ Hamblen, "Contractual Interpretation—An Anglo/Australian Journey," [2](c).

¹⁸⁹ David McLauchlan, "The Lingering Confusion and Uncertainty in the Law of Contract Interpretation," *Lloyd's Maritime and Commercial Law Quarterly* (2015), p. 430.

¹⁹⁰ Richardson, "Commercial Common Sense' Again," p. 93.

¹⁹¹ Suzanne Robertson, "Making Sense of Commercial Common Sense," *Victoria University of Wellington Law Review* 49, no. 2 (2018), p.

a ‘substantial danger’ in the post-contractual task of discerning ‘commercially sensible’ constructions, where a judge may find themselves subconsciously influenced by the circumstances that have unfolded since the contract was entered into. On this basis, the hypothetical judge may reach a misguided conclusion as to the ‘commercial sensibility’ of an action (i.e. agreeing to an unfavourable term), and fail to consider the psychological state of the parties at the time of contractual formation.¹⁹² In view of these practical challenges, the judiciary’s confidence in its ability to ascertain consistency in its outcomes may well be unduly optimistic. Accordingly, the degree to which the present framework is ‘legally certain’ may be equally oversold.

The final contention levelled against judicial confidence in appraisals of CCS concerns the degree to which the judiciary overestimates the ‘commercial sensibility’ of the contracting parties, thereby overlooking the notable possibility of commercial parties having approached their engagements with a competitive and optimistic spirit.¹⁹³ This point is raised by Lord Sumption, as he warns against excessive judicial confidence in their appraisals of the ‘commercial reasonableness or likelihood’ of any particular course of action.¹⁹⁴ Similarly, Lewison asserts that judges may have preconceived notions as to what contracts of a specific character set out to achieve. However, Lewison cautions against judicial intervention which seeks to reinterpret the language of the contract to align with such preconceptions, as doing so risks undermining the true intentions of the commercial parties.¹⁹⁵

ii. Judicial Disharmony

In alignment with the findings of the preceding analysis, Richardson compellingly asserts: ‘there is no clear understanding of commercial common sense among the Inner House’.¹⁹⁶ While Richardson’s contention preceded the case of *Ashtead v Granton*, the statement may carry even greater weight in the present context, in light of *Ashtead*’s reassertion of *Grove*-like principles following *@SIPP*. Central to the issue of judicial disharmony is the absence of established judicial guidelines to be considered in commercial cases concerning contractual interpretation. Returning to the essential significance of continuity for legal certainty, Lim contends that the absence of judicial guidance may be obscuring the task for presiding judges, thereby contributing to the inconsistent outcomes observed across cases.¹⁹⁷ Thus, instead of retaining its footing in consolidated normative requirements, Mitchell asserts that CCS is conceptually rooted in judicial value judgements.¹⁹⁸ By nature, these judgements are characteristically malleable, inconsistent, and highly reliant on the individual judge’s experience, as well as their own ethical predispositions. For instance, in *Ashtead*, Lord Drummond Young invited the judiciary to inquire how the ‘reasonable businessman’ might conduct their affairs under the given circumstances, for the

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¹⁹² David Neuberger, Lord Neuberger of Abbotsbury, “The Impact of Pre- and Post-Contractual Conduct on Contractual Interpretation,” Banking Services and Finance Law Association Conference, Queenstown, August 11, 2014, [19]–[20].

¹⁹³ Hamblen, “Contractual Interpretation—An Anglo/Australian Journey,” [17].

¹⁹⁴ Jonathan Sumption, Lord Sumption, “A Question of Taste: The Supreme Court and the Interpretation of Contracts,” Harris Society Annual Lecture, Keble College, Oxford, May 8, 2017.

¹⁹⁵ Kim Lewison, *The Interpretation of Contracts*, 6th ed. (Sweet & Maxwell, 2015), p. 208.

¹⁹⁶ Lorna Richardson, “Commercial Common Sense in Contractual Interpretation: Further Views from the Inner House,” *Edinburgh Law Review* 21, no. 3 (2017), p. 429.

¹⁹⁷ Ernest Lim, “Commercial Purpose and Business Common Sense in Contractual Interpretation,” *King’s Law Journal* 23, no. 1 (2012), p. 96.

¹⁹⁸ Mitchell, “Interpreting Commercial Contracts,” pp. 241–42.

purposes of determining the ‘commercially sensible’ construction.¹⁹⁹ However, Moore identifies an inherent difficulty with such a line of reasoning: namely, what constitutes the approach taken by a ‘reasonable businessman’?²⁰⁰ In seeking to replicate a commercially ‘reasonable’ approach, judges may adopt differing perspectives on how the reasonable businessman might approach a given transaction: which commercial factors they would seek to prioritise, which they would be willing to compromise in furtherance of their broader commercial aims and the degree of risk they would be prepared to absorb.²⁰¹ Lord Drummond Young’s notional ‘reasonable businessman’ therefore remains difficult to characterise. In the absence of a uniform conceptualisation of commercial rationality, this construct risks generating conflicting judicial assessments, thereby undermining legal certainty.

3.3. Interpretation or Rectification: The Consent Dilemma

The preceding analysis has indicated that contemporary iterations of CCS plausibly compromise intention’s centrality within the interpretative exercise. On this basis, one of the most potent critiques of the Scottish approach to CCS concerns the degree to which it resists reconciliation with the foundational Scots contract law principles of *consensus in idem* (‘meeting of the minds’) and the sanctity of contract, according to which parties are bound to honour the obligations they have undertaken. Given the elasticity of CCS as a legal concept, concerns have been raised as to the ease with which judges may ‘rectify’ commercial agreements that have unravelled unfavourably for a particular party.²⁰² By characterising commercial engagements by reference to equivalence, proportionality and reasonableness, terms agreed outwith these notional bounds are less likely to be subsequently upheld, notwithstanding their grounding in the parties’ intention. The concern, then, is that the agreement to which the parties bound themselves through consent, capacity and intention may be adjusted so as to align more closely with the judiciary’s conception of commercial good sense. In this manner, the critique concerns whether judicial assessments of commercial rationality have come to occupy the position previously held by contractual intention.

Furthermore, Moore asserts that judges may fall victim to the fallacy of ‘outcome-led’ decision-making, whereby judges apply the relevant legal materials to an intuitive decision made *ex ante*, as opposed to reaching their decisions after having examined the relevant materials.²⁰³ Having analysed the English judiciary’s treatment of CCS across a diverse body of cases, Moore has identified discernible patterns in the decision-making tendencies of presiding judges. Strikingly, Moore’s research revealed a judicial tendency to favour the interests of: (1) non-property parties over property parties; (2) the interests of parties with high contractual adjustment costs over those with relatively lower adjustment costs; and (3) the interests of parties with higher sunk costs over those with

¹⁹⁹ *Ashtead* (n 135) [14].

²⁰⁰ Marc T. Moore, “Commercial Common Sense in Contract Interpretation: A Legal Realist Analysis,” *SSRN Electronic Journal* (2024), p. 5.

²⁰¹ Moore, “Commercial Common Sense in Contract Interpretation,” pp. 5–6.

²⁰² Andrews, “Interpretation of Contracts,” pp. 56–60.

²⁰³ Moore, “Commercial Common Sense in Contract Interpretation,” p. 7.

lower sunk costs.²⁰⁴ While Moore's findings are not determinative in the Scottish context, they may serve as a cautionary illustration. They suggest that, where courts are empowered to evaluate commercial reasonableness in the abstract, such decision-making may be affected by a broader tendency to favour the 'disadvantaged' parties over parties whose cumulative losses would not affect them as gravely.

Appealing to broader notions of justice and fairness may be enticing, but, as Cabrelli has compellingly advanced, a superficially disadvantageous bargain may have been reached through intentional concession and compromise, thereby representing the only means through which the parties were able to reach *consensus in idem*.²⁰⁵ Furthermore, once *consensus in idem* has been attained, it should not be readily displaced in the name of fairness, or other morally charged arguments presented through the language of commercial rationality. To adopt such a course would render Scots law vulnerable to scrutiny on the basis that its current framework risks diminishing the priority traditionally afforded to party consent. In such circumstances, the systemic costs to contractual certainty may ultimately outweigh the hardship experienced by individual parties obliged to perform the agreements they have willingly undertaken.

4. The Policy Argument: When Guesswork Becomes Costly

In *Hoe v Andersen* [2017], the Inner House asserted that CCS serves as an antidote against an 'over-strict and over-literal' approach to contractual interpretation. By enabling the court to consider CCS, parties are relieved of the obligation to account for every conceivable contingency within their contract, thereby shortening contractual documents and reducing transaction costs. By contrast, Richardson maintains that the employment of CCS is likely to give rise to further disputes surrounding the meaning of the contract, thereby raising transaction costs for the parties involved, and placing undue strain on public expenditure.²⁰⁶ Given the present judicial stance on CCS, Richardson's prediction should be heeded. There is a conceivable risk that non-favoured parties may challenge judicial findings on the basis that the 'commercial principles' guiding the courts' consideration of CCS were prioritised over the commercial objective of their agreement. Lower-level courts, seeking to adhere to precedent, may apply the principles established in *Ashtead* when interpreting contracts in future disputes. Where judicial reasoning is guided by an abstract conception of 'commercial good sense', parties dissatisfied with their outcomes may feel incentivised to appeal, thereby prolonging litigation and raising costs both for themselves and for the public treasury. Such procedural inefficiencies may yet be reduced if the judiciary reconsiders the scope and utility of its 'commercial principles' and reaffirms CCS as a tool of contractual interpretation, rather than rectification.

²⁰⁴ Moore, "Commercial Common Sense in Contract Interpretation," p. 17.

²⁰⁵ David Louis Cabrelli, "Interpretation of Contracts, Objectivity and the Elision of Consent Reached through Concession and Compromise," University of Edinburgh School of Law Legal Studies Research Paper Series (2010), pp. 15–16.

²⁰⁶ Richardson, "Commercial Common Sense in Contractual Interpretation," p. 428.

Conclusion

It is no surprise that the greater part of existing literature on CCS advocates the doctrine's redundancy, given the propensity of its modern usage to undermine parties' intentions. In doing so, it poses a plausible threat to the consent-centric foundations of contract law, thereby rendering the case for its retention analytically demanding. However, as this article has demonstrated, such perspectives fail to account for the range of functions attributed to CCS, including its alleged or improper use as a means of quasi-rectification. Indeed, CCS originated as a narrower concept, designed to assist courts in the identification of the construction that most faithfully reflected the parties' objective intention. The practical difficulties that later crystallised did not follow from the proper exercise of this function but emerged once CCS was made to bear a normative weight it was never *designed* to carry. Absurdity prevention is one thing; mandating the cooperation of contractual parties and a broadly equivalent allocation of burdens is quite another. Thus, while the retirement of the CCS doctrine might resolve some of the complexities discussed in Part Two, it would do so only at the cost of a tool that, properly restrained, serves as an asset to contractual interpretation. The correct response, therefore, is not the wholesale abandonment of CCS, but its restoration to its historical and legitimate function.

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For Women Scotland Ltd v The Scottish Ministers

By Alfie Boxall

For Women Scotland Ltd v The Scottish Ministers marked a watershed moment in the United Kingdom's discourse on gender identity. However, as this paper argues, it sets a regrettable precedent for rights-based activism across the UK. It highlights how, due to the functioning of the Supreme Court, rulings on rights issues originating from devolved matters can negatively affect minority groups throughout the UK—even in nations beyond the one from which the devolved issue originally arose.

This paper outlines how the Scottish National Party's proactive yet disjointed approach to gender identity stemming from the initial provisions of the Gender Representation on Public Boards (Scotland) Act 2018—particularly in relation to the rest of the UK—adversely impacted the rights of minorities outside the Scottish Government's remit. These consequences stemmed initially from the statutory guidance that gave rise to the case and extended through the progression of appeals to the Supreme Court. It will be argued that the case's evolution—from advice issued by a devolved government to a ruling with nationwide precedent—reiterates longstanding concerns about the legal interplay between devolved and national jurisdictions, reminiscent of the West Lothian Question (WLQ). Activists, therefore, must consider how the actions of devolved governments may have far-reaching implications for rights across the entire country.

For Women Scotland Ltd v The Scottish Ministers means that rights activism in the UK is fundamentally limited in its scope under the current system of devolution in Scotland. Because the precedent set by the case raises an issue similar to the West Lothian Question, legislation intended to advance rights in one devolved administration may further restrict the rights of others throughout the UK through arbitrary rulings.

The West Lothian Question was a defining instance of a lack of constitutional clarity for the UK. Similarly, the relationship between lawmaking by the Scottish Parliament and by the sovereign Parliament at Westminster has been considered unfair since the inception of devolution.²⁰⁷ But that sense of unfairness has so far only been studied in terms of the legislative competences of the Scottish and Westminster Parliaments and votes on legislation at Westminster itself. This was the original concern of the West Lothian Question.²⁰⁸ The implications of such a situation, a constitutional anomaly between a devolved and central government organ, in the form of a legal ruling, have not yet been studied. This is the area of concern where *For Women Scotland Ltd v The Scottish Ministers* sits. This paper will explore the origins of the legal and constitutional situation this case creates and its implications. It will also explore the implications for rights-based activism, and how in this context the issue generates a similar form of constitutional unfairness or inequality to that articulated in the West Lothian Question. We will first outline why the ruling developed and how the existing mechanisms of the Scottish Parliament, Supreme Court and Westminster Parliament facilitated how it unfolded. Then, we will examine how this sets a

²⁰⁷ HC Deb 14 November 1977, vol 939, col 123.

²⁰⁸ Paul Bowers, "The West Lothian Question," Research Briefing SN02586 (House of Commons Library, January 18, 2012).

similar precedent to the West Lothian Question, but also how this precedent is unique in and of itself. We will then outline how this is also unique because it concerns the role of the Supreme Court in setting such precedents. Lastly, we will explore how this sets a troubling precedent for rights-based activism, what this might mean for rights-based movements and how these movements can learn from the ruling. This article will also examine how this case fits into the existing scholarship surrounding gender identity and recognition, as well as the existing scholarship on legal-to-national devolved functions.

Rights-based claims have long been brought before the UK courts, which have been a primary vehicle for legal change, especially under so-called judicial activism, for which there is established precedent. Indeed, the constitutional instruments necessary for it have long been in place.²⁰⁹ In terms of trans and queer rights, the implementation of laws and various rulings has also been the device by which questions about rights have been raised and activism has been pursued in the first instance, especially in response to instances of moral panic.²¹⁰ And it could be argued that this context of moral panic was similar to that in which *For Women Scotland Ltd v The Scottish Ministers* originated. FWS Ltd launched the case after the Scottish Government's Gender Representation on Public Boards (Scotland) Act 2018.²¹¹ This Act was passed by the Scottish Parliament²¹² in response to the relevant statutory guidance issued under the Equality Act 2010.²¹³ The Scottish Parliament is not an independently sovereign Parliament but a devolved body under the supreme Westminster Parliament which maintains some reserved powers.²¹⁴ So in this case, it was a devolved update to existing legislation from the supreme legislative body via a devolved assembly. The Supreme Court is the final court of appeal in the UK and hears cases from all of the devolved nations.²¹⁵ The case was taken there and the ruling was determined.²¹⁶

Now, while all three bodies are working in tandem as intended, the nature of the ruling nonetheless bends legislative norms. One only needs to look at Dicey at his most basic to know that Parliament is sovereign, and that deviation from that is out of the norm. That was the worry behind the West Lothian Question, that despite being a creation of the sovereign Westminster Parliament,²¹⁷ the Scottish Parliament would override the authority of MPs sitting in Westminster and thus undermine parliamentary sovereignty. The issue in the case of *For Women Scotland Ltd v The Scottish Ministers* is that the disproportionate impact on parliamentary sovereignty arose through the courts, by way of an established ruling, rather than merely as a by-product of the devolution arrangements. It shows that a deliberate legal effort in one devolved nation has the potential to alter the impact and meaning of laws from the supreme legislature which have a deep impact on rights. Such a perspective had not previously been included in the academic literature because no such ruling had been made. In addition, it is worth

²⁰⁹ Anwar Baig, "Activism Under Certain Circumstances Be a Legitimate and Protect the Human Rights Effectively," *Wah Academia Journal of Social Sciences* 3, no. 2 (2024), pp. 775–98.

²¹⁰ Sandra A. Duffy, "Moral Panics and Legal Projects: Echoes of Section 28 in United Kingdom Transgender Discourse and Law Reform," *Gender and Justice* 1, no. 1 (2025), pp. 78–99.

²¹¹ Isabel Kagoo, "Defining Woman—The Contentious Legal Battle over the Definition of 'Woman' in Scotland," *St Andrews Law Review*, March 12, 2024.

²¹² Gender Representation on Public Boards (Scotland) Act 2018 (asp 4).

²¹³ *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16, [2025] 2 WLR 879 [15]–[20].

²¹⁴ Scottish Parliament, "Difference between Parliament and Government."

²¹⁵ Robert Reed, Lord Reed of Allermuir, "Why Does the UK Supreme Court Matter for Scotland?," speech delivered at the University of Strathclyde, October 28, 2024.

²¹⁶ *For Women Scotland* (n 213) [264]–[268].

²¹⁷ Scotland Act 1998, s 28.

mentioning that this contribution also includes wider scholarship regarding issues of biological sex and gender identity. Much of the scholarship has thus far been centred around the introduction of legislation such as the Gender Recognition Act 2004. This scholarship has examined, through a contemporary lens, the initial changes that the legislation made to the status of trans people in the UK and how efforts by devolved nations to improve the status of trans people may, on a wider scale, imperil similar efforts across the UK.

The response to the ruling was one of general negativity and it was acknowledged as perhaps the most significant backstep on trans rights in British history.²¹⁸ The role of the Scottish Government was largely ignored, except for observations that it was a devolved administration and that the governing SNP had adopted a more active approach to trans rights than the Westminster government. This reflects a longstanding tendency among sections of the British left to portray successive Westminster Governments, including the Labour Government, as inactive on trans rights as the issue has become increasingly prominent.²¹⁹ Although there has been little academic or media attention directed towards the mechanics of the ruling, discussion of it has largely been political. The advantage of adding the perspective that this article takes is identifying the underlying functional and constitutional issues which truly exacerbate the negative experience of minorities in the UK and even elsewhere with similar constitutional arrangements, including in countries with uncoded constitutions or Westminster parliamentary systems. There needs to be a comprehensive account of how and why such dynamics exist and what their implications may be if rights activism in the UK is not to remain constrained by such challenges. Regarding the existing scholarship on devolved-to-national legal functions and relationships, there is little on the specific relationship between the UK Supreme Court and the Scottish Government. Scholarship on general devolved-to-national legal functions has focused on the limited role that the courts ultimately play and how this is unlikely to change.²²⁰ This ruling suggests the opposite, because there is now a concrete example of the courts becoming involved in such functions, and the Supreme Court no less. This article aims to prove that the courts do in fact play a role in devolved-to-national legal functions and that there is the potential for such cases to arise in the future.

The precedent set by the ruling is similar to the West Lothian Question in that it is an instance of the devolved rulings producing an unfair balance legally speaking. But it has never been explored whether the Supreme Court was able to produce such a balance. The role of the Supreme Court encompasses the outcomes of rulings in the devolved administrations. But it has never been considered whether such devolved rulings would harm the rights of those protected by supreme legislation. The Equality Act 2010 had remained unchanged in terms of precedents until the ruling.²²¹ And it can be argued that the impact the ruling had on the guidance laid out in said Act was seismic. In addition to the cultural disquiet it produced among the trans community and its allies, architects of the 2010 Act acknowledged that its impact was disproportionate with regard to the original scope of the Act.²²² This suggests that part of the scope of the impact of the ruling lies in a degree of unfairness

²¹⁸ Rosemary Hunter, "For Women Scotland Ltd v The Scottish Ministers': An Error of Judgment," *feminists@law* 14, no. 2 (2025).

²¹⁹ Andrew McDonald, "Why Scotland and Westminster Are Going to War over Trans Rights," *Politico*, September 19, 2023.

²²⁰ Alan Trench, "The Courts and Devolution in the UK," *British Journal of Politics and International Relations* 14, no. 2 (2012), p. 303.

²²¹ Sophie Lewis, "The UK's Anti-Trans Ruling Is a Defeat for All Women," *The Nation*, April 23, 2025.

²²² Sana Noor Haq, "UK Supreme Court Says Legal Definition of 'Woman' Excludes Trans Women, in Landmark Ruling," CNN, April 16, 2025.

outside of the remit of the passage of the Equality Act 2010. And based on the mechanics outlined in the first section, we can ascribe this unfairness to the fact that the nature of the ruling originated from a matter taken to a devolved government. Much like the WLQ, this was unintentional in that such unfairness was the result of the inherent functioning of the bodies involved (in the case of the WLQ, the Westminster Parliament and the Scottish Parliament; in the case of the ruling, the Supreme Court and the Scottish Parliament). The difference with *For Women Scotland Ltd v The Scottish Ministers* is that it, in legislative terms, implicates the Supreme Court as well as the devolved Scottish Parliament and the Westminster Parliament. The case was against the Scottish Parliament, was brought to the Supreme Court, and resulted in a fundamental reinterpretation of the legislation passed by Westminster. Such a tripartite result is commonly understood to be possible, as the Supreme Court is the final court of appeal for cases arising from the devolved jurisdictions. But a ruling which has had such a fundamental impact in terms of confusing the status of a minority group's rights is not comparable to any other in the UK so far. Most common law revisions of this sort have come from lower courts, especially regarding rights activism.²²³ What, then, does this mean overall for rights activism in Britain? Rights activism depends on legislative clarity. Indeed, that was what many advocates for issues regarding minority groups like trans rights in the UK had asked for. The ruling establishes the possibility that legislation enacted at Westminster may be altered through rulings arising from devolved jurisdictions. And what that means for rights activism, especially regarding small minorities, is that a similarly significant impact on rights governed by the Gender Recognition Act 2004 is likely to recur.

But in order to create a more comprehensive assessment of the implications of the ruling for rights activism, it would be wise to consider what the dynamic outlined above means for the constitutional organs involved, and how the institutional effects of the ruling, if unchanged, set an ingrained challenge for rights activism. The case was initially taken to the top of the Scottish legal system in the Court of Session,²²⁴ demonstrating the potency of trans rights as an area of rights activism which can permeate the UK legal system. It reached the top of a devolved nation's legal structure and had to be taken to the final court of appeal. It is worth investigating briefly whether this was a unique deficiency of the Scottish legal system that the matter could not be resolved within the Scottish courts. By doing this, we can ascertain the extent to which this issue could recur in other devolved jurisdictions, namely, Wales or Northern Ireland. In the case of Northern Ireland, it seems that rights activism has been latently related to cases related to the Troubles, and arbitration has been linked to the ECHR and supranational legal organs rather than the UK Supreme Court:

*"In an accompanying legal memorandum, the UK government acknowledges that the ECtHR of Human Rights 'has articulated a general opposition' to amnesties but goes on to suggest that the Court has countenanced the possibility of an amnesty being ECHR compatible, 'including where a reconciliation process is in existence.'"*²²⁵

²²³ Brice Dickson, "Activism and Restraint within the UK Supreme Court," *European Journal of Current Legal Issues* 21, no. 1 (2015).

²²⁴ *For Women Scotland* (n 213) [15]–[30].

²²⁵ Anna Bryson and Kieran McEvoy, "Human Rights Activism and Transitional Justice Advocacy in Northern Ireland," *International Journal of Transitional Justice* 17, no. 3 (2023), p. 460.

And in the case of Wales, there is no equivalent to the Court of Session, and the legal jurisdiction forms part of the single legal jurisdiction of England and Wales.²²⁶ Nor have cases involving comparably prominent rights issues originated in Wales and subsequently reached the Supreme Court. What this suggests is that the Scottish case does have a degree of uniqueness when it comes to rights activism. Northern Ireland is a polarised jurisdiction for a number of reasons and rights activism centres around sectarian identity and the history of the Troubles and extrajudicial management outside of the UK. In Wales, most rights-based cases seem tied to England. However, this should not defeat the precedent which the Scottish case sets. It proves that it is possible for such a case to happen. Just because it is more likely in Scotland does not mean it is impossible for it to ever happen in Northern Ireland or Wales. Regardless, we will next look at the role of the Scottish legal system in managing the case to the point at which it became a non-devolved matter at the Supreme Court, and became a matter involving the reinterpretation of national legislation. The Inner House of the Court of Session overturned the ruling in favour of the Gender Representation on Public Boards (Scotland) Act 2018 in early 2022.²²⁷ This led to the case subsequently becoming entangled in the Scottish legal system with FWS filing numerous appeals and the appellate judges in the Court of Session striking them down.²²⁸ What this shows is that the lead-up to the ruling was extremely prolonged, and that this was determined by the intense conviction and efforts of FWS to force the ruling in the Scottish courts and subsequently their efforts to force the case *out* of the Scottish courts. And it was only when the case came under the remit of the Scottish legal system that it became a harmful instance of rights activism backfiring. Existing scholarship has admitted that such a problem has the potential to happen but has not acknowledged that it would be inherently problematic. As Chalmers explains: ‘The possibility of disparate interpretation already exists in relation to UK statutes dealing with matters of criminal law, but does not appear to have proved unduly problematic.’²²⁹ This judgment is unsurprising given that it was written before the creation of the Supreme Court, when it was uncertain whether such a case would come before the new court. But Chalmers, despite this, does actually propose the available solution to the ruling in a political sense by suggesting that such matters can be resolved by Parliament: ‘Parliament can, of course, always intervene to impose uniformity by way of legislation if disparate interpretations are seen as problematic.’²³⁰ The effective political solution for rights activists who are for trans rights and against the ruling is for gender identity and care to be clarified in legislation. In terms of the law, however, his perspective suggests that the impact of the ruling does in fact lie within the functioning of the Supreme Court itself. Chalmers suggests that the possibility of disparate interpretation may be inherent in the functioning of the Supreme Court, or may at least prove to be a problem in appeals directed to the court from the Scottish courts. This begs the question of whether the role of the Supreme Court is inherently biased towards any group with a persistent enough effort to change legislation, and whether the issue was the adequacy of the existing legislation. The Gender Recognition Act 2004 was ultimately the target of FWS. But I would argue

²²⁶ Law Society of England and Wales, *England and Wales: A World Jurisdiction of Choice* (Law Society of England and Wales, 2019), p. 12.

²²⁷ *For Women Scotland Ltd v Lord Advocate* [2022] CSIH 4, 2022 SC 150 (IH) [40].

²²⁸ *For Women Scotland Ltd v Scottish Ministers* [2023] CSIH 37, 2024 SC 117 (IH).

²²⁹ James Chalmers, “Scottish Appeals and the Proposed Supreme Court,” *Edinburgh Law Review* 8, no. 1 (2004), p. 21.

²³⁰ Chalmers, “Scottish Appeals,” p. 21.

that it was indeed the functioning of the Supreme Court which is to blame. The court operated under the assumption that the case needed resolving because FWS kept pushing for its progression and had made several unsuccessful appeals. This sets a precedent suggesting to rights activists that any movement with significant effort behind it would be able to use the Supreme Court to amend legislation in a way that harms minorities, where legislation such as the Gender Recognition Act leaves room for reinterpretation. And the fact that this came through the appeals process from another devolved jurisdiction is the key to this effort which could undermine rights activism. All it would take is any concerned group to make a case in a devolved jurisdiction and forward the case to the Supreme Court for the entire country to feel the impact. It would be wise for rights activists to, in addition to asking for legislative clarity, have the courage to question the constitutional loopholes which allow for malicious actors to harm the rights of minorities by amending existing legislation. The state should consider establishing panels or bodies to assess such changes and determine whether they would cause excessive harm.

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Arsenal of Peace: Feminist Reflections on Gender-Responsive Disarmament and the Challenges of International Law's Framework for Security

By Candace Singh

Introduction

In *The Boundaries of International Law: A Feminist Analysis*, Hilary Charlesworth notes the role of women and international legal responses to women:

*“Although women are in a disadvantaged position worldwide, they have not been passive victims of discriminatory structures but have used international fora to air their concerns for the last 150 years.”*²³¹

This statement provides a useful starting point for analysing United Nations General Assembly Resolution 79/57 on women, disarmament, non-proliferation and arms control, and for identifying discrepancies within international law. On 2 December 2024, the General Assembly of the United Nations recalled General Assembly and Security Council resolutions on issues concerning women, peace, and security.²³² On the table for discussion was the adoption of the Pact for the Future, which describes the promotion of efforts to “achieve gender equality, women’s participation and the empowerment of all women and girls, including in conventional disarmament and arms control”,²³³ alongside other initiatives intended to increase women’s involvement in arms-control processes. However, it is important to discern that whilst ostensible progress may be occurring in some areas of this mission, other areas, particularly efforts to challenge the predominantly masculine framework underpinning armament, remain neglected. By focusing on this UNGA resolution, I argue that the international legal frameworks’ lacking strategic implementation of A/RES/79/57 reflects two structural issues: first, the militarised and masculinised logic of state security, which resists feminist disarmament norms; and second, the reduction of women’s participation to symbolic inclusion that affords them insufficient authority to challenge that logic.

The position adopted without a vote by the General Assembly prompts this exploration.²³⁴ In a modern international policy landscape, nation-states have adopted feminist foreign policies as a step towards signalling support for a new international order, one where women’s rights hold equal value to men’s.²³⁵ Gillian Youngs describes this phenomenon in feminist international relations, where “the work of feminist political and economic theory” is built upon the masculinism inherent in political, economic, military, and governmental institutions.²³⁶ Victoria Scheyer and Marina Kumskova further assert that traditional approaches to security are divided into two

²³¹ Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, 2000), p. 14.

²³² UNGA Res 79/57 (2 December 2024) UN Doc A/RES/79/57.

²³³ UNGA Res 79/57 (n 232).

²³⁴ UNGA Res 79/57 (n 232).

²³⁵ Victoria Scheyer and Marina Kumskova, “Feminist Foreign Policy: A Fine Line between ‘Adding Women’ and Pursuing a Feminist Agenda,” *Journal of International Affairs* 72, no. 2 (2019), p. 57.

²³⁶ Gillian Youngs, “Feminist International Relations: A Contradiction in Terms? Or: Why Women and Gender Are Essential to Understanding the World ‘We’ Live In,” *International Affairs* 80, no. 1 (2004), p. 76.

categories: either adding women into a determinate system or applying gender structures that embed equality and justice within themselves.²³⁷ Scheyer and Kumskova contend that gender cannot be separated from, and is integral to, international systems. Elizabeth Minor suggests that gender intersects with arms-related issues in myriad ways, one example being the underrepresentation of women at diplomatic meetings.²³⁸ The “gendered discussion of violence and weapons, which may frame certain weapons as symbols of masculine strength and women as being in need of male protection, can shape how disarmament issues are addressed, as well as exacerbate women’s exclusion from these processes.”²³⁹ There is a consensus within disarmament policy that further progress is needed in integrating gender considerations into arms control.²⁴⁰ Whilst nation-states can unanimously agree on acknowledging the gendered lens, what prevents the gendered perspective from being implemented in practice? In his review of feminist security theory scholarship, Eric Blanchard notes that answers to this central question can be found; his analysis helps to explain why international law’s framework for gendered security lacks an effective model for implementing gender-responsive disarmament.²⁴¹

Richard Steinberg notes that “the state remains a central actor in international law, international law is largely shaped and constrained by state power, and international law has a limited capacity to constrain the behaviour of powerful states.”²⁴² This, in part, reveals the marginalised position that gender-responsive disarmament has fallen into; many states operate according to a masculinised conception of security that is militarised and offensive in character, and therefore cannot fully comprehend a feminist perspective that centres women and children, including the full implementation of the Women, Peace, and Security (WPS) agenda, adopted in October 2000 by the UN Security Council.²⁴³ Robert O. Keohane develops this idea further by emphasising the nature of political power: “emphasizing power as the ability to act in concert would call attention to areas of world politics in which human beings seek to collaborate to cope with collective problems [...]”²⁴⁴ The legal significance of the assertion lies in this understanding of collective power. As a result of the adopting body’s absence of necessary powers, although peripheral effects may emerge from unanimous decisions, a rhetorical veneer of participatory progress is the abiding system.²⁴⁵

Evidently, there emerge many points of tension within a feminist perspective. Understanding feminist methods, including their critiques of law and approaches to legal reform,²⁴⁶ is critical to understanding why such claims should be regarded as legitimate.²⁴⁷ Through emphasising the gaps in international law, which invite

²³⁷ Scheyer and Kumskova, “Feminist Foreign Policy,” p. 59.

²³⁸ Elizabeth Minor, “Missing Voices: The Continuing Underrepresentation of Women in Multilateral Forums on Weapons and Disarmament,” *Arms Control Today* 47, no. 10 (2017), p. 15.

²³⁹ Minor, “Missing Voices,” p. 15.

²⁴⁰ United Nations Office for Disarmament Affairs, “Gender and Small Arms Control.”

²⁴¹ Eric M. Blanchard, “Gender, International Relations, and the Development of Feminist Security Theory,” *Signs* 28, no. 4 (2003), p. 1290.

²⁴² Richard H. Steinberg, “Overview: Realism in International Law,” *Proceedings of the Annual Meeting of the American Society of International Law* 96 (2002), p. 260.

²⁴³ United Nations Development Programme, *Parliaments as Partners Supporting the Women, Peace and Security Agenda: A Global Handbook* (2019).

²⁴⁴ Robert E. Keohane, “International Relations Theory: Contributions of a Feminist Standpoint,” in *Gender and International Relations*, ed. Rebecca Grant and Kathleen Newland (Indiana University Press, 1991), p. 43.

²⁴⁵ Marko Divac Öberg, “The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ,” *European Journal of International Law* 16, no. 5 (2005), p. 881.

²⁴⁶ Katharine T. Bartlett, “Feminist Legal Methods,” *Harvard Law Review* 103, no. 4 (1990), p. 830.

²⁴⁷ Bartlett, “Feminist Legal Methods,” p. 831.

inaction, this article illustrates the demand for a legal precedent that aligns with the UN Charter. I argue that states' maintenance of a militarised standpoint further foregrounds the foundational nature of gendered violence and undermines UNGA Resolution 79/57's consistent implementation within the international community. Firstly, I examine the consequence of international law's state-centric and militarised understanding of security which obstructs the full implementation of gender perspectives, including the WPS agenda, in the international framework. Secondly, I assert that representation and inclusionary politics, including gender-inclusive language, limit the resolution's capacity to support compliance with legally binding obligations such as the Arms Trade Treaty (ATT), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and UN Security Council Resolution 1325 (Women, Peace, and Security).

1. Militarisation and Gender Perspectives in the International System

Current perspectives regarding disarmament can be understood as reflective of power dynamics in the international community, or, in Paul Higate's terms, as cognisance of the "malestream tenets" that reflect the masculinised logic of the social world order.²⁴⁸ Gender-responsive disarmament responds to this dynamic by recognising women's roles in "all aspects of disarmament, non-proliferation, and arms control efforts", whilst also welcoming "full, equal, and meaningful participation of women [...] to prevent, combat, and eradicate the illicit transfer of small arms."²⁴⁹ The United Nations Office for Disarmament Affairs (UNODA) reinforces that whilst progress has been made, namely in seizing weaponry, a stronger framework is required to integrate gender perspectives, as agreed upon in the Programme of Action (PoA) on small arms and light weapons (SALW) and the ATT. UNODA further asserts that Member States are now also detailing their respective steps in considering gender perspectives when implementing the PoA, including the reporting of "sex-disaggregated data."²⁵⁰

The PoA was adopted in 2001 following a governmental agreement to improve the regulation of small arms, to bolster stockpile management, to validate reliably marked weapons, to improve cooperation in weapons tracing, and to foster national and international cooperation and assistance.²⁵¹ Since then, the database for the PoA has been active; every two years, countries submit national reports on their implementation of the UN PoA.²⁵² Whilst this has been established as a programme, it lacks widespread international cooperation. The database records data concerning every state's national coordination infrastructure, manufacture, international transfer, brokering, stockpile management, collection, marking and record-keeping, international tracing, international cooperation and assistance, and gender and additional information related to SALW trade. This data was drawn from Germany's entry in the database; Germany has expressed extensive support for the Women, Peace, and Security (WPS) agenda, and the Federal Government has given the WPS agenda special focus in German foreign

²⁴⁸ Paul Higate, "Men, Masculinity and Global Insecurity: Fighting for and against Islamic State," in *Routledge Handbook of Gender and Security*, ed. Caron E. Gentry, Laura J. Shepherd, and Laura Sjöberg (Routledge, 2019), p. 71.

²⁴⁹ UNGA Res 79/57 (n 232).

²⁵⁰ United Nations Office for Disarmament Affairs, "Gender and Small Arms Control."

²⁵¹ United Nations Office for Disarmament Affairs, "Programme of Action on Small Arms and Light Weapons—Eighth Biennial Meeting of States," 2022.

²⁵² United Nations Office for Disarmament Affairs, "Country Profiles," *Programme of Action on Small Arms and Light Weapons*.

policy.²⁵³ However, no entry has been made in the gender category; instead, the database reports “no information available on whether disaggregated data are collected on gender and the illicit trade in small arms and light weapons”.²⁵⁴ According to the OECD regarding international assistance on reintegration and SALW control, Germany provided US\$1.7 million in 2023 to eight projects.²⁵⁵ No information has been reported since. Whilst Germany reportedly commits to full implementation of the WPS agenda and to incorporating gender perspectives into its foreign policy, this is not reflected in its arms-related reporting. This data indicates that states with formal WPS commitments still fail to implement gender perspectives in arms reporting, demonstrating the gap between rhetorical endorsement and structural change.

Many states share this non-reportage; China, Denmark, France, Italy, India, Morocco, Poland and the United Kingdom are examples of such states that do not collect disaggregated data on gender, despite the unanimous vote on the WPS agenda. Other states, such as Canada, Argentina, Portugal, Mexico, the USA and Australia, do collect disaggregated data on gender. In cases like the United States, while gender is considered as part of SALW control, the export value of over 200 million small arms, and the import of over 50,000, suggest that the commitment remains superficial. As Paul Esau notes, many states’ implementations of feminist foreign policy in their respective national policies act as a cover for “the risk of human rights violations”.²⁵⁶ In Canada, military exports to Saudi Arabia since 2017 have violated Canadian military export policy and Canada’s adherence to the ATT. After considerable pressure from the public, the Canadian government released an internal report stating that Saudi Arabia was violating international humanitarian law and human rights law but argued that the specific equipment supplied by Canada may not have aided these violations.²⁵⁷ Furthermore, in the United States in 2023, President Biden released an updated “Conventional Arms Transfer Policy” which newly defined the alleged standard used to prohibit a sale. In effect, it significantly relaxes the “evidentiary threshold for refusing arms sales to dictators, human rights abusers, and other unsavoury customers”.²⁵⁸ This connotes a challenging pattern of approving military sales to autocratic regimes and to states with recognised human rights violations. This is consistent with the militarised logic of state security, which resists feminist disarmament norms, and thus hinders a formal, universal implementation of gender-based perspectives and practices.

A majority of the states listed, including others that have not been listed, operate under a masculinised, patriarchal view of security where arms are considered essential to prevent disorder and maintain peace. As Ann-Dorte Christensen argues, it is the military institution that is constructed as a “masculinity maker”.²⁵⁹ Its purpose is formed and maintained to wage war, and thus a militarised masculinity denotes traits typically associated with masculinity that can be acquired through military service and combat.²⁶⁰ Wars have historically been justified as

²⁵³ Federal Foreign Office, “No Peace Without Women: Women, Peace and Security Agenda,” January 21, 2022.

²⁵⁴ United Nations Office for Disarmament Affairs, “Country Profiles.”

²⁵⁵ United Nations Office for Disarmament Affairs, “Country Profiles.”

²⁵⁶ Paul Esau, “Conventional Arms Transfer Policies Weaponize Ambiguity and Ignore Risks,” *Inkstick*, June 29, 2023.

²⁵⁷ Esau, “Conventional Arms Transfer Policies.”

²⁵⁸ Esau, “Conventional Arms Transfer Policies.”

²⁵⁹ Ann-Dorte Christensen and Morten Kyed, “From Military to Militarizing Masculinities,” *NORMA: International Journal for Masculinity Studies* 17, no. 1 (2022), p. 1.

²⁶⁰ Maya Eichler, “Militarized Masculinities in International Relations,” *Brown Journal of World Affairs* 21, no. 1 (2014), p. 81.

being fought to protect women, and a feminist perspective asserts that military violence only exacerbates insecurities for women.²⁶¹

Jacklyn Cock declares this the feminist challenge to a militaristic framework; policy solutions that work to rectify participation and inclusivity “ignore the plurality of such institutions and social relations with which the state must engage.”²⁶² Even though traditional constructions of militarisation and masculinity have been reproduced to include a gendered aspect, namely through the introduction of women’s participation in matters related to armament, they are still operative according to Christensen, and have emerged in new forms, such as in arguments for “Western military international intervention.”²⁶³ This leaves little room for establishing lasting peace for women. As Cock posits, “weaponry and war are not fixed topographical features of the social landscape. Armies are not essential to the existence of a nation-state, as the experience of Costa Rica demonstrates; private gun ownership is not essential to citizenship. The diverse examples of Japan and Botswana suggest a gun-free society is a ‘real utopia’.”²⁶⁴ Without idealising this ‘utopia’, what is the purpose of the UN’s unanimous vote for A/RES/79/57? How is it expected to impart a lasting effect on vulnerable populations, populations in which gender-based violence was reported ‘severe’ or ‘extreme’ in 22 of 25 countries that experienced humanitarian crises in 2024 alone?²⁶⁵ Ignoring certain factors that exacerbate the likelihood of small-arms-related conflict reveals a gap in the logic behind unanimous decisions. In this way, international law’s framework is left vulnerable to cherry-picking politics, where states work on the implementation of agendas and resolutions that accord with their own political priorities. This notion will be elaborated upon in the next section.

2. Inclusionary and Representational Politics and Their Effects on Vulnerable Populations

In chapter 3 of A Global Study on the Implementation of the United Nations Security Council Resolution 1325, conducted by UN Women, gaps in the implementation of participatory commitments in international law’s framework are highlighted. Titled “Participation and a Better Understanding of the Political”, the publication breaks down the numbers: “since the adoption of resolution 1325, there has been a substantial increase in the frequency of gender-responsive language in peace agreements and the number of women, women’s groups, and gender experts who serve as official negotiators, mediators, or signatories. Nonetheless, in many contexts, women’s official participation may be temporary, their delegated roles may be more symbolic than substantive, and their capacity to influence may be directly resisted by cultural norms.”²⁶⁶ This statement directly correlates to the findings of the study, as the investigation relates to peace agreements and peace processes signed in countries like Colombia (from 1998-2002), Moldova (from 1992-2005), and Cyprus (from 1999-2004), where no agreement was reached due to lack of influence from women in the process, versus countries like Yemen (from 2011-2014),

²⁶¹ Eichler, “Militarized Masculinities,” p. 83.

²⁶² Jacklyn Cock, “The Feminist Challenge to Militarism,” *Agenda: Empowering Women for Gender Equity*, no. 36 (1997), p. 37.

²⁶³ Christensen and Kyed, “From Military to Militarizing Masculinities,” p. 2.

²⁶⁴ Cock, “Feminist Challenge to Militarism,” p. 38.

²⁶⁵ UN Women, “Facts and Figures: Women, Peace, and Security,” October 20, 2025.

²⁶⁶ UN Women, *Preventing Conflict, Transforming Justice, Securing the Peace: A Global Study on the Implementation of United Nations Security Council Resolution 1325* (UN Women, 2015), p. 111.

South Africa (from 1990-1997), and Northern Ireland (from 2001-2013), where an agreement was reached and implemented due to a strong influence from women. In cases like Fiji, however, the data is incongruent, with a strong influence of women in the process, yet no agreement was reached from 2006-2013.²⁶⁷ This is attributed to cultural resistance to women's empowerment and gender equality.²⁶⁸ It is evident that societal and cultural influences inherent to respective nations are significant factors in the implementation of peace processes, including the data on the PoA on SALW, explored in the prior chapter, which suggests a similar pattern.

As the Global Study explains, an “analysis of 40 peace processes since the end of the Cold War shows that in cases where women were able to exercise a strong influence on the negotiation process, there was a much higher chance that an agreement would be reached than when women's groups exercised weak or no influence. In cases of strong influence of women an agreement was almost always reached.”²⁶⁹ This does not, however, negate the cultural influence at play; as the Global Study notes, “In 15 of the 16 national dialogues examined for this Study, it was found that decision-making was left to a small group of male leaders.”²⁷⁰ Although nation-states recognise that many United Nations resolutions lack binding force, they may exploit that weakness and obstruct implementation where the resolutions would benefit women.

As Manuel Mesa observes, whilst UN Resolution 1325 “transformed the view of women in conflicts, from passive victims to key actors in peacebuilding [...], its impact remains limited in everyday life.”²⁷¹ This is due to the regulatory framework remaining insufficient to positively affect the lives of women in conflict settings. Mesa states that sexual violence prevails with impunity, and women's participation in peace processes continues to be limited. Furthermore, where National Action Plans have been implemented, whilst they improve intergovernmental and civil-society coordination, they suffer from insufficient political commitment, inadequate dedicated budgets, and uneven reach and effectiveness. These limitations differ across contexts but overlap in important respects when these areas are evaluated. Mesa describes this as the “clearest shortcoming in implementing the WPS agenda”, as there is an evident gap between “declared ideals” and “actual action”. It can be further asserted that this is an additional shortcoming in PoA SALW implementation.

The analysis of the implementation of peace processes as supported by the UN Women's Global Study and Mesa's enquiry can reasonably be applied to the PoA on SALW, and similar entries submitted into the database informing implementation status. “Too often, gender perspective is still seen merely as the inclusion of women, without questioning or transforming the structures of inequality and power that perpetuate exclusion.”²⁷² In this context, the structure of inequality and power to which Mesa refers is principally patriarchal. Patriarchy as a system of power is an idea expressed by bell hooks.²⁷³ When CEDAW entered into force in 1981, its states parties

²⁶⁷ Marie O'Reilly, Andrea Ó Súilleabháin, and Thania Paffenholz, “Women's Participation and a Better Understanding of the Political,” in *Preventing Conflict, Transforming Justice, Securing the Peace: A Global Study on the Implementation of United Nations Security Council Resolution 1325* (UN Women, 2015), p. 42.

²⁶⁸ O'Reilly, Ó Súilleabháin, and Paffenholz, “Women's Participation,” p. 42.

²⁶⁹ O'Reilly, Ó Súilleabháin, and Paffenholz, “Women's Participation,” pp. 41–42.

²⁷⁰ O'Reilly, Ó Súilleabháin, and Paffenholz, “Women's Participation,” p. 48.

²⁷¹ Manuel Mesa, “The Challenges of the UN Women, Peace and Security Agenda on Its 25th Anniversary,” *Latinoamérica21*, October 1, 2025.

²⁷² Mesa, “Challenges of the UN Women, Peace and Security Agenda.”

²⁷³ bell hooks, “Understanding Patriarchy,” *The Anarchist Library*, December 2004.

undertook to protect women's equal human rights and to take the steps necessary to guarantee gender equality.²⁷⁴ They further agreed to address and subsequently dismantle “social, religious, and cultural structures which foster the subordination of women by men”.²⁷⁵ The CEDAW Committee assumes this to include religious, “traditional and customary beliefs, ideas, rules and practices”, whilst not explicitly stating the word ‘patriarchy’, demonstrating the “problematic distinction between non-western and non-European states, versus western and European states.”²⁷⁶ The CEDAW Committee is “concerned at the persistence of patriarchal attitudes and deeply-rooted stereotypes regarding the roles and responsibilities of women in the family and in society.” In observations concerning Pakistan, Syria, Kyrgyzstan, Cameroon and Uganda, the Committee identifies “harmful traditional practices” such as female genital mutilation, honour killings, early and forced marriage, and violence against women generally.²⁷⁷ Mudgway presents the argument that these practices could be associated with patriarchy and could serve as direct indicators of it, as they correlate to men's comprehensive power and the oppression of women. This supports the argument advanced in this section; due to bureaucratic authority and the predominance of men in power, the implementation of the PoA on SALW cannot be fully absorbed into every nation's framework or culture, thereby creating vulnerabilities for women and girls and leaving them at risk of abandonment by structures that are in dire need of systemic reform.

This notion is directly connected to legally binding obligations such as the ATT and CEDAW. Put simply, in the case of the PoA on SALW and A/RES/79/57, since certain states remain selective regarding full implementation of the Resolution on Women, Disarmament, Non-Proliferation, and Arms Control, they act contrary to obligations under legally binding treaties, under which States Parties are required to evaluate and report the risk of conventional arms exports being used to commit serious acts of harm and gender-based violence (GBV).²⁷⁸ Risk assessment cannot be completed under the ATT without collecting and reporting sex-disaggregated data. At the Eleventh Conference of States Parties to the ATT, held in August 2025, states agreed to establish Gender Focal Points to thoroughly integrate a gendered perspective across all treaty processes and support its implementation.²⁷⁹ Further to this, CEDAW is a legal instrument that instructs countries to eliminate discrimination against women and girls and works in tandem with the ATT and the PoA on SALW. General Recommendation No. 30, adopted in 2013, specifically guides States parties on “the implementation of the obligation of due diligence”, in particular “protecting women's human rights at all times, advancing substantive gender equality before, during and after conflict and ensuring that women's diverse experiences are fully integrated into all peacebuilding, peacemaking, and reconstruction processes.”²⁸⁰ Under CEDAW, there is a legal requirement for states to report the steps they have taken to protect women and girls from systemic harm and

²⁷⁴ Cassandra Mudgway, “Smashing the Patriarchy: Why International Law Should Be Doing More,” *Women, Peace and Security*, October 7, 2019.

²⁷⁵ Mudgway, “Smashing the Patriarchy.”

²⁷⁶ Mudgway, “Smashing the Patriarchy.”

²⁷⁷ Mudgway, “Smashing the Patriarchy.”

²⁷⁸ Asociación para el Análisis de Políticas Públicas, “Judicial Sentences as Evidence for Gender-Responsive Small Arms Control: Contributions to UNPoA Monitoring and ATT Article 7(4) Risk Assessments” (2026).

²⁷⁹ Asociación para el Análisis de Políticas Públicas, “Judicial Sentences as Evidence for Gender-Responsive Small Arms Control.”

²⁸⁰ CEDAW Committee, ‘General Recommendation No 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations’ (18 October 2013) UN Doc CEDAW/C/GC/30, paras 2–3.

violence. As such, the discrepancies in reportage of sex-disaggregated data underline a gap in implementation. Without data on the differentiated impacts of armed violence on women and girls, states cannot fulfil their assessments of the risk of gender-based violence under the ATT.²⁸¹ This reflects two problems: first, a militarised and masculinised approach to security, as states do not honour their commitments, possibly because full reporting would require the acknowledgement of human-rights violations; and second, the absence of women from the process, allowing a single perspective to prevail without challenge.

Conclusion

Feminist legal theory identifies potential reforms that can aid in closing the gap between the formal adoption and practical implementation of A/RES/79/57. Firstly, Katharine T. Bartlett asserts what she calls a fusion of a “classic Aristotelian model of practical deliberation” and the “feminist focus on identifying and taking into account the perspectives of the excluded.”²⁸² This can yield the desired outcome of widespread implementation across the global landscape, because it considers alternative perspectives including those shaped by different cultures and societal norms. As Bartlett states, “practical reasoning approaches problems not as dichotomized conflicts, but as dilemmas with multiple perspectives, contradictions, and inconsistencies.”²⁸³ This method supports innovative ways to integrate and reconcile implementation whilst acknowledging specified context. For instance, this method may be of use in the case of Sudan, where Sudanese women’s groups appealed to the States Parties to the Arms Trade Treaty (ATT) in 2025. As the appeal notes, since 2022, “Serbia has exported massive quantities of small arms and light weapons, including assault rifles and ammunition, despite clear indication that these arms are being used in the conflict.”²⁸⁴ China and the United Arab Emirates have also been implicated in the perpetuation of violence in Sudan; China has reportedly provided military equipment and technology, while the United Arab Emirates has reportedly facilitated the transit of arms shipments, thereby circumventing international oversight. Further to this, Sudanese women’s groups have expressed the “human cost” of illicit SALW, including the subjection of women and children to sexual violence and indiscriminate attacks, “accelerating the breakdown of the social fabric.”²⁸⁵ Should a practical reasoning approach have been taken in this case together with Sudan’s report on gender considerations in the PoA SALW database, Sudanese women’s groups’ pleas for reform could have been heeded. Practical reasoning does not address circumstances in advance based on predictability.²⁸⁶ Rather, it recognises that facts are often varied and unpredictable, making it difficult for lawmakers to “frame determinate rules”.²⁸⁷

²⁸¹ United Nations Office for Disarmament Affairs, “Chapter 6: Gender and Disarmament,” in *United Nations Disarmament Yearbook*, vol. 48 (2023).

²⁸² Bartlett, “Feminist Legal Methods,” p. 850.

²⁸³ Bartlett, “Feminist Legal Methods,” p. 851.

²⁸⁴ Peace for Sudan Platform, “Sudanese Women Groups Appeal to the Conference of States Parties to the Arms Trade Treaty,” August 2025, p. 1.

²⁸⁵ Peace for Sudan Platform, “Sudanese Women Groups Appeal,” p. 2.

²⁸⁶ Bartlett, “Feminist Legal Methods,” p. 853.

²⁸⁷ Bartlett, “Feminist Legal Methods,” p. 853.

The Agency for Peacebuilding recommends gearing towards substantive participation and proposes “confronting entrenched gender hierarchies and embedding women’s authority into formal peacemaking processes.”²⁸⁸ As it stands, women’s participation in peace and security processes and decisions has often been confined to “peripheral or subsidiary positions: observer roles, advisory positions, or symbolic appointments” that only address visibility and representation.²⁸⁹ Because these positions often hold little weight with regard to influencing decision-making or gaining authority in international fora, participation has become a numbers game, and thus gender-based resolutions and decisions cannot make substantial progress. Women’s representation is further limited across the Horn of Africa, in Sudan, Somalia, and Ethiopia, where embedded gender structures restrict women’s access to formal decision-making areas. Only by challenging patriarchal structures in these regions, but indeed, across the globe, can the WPS agenda “fulfill its promise of transforming peace and security for all”.²⁹⁰

The United Nations Regional Centre for Peace and Disarmament in Asia and the Pacific held an event in Geneva in August 2023 on the margins of the ninth Conference of States Parties to the Arms Trade Treaty. Co-moderated by the United Nations Institute for Disarmament Research (UNIDIR), the event emphasised gender-based considerations for national arms exports and transfers.²⁹¹ I propose that this step be extended into the domestic legal systems of individual states; the UN PoA guidelines should transition into binding laws by introducing a “National Small Arms and Light Weapons Gender Act”, which would require national law-enforcement agencies in all states to record the sex of victims and perpetrators in firearm registries. This would rectify inconsistent practices in reporting sex-disaggregated data by embedding policy into states directly. As many causes of the lack of consistent reportage are due to the underfunding of data architecture and national agency data silos, this implementation would make law-enforcement agencies responsible for collecting and recording the data, thereby feeding into a database accessible to international organisations.

This recommendation should be accompanied by updates to national law-enforcement data-collection systems to ensure that they are compatible with the Modular Small-arms-control Implementation Compendium (MOSAIC), which is a module-based system that translates the objectives of key global agreements on SALW.²⁹² By doing so, individual states would adhere to their legal requirements under the ATT and CEDAW and contribute to a downward trajectory in illicit flows of SALW and GBV by tracking the data and causes. This would challenge the patriarchal perspectives of state security by exposing the data reflecting violence against women and girls. It would also decrease reliance on individual agencies and increase data reportage, by embedding policy into many governmental agencies. Further, I propose using the UN PoA Biennial Meetings of States to resolve gaps in reportage, by introducing a peer-review system that can address compliance with gender-based data submission.

As states continue to push forward a militarised patriarchal agenda, A/RES/79/57 and the Programme of Action on Small Arms and Light Weapons are heavily hindered. Implementing these suggestions may promote

²⁸⁸ Alexa Marsh, “Participation vs. Power: Women’s Persistent Exclusion from Peacemaking Processes,” Agency for Peacebuilding, February 24, 2026.

²⁸⁹ Marsh, “Participation vs. Power.”

²⁹⁰ Marsh, “Participation vs. Power.”

²⁹¹ United Nations Office for Disarmament Affairs, “Chapter 6: Gender and Disarmament.”

²⁹² United Nations Office for Disarmament Affairs, “Modular Small-Arms-Control Implementation Compendium.”

fuller international cooperation on a resolution that would benefit the broader human population. A meaningful implementation of A/RES/79/57 can result in greater peace and security for women and children.

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Law as It Is, Law as It Lives: Judicial Reasoning in Penumbra Interpretation of Same-Sex Marriage Rights

By Rusne Vaskeviciute

Introduction

“The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,” declared Chief Justice Warren, delivering the opinion of the Supreme Court of the United States in *Trop v. Dulles*.²⁹³ This 1958 holding addresses law not as a static entity, but as an evolving one, responsive to the necessities and standards of a developing society. Justice Warren’s statement reflects a teleological interpretative approach towards jurisprudence, which aims to reason the law in compliance with its intended purpose. Through this interpretative framework, legal reasoning extends beyond the clear-cut wording of legal provisions towards the surrounding *penumbra*. In this domain, the limitation of legal language becomes apparent. Since legal provisions cannot anticipate every circumstance they are meant to regulate, they require judicial interpretation.

The most comprehensive definition of *penumbra* was coined by English legal professional and philosopher H. L. A. Hart in his 1961 work *The Concept of Law*.²⁹⁴ Hart defined it as the area of ambiguity in an application of legal rules where judicial discretion²⁹⁵ is necessary due to the inherently imprecise legal language not accounting for every possible state of affairs that might occur.

However, American legal professional and philosopher Ronald Dworkin criticises Hart’s definition. He argues that Hart fails to include the role of legal principles, which substantially guide judicial decisions in the absence or ambiguity of explicit legal rules. Dworkin extends Hart’s account of the *penumbra*, arguing that even within that so-called *grey zone*, judicial reasoning remains guided by principles of fairness, justice, and equality integral to the legal system.²⁹⁶

French philosophers Michel Foucault and François Ewald propose a different approach to the concept of *penumbra*. Instead of focusing on judicial decision-making, they delve into the social and historical conditions that produce it. Foucault and Ewald examine how non-legal norms, such as evolving societal expectations and shifting rights discourse, widen the gap between socially recognised and legally protected conduct, generating pressure around rights and duties that have yet to gain legal recognition.^{297 298}

These perspectives suggest that when legal rules provide no determinate answer, judges must exercise discretion in interpreting the law. However, such discretion does not operate in isolation. From the Indian Supreme Court’s use of constitutional provisions to establish safeguards against workplace sexual harassment,²⁹⁹

²⁹³ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

²⁹⁴ H. L. A. Hart, *The Concept of Law*, 2nd ed., edited by Penelope A. Bulloch and Joseph Raz (Oxford University Press, 1994), p. 123.

²⁹⁵ Judicial discretion – the authority and flexibility of the judges to exercise independent legal reasoning to reach decisions where the law does not prescribe a single, definitive outcome.

²⁹⁶ Ronald Dworkin, “The Model of Rules,” *University of Chicago Law Review* 35, no. 1 (1967), p. 35, <https://doi.org/10.2307/1598947>.

²⁹⁷ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan, 2nd ed. (Vintage Books, 1995), pp. 210–11.

²⁹⁸ François Ewald, “Norms, Discipline, and the Law,” *Representations* 30 (1990), p. 138, <https://doi.org/10.2307/2928449>.

²⁹⁹ *Vishaka v. State of Rajasthan*, (1997) 6 S.C.C. 241 (India).

to the Italian Constitutional Court's recognition of informed consent as a fundamental principle protecting health and individual self-determination,³⁰⁰ courts adapt legal doctrines to evolving values of equality and dignity where legislation is limited or absent.

Therefore, to analyse the relationship between the transformation of collective values and judicial interpretation of laws established under earlier social conditions, this paper aims to assess *how changing societal attitudes toward sexuality, family, and equality influence judicial interpretation of penumbra across legal systems concerning same-sex marriages*.

As this paper will reflect on the United States of America's common law system and Brazil's civil law system, specifically through the respective cases *Obergefell v. Hodges* (2015)³⁰¹ and *ADI 4277*³⁰² and *ADPF 132* (2011),³⁰³ it will be argued that:

(I) while the interpretation of penumbra in law is largely influenced by the *internal dynamics* of judicial reasoning, such as different legal interpretative methodologies employed by judges within their respective legal systems,

(II) *external factors*, such as changing public attitudes and evolving understandings of individual rights, play a crucial role in shaping the normative environment within which judges reason and decide, as evidenced by the impact of the expanding public recognition of LGBT rights on judicial decisions across civil and common law systems.

1. The Influence of Legal Theory on Judicial Reasoning and the Use of Precedent and Judicial Review in Resolving Penumbral Ambiguity

1.1. The Influence of Legal Theory and Interpretative Methodology on Judicial Reasoning in Penumbral Cases

The issue of the approach towards penumbra in law is twofold. Firstly, legal theories present contrasting visions of the function of law. Secondly, it concerns interpretative methodology, which determines how law is applied in practice by judges.

Natural law theory, legal positivism, legal realism, and critical legal studies constitute prominent legal theories that define the nature and source of law and determine the normative standards by which its validity and scope are assessed. However, given their direct relevance to the treatment of penumbra in law, particularly in the context of same-sex marriage, this paper will focus on legal positivism and legal realism. These theories diverge on whether law constitutes a closed, self-sufficient system, autonomous from morality and social reality

³⁰⁰ *Decisione della Corte Costituzionale*, n. 438/2008 (Italy, 2008).

³⁰¹ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

³⁰² *Ação Direta de Inconstitucionalidade [ADI] 4277* (Prosecutor General v. President of the Republic), Supremo Tribunal Federal (Brazil 2011).

³⁰³ *Arguição de Descumprimento de Preceito Fundamental [ADPF] 132* (Governor of the State of Rio de Janeiro v. Courts of Justice of the States), Supremo Tribunal Federal (Brazil 2011).

(an approach advocated by legal positivism), or whether it is shaped by social context and judicial discretion (an approach advocated by legal realism). Therefore, their divergence influences how judges address the insufficiency of the legal framework in indefinite legal situations. It is important to note that legal theories operate alongside interpretative methodologies. In this regard, the two interpretative methodologies most pertinent to this discussion are *formalist* and *teleological*.³⁰⁴ This subpart therefore traces two parallel tracks: the theoretical positions of legal positivism and legal realism, which define the nature and boundaries of law, and the interpretative methodologies of formalism and teleological reasoning, which translate those theoretical positions into judicial practice.

(a) Legal Positivism and Formalist Interpretation

The treatment of penumbra in law is most developed within **legal positivism**, primarily through Hart's distinction between clear-cut cases and *hard cases*. The latter are instances where the legal text is inconclusive and judicial discretion becomes necessary, creating a "penumbra of debatable cases".³⁰⁵ However, such discretion operates strictly within the boundaries of *law as it is*, independently of moral considerations, given the strict separation between law and morality that legal positivism maintains. From the perspective of legal theory, the positivist approach to the limits of judicial authority is reflected in the dissenting opinions in *Obergefell v. Hodges*. The minority held that the Constitution's silence on same-sex marriage left no textual basis for judicial intervention (therefore, the issue did not constitute a hard case), and that any broad margin of interpretation would exceed the boundaries of *law as it is*, amounting to judicial legislation rather than adjudication. This positivist position is exemplified in Chief Justice John Roberts's dissenting opinion: "*judges have power to say what the law is, not what it should be*".³⁰⁶

In contrast to hard cases, clear-cut cases present no such ambiguity; therefore, no judicial discretion is required. In these instances, legal positivism tends to operate alongside **formalism**. Whereas legal positivism defines the boundaries of judicial authority, a judge who adopts a formalist interpretation reads and applies the text solely within those boundaries, without looking beyond its literal meaning. The formalist interpretative approach derives from Montesquieu's principle of separation of powers between the government branches, articulated in his 1748 work *The Spirit of the Laws*: "*But as we have already observed, the national judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour.*"³⁰⁷ With that being said, formalism does not recognise penumbra as an invitation for any judicial response whatsoever, and leaves the concept of a legal *grey area* out of the discourse. In *Obergefell v. Hodges*, such a formalist approach is reflected in Justice Antonin Scalia's opinion. He strongly dissented from

³⁰⁴ Telos – an ultimate objective or aim.

³⁰⁵ H. L. A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71, no. 4 (1958), p. 607, <https://doi.org/10.2307/1338225>.

³⁰⁶ *Obergefell*, 576 U.S. at 686 (Roberts, C.J., dissenting) ("Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be").

³⁰⁷ Montesquieu, *The Spirit of the Laws*, trans. Thomas Nugent (Batoche Books, 2001), bk. XI, ch. VI, p. 180, originally published 1748, <https://plattypus1917.org/wp-content/uploads/The-Spirit-of-Laws-Montesquieu.pdf>.

the majority's decision to legalise same-sex marriage, arguing that the ruling constituted judicial overreach,³⁰⁸ and claiming that the Court's mission was to read the constitutional text and do what it says.³⁰⁹ Scalia's position thus exemplifies formalist interpretation in practice, confining the Court strictly to the enacted constitutional text.

(b) Legal Realism and Teleological Interpretation

Where legal positivism conceives of law as a closed, autonomous system defined by its textual form, legal realism takes an opposing position, situating law as a social fact – dynamic, indeterminate, and inseparable from the realities of how courts resolve disputes in practice.

This is captured most prominently in the work of Oliver Wendell Holmes Jr., who, across his two foundational texts, articulated the core claims of legal realism. In the 1881 book *The Common Law*, Holmes argues that the life of the law has not been logic, but experience.³¹⁰ He positions law's content as not determined by textual logic or formal deduction, but by the accumulated social and historical realities through which it has been applied. This statement directly challenges the positivist conception of law as a self-sufficient logical order.

In the 1897 essay "The Path of the Law", he advances this idea further by introducing the "Bad Man" theory. The theory proposes that the most accurate understanding of law comes from the perspective of an individual entirely unconcerned with morality, who calculates the law solely by predicting when and how force will be applied to his conduct. Because a "bad man" disregards moral obligation entirely, he strips law down to its practical reality: not what statutes declare, but what courts will actually do³¹¹. This perspective reinforces the legal realist distinction between law in books and law in action, and positions law as fundamentally a prediction of judicial behaviour rather than a fixed textual command. Since legal realism argues that law is defined through how courts resolve disputes, judicial engagement with unclear or undefined legal situations is neither a deviation from the legal system nor an instance of judicial overreach, but a constitutive part of how law materialises in reality and develops. However, the question of how judges ought to reason when confronting penumbral cases belongs to interpretative methodology. Judges drawing on legal realist assumptions tend to employ teleological reasoning as their interpretative methodology, as both share a rejection of law as a closed textual system and an orientation toward law's social purpose and lived reality.

Obergefell v. Hodges demonstrates such a methodological position in the majority's ruling. The Court held that the exclusion of same-sex couples from the institution of marriage violated the Fourteenth Amendment's right to marry protected by the Due Process Clause³¹² and that denying this right violated the Equal

³⁰⁸ *Obergefell*, 576 U.S. at 713 (Scalia, J., dissenting) ("This is a naked judicial claim to legislative - indeed, super-legislative - power; a claim fundamentally at odds with our system of government").

³⁰⁹ Jonathan R. Siegel, "Legal Scholarship Highlight: Justice Scalia's Textualist Legacy," *SCOTUSblog*, November 14, 2017, <https://www.scotusblog.com/2017/11/legal-scholarship-highlight-justice-scalias-textualist-legacy/>.

³¹⁰ Oliver Wendell Holmes, Jr., *The Common Law*, ed. Paulo J. S. Pereira and Diego M. Beltran (University of Toronto Law School, 2011), p. 5, <https://www.general-intelligence.com/library/commonlaw.pdf>.

³¹¹ Oliver Wendell Holmes, Jr., "The Path of the Law," *Harvard Law Review* 10, no. 8 (1897), pp. 459–61, <https://moglen.law.columbia.edu/LCS/palaw.pdf>.

³¹² The Due Process Clause prohibits the government from depriving any person of life, liberty, or property without due process of law. It

Protection Clause.³¹³ By using the Fourteenth Amendment's broader objective of guaranteeing equal dignity and protection under the law, the Court reasoned that the meaning of fundamental rights is not fixed at the moment of a provision's drafting, but evolves alongside society's understanding of liberty³¹⁴ ("*The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution*").³¹⁵ Therefore, the ruling exemplifies teleological interpretation by reading the constitutional provision beyond its original textual meaning in light of the broader purpose it was intended to serve.

Common law systems are more conducive to such teleological interpretation, as judicial reasoning proceeds inductively from specific cases toward broader legal principles, as evident in *Obergefell v. Hodges*. In civil law systems, by contrast, judicial reasoning proceeds deductively, applying pre-existing codified rules to the facts at hand. However, penumbral protection for same-sex couples is not exclusive to common law systems. Cases *ADI 4277* and *ADPF 132* illustrate that civil law judges are equally capable of penumbral reasoning. At the joint trial of *ADI 4277* and *ADPF 132*, the Brazilian Supreme Court read constitutional Article 226 as an open rather than exhaustive enumeration of family entities, positioning same-sex families not as excluded by the provision, but simply unaddressed, leaving penumbral space for judicial extension. Therefore, teleological reasoning facilitated the penumbral extension of legal recognition and protections for same-sex couples in both civil and common law systems, directing judges toward the broader purpose of existing legal provisions rather than their explicit text.

1.2. The Use of Judicial Precedent and Judicial Review to Resolve Penumbral Ambiguity of Same-Sex Marriage

In common law systems, the judiciary uses *stare decisis* – binding precedents – as the primary source of law in an incremental development of legal protections across successive cases. In civil law systems, where precedent carries no binding force, judicial review of constitutional principles serves as the primary tool for resolving ambiguity in constitutional text.

(a) Stare Decisis and Penumbral Extension

In the US, state supreme courts generally have final authority over questions of state law within their jurisdictions, while the US Supreme Court may review final state-court judgments that present federal constitutional questions. Accordingly, a state court's interpretation of federal constitutional protection may be reviewed by the US Supreme Court, whereas questions of state law ordinarily remain for the state courts. The

encompasses both procedural protections (fair notice and a hearing) and substantive limits on government power over fundamental rights.
³¹³ The Equal Protection Clause prohibits states from denying any person within their jurisdiction equal protection under the law. It requires that similarly situated individuals be treated alike by the government, and serves as the constitutional basis to combat discriminatory laws and policies.

³¹⁴ The Court's reasoning reflects the philosophy of living constitutionalism, which holds that the Constitution's meaning evolves alongside contemporary social values rather than remaining fixed to its original textual intent. Living constitutionalism shares the purposive orientation of teleological reasoning, though it operates specifically at the level of constitutional interpretation rather than statutory interpretation.

³¹⁵ *Obergefell*, 576 U.S. at 663 (opinion of the Court).

legal recognition of same-sex marriage in the US ultimately required Supreme Court intervention to resolve the federal constitutional question and extend constitutional protections into previously unaddressed penumbral territory.

In 1972, the appeal of *Baker v. Nelson* to the US Supreme Court, in which petitioners argued that Minnesota's refusal to issue a same-sex marriage licence violated the Ninth Amendment's protection of fundamental rights and the Fourteenth Amendment's Due Process and Equal Protection Clauses, was dismissed "for want of a substantial federal question" at that time.³¹⁶ However, in the 43 years between *Baker v. Nelson* and *Obergefell v. Hodges*, successive Supreme Court decisions progressively developed the penumbral scope of the Fourteenth Amendment, gradually reading the fundamental right to marry into its protections of liberty, dignity and equal protection.

In reaching its 2015 decision in *Obergefell v. Hodges*, the Supreme Court anchored its majority ruling in a line of prior precedents. Those precedents established that the right to marry cannot be based on arbitrary distinctions (*Loving v. Virginia*, 1967), cannot breach personal autonomy and respect for privacy (*Lawrence v. Texas*, 2003), and cannot violate dignity and equality for same-sex couples under the law³¹⁷ (*United States v. Windsor*, 2013). Grounded in this case law, the Court in *Obergefell v. Hodges* extended the right to marry to same-sex couples, overruling *Baker v. Nelson* as incompatible with the evolved constitutional understanding of liberty, dignity, and equal protection.

(b) Judicial Review and Constitutional Scrutiny

In Brazil, the penumbral extension of legal recognition to same-sex couples was determined through the Federal Supreme Court's constitutional judicial review, examining whether the statutory treatment of same-sex unions established in the Civil Code conformed to the constitutional principles of human dignity and non-discrimination.

The Supreme Federal Court of Brazil (STF) granted such recognition, addressing the penumbra of same-sex stable unions by evaluating whether existing laws violated the established constitutional principles. In *ADI 4277* and *ADPF 132*, judicial review centred on Article 226, § 3 of the Brazilian Constitution, which recognises the stable union between a man and a woman as a family entity but contains no explicit prohibition of same-sex unions.³¹⁸ Brazilian law never explicitly prohibited same-sex marriage, as Article 1.521 of the Civil Code, which enumerates matrimonial impediments, contains no provision excluding same-sex couples. Under Article 5 of the Brazilian Constitution, no one is obliged to refrain from doing something except by virtue of explicit law. This means that individual conduct is permitted by default unless expressly restricted; neither the Constitution nor the Civil Code prohibits same-sex marriage. The gendered language of Articles 1.514, 1.517, 1.565 and 1.723 of the

³¹⁶ *Obergefell*, 576 U.S. at 656 (syllabus).

³¹⁷ In *United States v. Windsor*, 570 U.S. 744 (2013), the US Supreme Court ruled that Section 3 of the "Defence of Marriage Act", which defined marriage explicitly as between a man and a woman, was unconstitutional because it violated the equal dignity of same-sex marriages already recognised by states.

³¹⁸ Constituição Federal [C.F.] art. 226, § 3 (Brazil), <https://www.globalhealthrights.org/wp-content/uploads/2013/09/Brazil-constitution-English.pdf>.

Civil Code (“between/for the man and a woman”) did not amount to an implicit prohibition, given that Brazilian law requires explicit legal provision to restrict individual conduct.³¹⁹ Therefore, same-sex stable unions occupied a penumbral space in Brazilian law: not prohibited, but equally without any statutory mechanism through which couples could formally implement their civil union.

Therefore, through judicial review, the STF jointly held that gendered provisions (“between/for the man and a woman”) in the Civil Code and Article 226 of the Constitution **must be interpreted in conformity** with Article 3, IV, of the Constitution, which prohibits “*prejudice as to <...> sex, <...> and any other forms of discrimination*”,³²⁰ thereby extending recognition to same-sex stable unions as family entities. Moreover, it was established that the absence of recognition of same-sex stable unions violates the principles of human dignity and protection of equality established in the Constitution.

The ruling resolved the issue of penumbra surrounding same-sex stable unions, granting same-sex couples nationwide the same legal rights as heterosexual couples in stable unions, setting a foundation for further legal changes, as the conversion of stable unions into marriage remained contested in subsequent proceedings. Two years later, in 2013, the STF’s rulings in *ADI 4277* and *ADPF 132* provided the constitutional foundation for Resolution 175, issued by the National Council of Justice in 2013. The Resolution ordered all civil registries to license same-sex marriages and convert existing stable unions into marriages upon request, effectively legalising same-sex marriage across Brazil through an administrative order.³²¹

2. The Influence of the LGBT Rights Movement and International Human Rights Norms on Judicial Recognition of Same-Sex Marriage

2.1. Societal Mobilisation and the LGBT Movement as Catalysts for the Judicial Establishment of Same-Sex Marriage Rights

Judicial interpretation does not occur in a social vacuum. The attitudinal change model holds that the same social forces that reshape public opinion shape judges as members of society. However, judicial outlook is influenced not by public opinion directly (e.g., opinion polls or political debates), but by the mutually experienced cultural and ideological shifts that simultaneously reorient judicial thinking. Chief Justice Rehnquist acknowledged that major constitutional cases, as they engage broad jurisprudential themes rather than narrow legal technicalities, are particularly susceptible to the tides of public opinion already running in the country.³²²

In the context of same-sex marriage, this dynamic is visible in the journey from the holding in *Baker v. Nelson* to *Obergefell v. Hodges*. Between 1972 and 2015, no amendment was made to the constitutional

³¹⁹ Marianna Chaves, “Same-Sex Families in Brazil: An Overview after the Trial of ADI 4277 and ADPF 132 by the Supreme Court,” in *The International Survey of Family Law 2014*, ed. Bill Atkin (Jordan Publishing, 2014), p. 30, <https://isfl.world/wp-content/uploads/2022/07/Brazil-2014.pdf>.

³²⁰ Constituição Federal [C.F.] art. 3, IV (Brazil).

³²¹ Conselho Nacional de Justiça, “Resolução nº 175, de 14 de maio de 2013,” <https://atos.cnj.jus.br/atos/detalhar/1754>.

³²² Riley Fredrick, “Marriage Equality: The Paralleled Progress Between Public Approval and Supreme Court Decisionmaking,” *Florida State University Law Review* 44, no. 2 (2016), p. 825, <https://ssrn.com/abstract=2837575>.

provisions at stake. However, arguments grounded in the Fourteenth Amendment that were dismissed in *Baker v. Nelson* were accepted in *Obergefell v. Hodges*, demonstrating that the shift in judicial reasoning reflected a transformation in the broader social environment rather than a change in the constitutional text itself. Before *Obergefell v. Hodges*, the question of same-sex marriage recognition remained within individual states' legislative and judicial competence due to the dismissal in *Baker v. Nelson*. This reflected the broader political context of 1972, in which same-sex marriage had not emerged as a subject of public political debate. Illinois had taken the most progressive state-level step in 1961 by decriminalising consensual sodomy, removing provisions disproportionately used to criminalise same-sex relationships and stigmatise LGBT individuals.³²³ However, even this represented only the removal of criminal punishment rather than any positive recognition of same-sex unions.

The emerging *Gay Liberation Movement* in the late 1960s focused on fighting discrimination against homosexual individuals in industry, the mass media, government, schools, and churches.³²⁴ The movement's sustained advocacy gradually shifted the legal and political landscape, manifesting in the Massachusetts Supreme Judicial Court's 2003 decision *Goodridge v. Dep't of Pub. Health*. It was the first decision by a state court in the US to hold that prohibiting same-sex marriage violated its state constitution.³²⁵ This decision catalysed public and political discourse on same-sex marriage at the national level, prompting demands for the extension of equal protection to same-sex couples across other states. By the time the Supreme Court ruled in *Obergefell v. Hodges* in 2015, 36 out of 50 states had already legalised same-sex marriage, demonstrating that federal constitutional recognition followed the broader shift in same-sex marriage law across the country, rather than led it.³²⁶ As Justice Anthony Kennedy stated in the opinion of the Court in *Obergefell v. Hodges*, "*the generations <...> did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.*"³²⁷

Similarly, in Brazil, shifting attitudes toward LGBT rights guided the recognition of same-sex unions, reflecting broader changes in views on marriage and equality. However, such changes began as early as 1830, when Brazil, then a unitary state governed by a single national penal code, eliminated sodomy from its criminal legislation nationwide. The broader legal and social recognition of LGBT rights, however, developed much later, gaining momentum through the political changes of the 1980s. Brazilian gay liberation activists leveraged the AIDS crisis as a starting point for advancing equality, forming alliances with political leaders during the country's transition from authoritarianism to democracy and gaining influence over public health policy through the progressive healthcare reform movement.³²⁸ The influence gained within political institutions during this period

³²³ Gerber/Hart Library and Archives, "Sodomy Laws and the LGBTQ Community," *Chicago LGBTQ History 1924–1970*, accessed March 30, 2026, <https://exhibits.gerberhart.org/exhibits/show/chicago-lgbtq-history-1924-197/sodomy>.

³²⁴ Gay Liberation Front, "Platform Statement," Digital Public Library of America, December 2, 1970, <https://dp.la/primary-source-sets/stonewall-and-its-impact-on-the-gay-liberation-movement/sources/1411>.

³²⁵ *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).

³²⁶ Lyle Denniston, "Opinion Analysis: Marriage Now Open to Same-Sex Couples," *SCOTUSblog*, June 26, 2015, <https://www.scotusblog.com/2015/06/opinion-analysis-marriage-now-open-to-same-sex-couples/>.

³²⁷ *Obergefell*, 576 U.S. at 664 (Kennedy, J.).

³²⁸ James N. Green, "In Brazil, AIDS Activism Led to Political Connections," *New York Times*, January 29, 2014, <https://www.nytimes.com/roomfordebate/2014/01/29/why-is-latin-america-so-progressive-on-gay-rights/in-brazil-aids-activism-led-to-political-connections>.

materialised in a series of Executive Branch public policy initiatives. The Branch adopted a series of human rights programmes targeting the LGBT population, beginning with “Brazil Without Homophobia” in 2004 and expanding through the National GLBT Conference (2008), the National Plan for the Citizenship and Human Rights of LGBT Persons (2009), and the National Council Against Discrimination and for LGBT Rights Promotion (2010).³²⁹

However, the LGBT movement has found the federal legislature largely unresponsive to advancing LGBT rights. Conservative religious factions, organised predominantly around the Evangelical Bench, created a persistent legislative deadlock preventing any federal law on LGBT rights from passing. This prompted LGBT organisations to redirect their efforts toward the Federal Supreme Court from the mid-2000s, which had demonstrated a willingness to decide on LGBT rights where the legislature had not.³³⁰ In 2011, Alagoas was the first state to legalise same-sex marriages, stimulating other states to do so, resulting in approximately half of Brazil’s 27 jurisdictions permitting same-sex marriage before the National Council of Justice legalised it nationwide in 2013.³³¹

2.2. The Aspirational Role of International Human Rights Standards in Domestic Judicial Recognition of Same-Sex Marriage

Growing international consensus on key issues influences domestic judicial interpretation by guiding courts in expanding constitutional protections within their own legal frameworks. The legalisation of same-sex marriage began in Europe, with the Netherlands becoming the first country to do so in 2001, followed by Belgium in 2003, establishing the first legal precedents for resolving the discrimination inherent in restricting civil marriage to heterosexual couples.³³² Both countries’ legislative choices aligned with the broader normative framework of the European Convention on Human Rights, which guarantees the right to marry and prohibits discrimination on grounds including sex. The legalisation of same-sex marriage extended beyond Europe before 2010, with Canada in 2005 becoming the first country in the Americas to do so, followed by Argentina in 2010 as the first in South America.

Although *Obergefell v. Hodges*, *ADI 4277*, and *ADPF 132* do not explicitly reference foreign decisions or international legal frameworks, the growing international consensus on same-sex marriage rights formed part of the broader legal and political environment within which these cases were decided. Constitutional scholars describe this phenomenon as the “migration of constitutional ideas”, through which constitutional courts draw on foreign legal developments to refine their understanding of fundamental concepts such as human dignity,

³²⁹ Ana de Mello Côrtes and Lívia Gonçalves Buzolin, “Paths Towards LGBT Rights Recognition in Brazil,” *Sexuality Research and Social Policy* 21 (2024), p. 1207, <https://doi.org/10.1007/s13178-023-00931-y>.

³³⁰ Côrtes and Buzolin, “Paths Towards LGBT Rights Recognition in Brazil,” p. 1215.

³³¹ Michael K. Lavers, “Brazil’s Most Populous State to Allow Same-Sex Marriage,” *Washington Blade*, December 21, 2012, <https://www.washingtonblade.com/2012/12/21/brazils-most-populous-state-to-allow-same-sex-marriage/>.

³³² Pew Research Center, “Gay Marriage Around the World,” accessed March 30, 2026, <https://www.pewresearch.org/religion/fact-sheet/gay-marriage-around-the-world/>.

equality, and freedom, without being formally bound by them.³³³ As founding members of the United Nations, Brazil and the US adopted the Universal Declaration of Human Rights (hereafter UDHR) on 10 December 1948, whose Article 16 guarantees the right to marry without any limitation due to race, nationality or religion, and without explicitly confining that right to heterosexual unions.³³⁴

Moreover, having ratified the *American Convention on Human Rights* in 1992, Brazil is legally bound by its Article 1, which prohibits discrimination based on sex, and Article 24, which affirms equal protection of the law without discrimination.³³⁵ The United States, by contrast, signed but never ratified the Convention, and therefore assumes no legally binding obligations under it.

The global normative consensus on same-sex marriage rights finds its most institutionally advanced expression in the European human rights framework. Unlike the UDHR and the *American Convention on Human Rights*, the *European Convention on Human Rights* operates through a designated court with binding enforcement authority. In *Oliari and Others v. Italy* (2015),³³⁶ the European Court of Human Rights held that Italy's failure to provide any legal recognition for same-sex couples violated Article 8³³⁷, which protects the right to respect for private and family life. The Court considered it unnecessary to examine separately the complaint under Article 14³³⁸, which prohibits discrimination in the enjoyment of the rights guaranteed by the Convention. The Court's Article 8 holding required Italy to provide a legal framework for the recognition and protection of same-sex couples. The Italian Senate's subsequent recognition of civil partnerships illustrates the trajectory of the global normative consensus: from aspirational international standards toward binding regional enforcement and concrete domestic legal change.³³⁹

The international human rights commitments of Brazil, the US, and Italy embed standards of equality and human dignity into the normative environment within which domestic courts and legislatures address the constitutional treatment of same-sex couples. In practice, these obligations shaped domestic legal developments differently across the three jurisdictions: providing an aspirational normative foundation in the US and Brazil, and producing a binding obligation in Italy to provide legal recognition and protection for same-sex couples through the enforcement authority of the European Court of Human Rights.

Conclusion

This paper set out to assess how changing societal attitudes toward sexuality, family, and equality shape judicial

³³³ Sujit Choudhry, "Migration as a New Metaphor in Comparative Constitutional Law," in *The Migration of Constitutional Ideas*, ed. Sujit Choudhry (Cambridge University Press, 2006), p. 1, <https://doi.org/10.1017/CBO9780511493683.001>.

³³⁴ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 16 (December 10, 1948), https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR_Translations/eng.pdf.

³³⁵ American Convention on Human Rights ("Pact of San José, Costa Rica"), arts. 1 and 24, November 22, 1969, 1144 U.N.T.S. 123, https://www.oas.org/dil/access_to_information/American_Convention_on_Human_Rights.pdf.

³³⁶ *Oliari and Others v. Italy*, App. Nos. 18766/11 & 36030/11, 2015-II Eur. Ct. H.R. 45.

³³⁷ European Convention on Human Rights, art. 8, November 4, 1950, 213 U.N.T.S. 221, https://www.echr.coe.int/documents/d/echr/convention_ENG (protecting the right to respect for private and family life).

³³⁸ European Convention on Human Rights, art. 14 (prohibiting discrimination in the enjoyment of the rights and freedoms set forth in the Convention).

³³⁹ Italian Ministry of Foreign Affairs and International Cooperation, "Civil Partnerships," accessed March 30, 2026, <https://www.esteri.it/en/servizi-opportunita/italiani-all-estero/stato-civile/unioni-civili/>.

interpretation of penumbra in same-sex marriage cases. The analysis of *Obergefell v. Hodges* and *ADI 4277* and *ADPF 132* has confirmed that neither internal judicial reasoning nor external societal forces operate independently in determining how courts resolve penumbral ambiguity. The legal theories and interpretative methodologies available to judges determine the internal dimension of penumbral interpretation. Formalism confines judicial interpretation to the explicit textual boundaries of law, leaving penumbral cases without a judicial response, while legal positivism acknowledges judicial discretion in hard cases but strictly within the boundaries of law as it is, independently of moral considerations. Legal realism and teleological reasoning accommodate penumbral cases as a constitutive feature of how law develops, enabling courts in both the US and Brazil to extend constitutional protections to same-sex couples through structurally distinct but analytically analogous processes.

The second part of this paper demonstrated that societal transformation was a constitutive condition for penumbral extension of same-sex marriage rights in both jurisdictions. The attitudinal change model explains how the same constitutional arguments dismissed in *Baker v. Nelson* were accepted in *Obergefell v. Hodges* without any amendment to the constitutional text. In Brazil, civil society mobilisation through the courts overcame legislative deadlock. In both cases, the growing international human rights consensus provided an aspirational normative backdrop that shaped the environment within which domestic judicial reasoning developed.

Penumbral interpretation through teleological reasoning carries an inherent limitation: the risk of judicial activism. When courts extend constitutional protections into a *grey area*, the line between purposive interpretation and judicial legislation becomes contested. On the one hand, it allows the law to develop forward. On the other hand, it exposes such judges to criticism for creating “*constitutional rules out of whole cloth*”.³⁴⁰ Both the US and Brazilian cases attracted this critique. *Obergefell v. Hodges* dissents characterised the majority’s reasoning as judicial overreach, and the Supreme Federal Court of Brazil acknowledged the limits of its authority in the absence of legislative action. This paper recognises this tension as unresolved and inherent to penumbral interpretation.

However, penumbra itself is inevitable, as legal language cannot anticipate every circumstance it is meant to regulate. The cases examined in this paper demonstrate that their resolution is shaped by both the internal frameworks through which judges reason and the social conditions within which they operate.

³⁴⁰ Geoffrey R. Stone, “Selective Judicial Activism,” *Texas Law Review* 89, no. 6 (2011), p. 1423, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=6048&context=journal_articles.

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“During good Behaviour”: An Investigation of Failed Legal Frameworks for Judicial Impeachment and Democracy

By Sky Crawford

Introduction

Throughout history, many emerging and changing states have adopted constitutional models from more powerful established nations, often without adapting them to local institutional needs. While these influential states occasionally revised their own judicial removal mechanisms, the exported constitutional templates do not automatically incorporate these changes, reproducing weak impeachment structures and embedding systemic gaps in the law.³⁴¹ The U.S. Constitution exemplifies this tension: Article III grants federal judges tenure during “good Behaviour,” strongly protecting judicial independence, while formal removal depends on impeachment and conviction.³⁴² Constitutions modelled on this approach may likewise create strong protections for judicial independence while, without supporting political institutions, struggling to hold judges accountable.³⁴³ In this paper, I explore these trends by investigating research on structural transplantation and performing data analysis on states which have participated in this process. I ultimately look to confirm the trend of judicial structural transplantation—especially of removal mechanisms—and its impacts on corruption, government efficacy and democracy. Through this, I also problematise the way we compare judicial structures globally because of the trends discovered.

I begin by investigating the UK’s impact on Nigerian judicial systems and corruption as an exemplar case of the transfer of structural faults and corruption with them. Then, I explore Vietnam as a complex case in which the U.S.S.R. and China have both played large roles in shaping judicial structures and struggles. I next expand this study to include 4 great-power states and 6 developing states, attempting to cover a variety of exemplar global cases to create a dataset from which to compare trends in structure and resulting corruption levels. My data’s focus is largely on events and legal documents from 1990 to the present, representing the end of the Cold War and the subsequent general stabilisation of governmental structures in many states. I then collect and analyse the data to identify the impacts of the transplantation of structural faults before exploring typification of judicial structures and corruption, as well as the impacts of these trends on government efficacy and democracy. Finally, I conclude with some thoughts on resolving corruption and how to meaningfully discuss judicial law in academia and a recount of the paper’s main analytical results.

This paper ultimately demonstrates that postcolonial transplantation of flawed judicial systems and removal structures from great-power influencing states to smaller developing states also transfers and consequently expands forms of corruption caused by structural faults. I argue that different structural faults are

³⁴¹ Alan Watson, “Introduction to Legal Transplants,” in *Legal Transplants: An Approach to Comparative Law*, 2nd ed. (University of Georgia Press, 1993), p. 22.

³⁴² U.S. Constitution, art. III, § 1; Jarrod Wong, “The U.S. National Report on the Independence and Impartiality of International Adjudicators,” *American Journal of Comparative Law* 70, suppl. 1 (2022): i376–i393, <https://doi.org/10.1093/ajcl/avac019>; Library of Congress, *Constitution Annotated*, “Good Behavior Clause Doctrine,” https://constitution.congress.gov/browse/essay/artIII-S1-10-2-3/ALDE_00000686/.

³⁴³ Stefan Voigt and Jerg Gutmann, “On the Wrong Side of the Law – Causes and Consequences of a Corrupt Judiciary,” *International Review of Law and Economics* 43 (2015): 156–66, <https://doi.org/10.1016/j.irle.2014.04.005>.

the source of different types of corruption, and that transferring these structural faults often erodes governmental efficacy and democracy, especially in states importing the flawed structures. I also discuss issues of liberal centrism in mainstream academia on judicial law, proposing a more global framework of understanding, as well as briefly exploring how systemic change is the only real solution to corruption and misbehaviour across the globe.

1. Data, Evidence, and Method: Notes for the Reader

Briefly, I will outline key decisions made in the construction, analysis, and use of my data. My data is collected primarily from academic articles and book chapters on individual states and their judicial systems. My period of interest begins roughly in 1980 and extends to the present, academia permitting. Where large political changes have taken place, I seek either to acknowledge the relevance of these changes or to focus on the most current situation. My discussion of the U.S.S.R. intentionally refers to the influence of the Soviet Union, which was dissolved in 1991 but continues to have large and observable impacts on states across the globe today. I frequently deem certain states ‘great-power’ states, referring to the sizeable influence they have or have had on the structuring of governments worldwide because of postcolonialism. ‘Developing’ or ‘influenced’ states refer to states which have either been founded or undergone significant change after being impacted significantly by colonialism and its end in the mid-20th century. For this reason, despite some regional influence, states like India are considered ‘developing,’ whereas states like the U.S. are considered ‘great-power’ states. Crucial to many analyses of corruption in its various forms is the Corruption Perceptions Index and related data produced by Transparency International. This index measures perceived levels of public-sector corruption on a scale from 0 (highly corrupt) to 100 (very clean) and provides further information on individual states where possible. It does not isolate judicial corruption and is therefore used here as a contextual indicator rather than a direct measure of corruption within the judiciary. These scores form a substantial part of my data but are significantly supplemented by context-sensitive articles and book chapters for analysis and conclusion-drawing.

2. The Case of the UK and Nigeria: a Textbook Case

In 1960, Nigeria was granted independence from the UK. Three years later, Nigeria transitioned into a constitutional republic but maintained heavy interaction with British advisers.³⁴⁴ In addition, the members of the educated populace who formed the government were largely British-educated and -trained. Thus, when designing and executing the new government, including the judiciary, British design was imported into Nigeria for a smooth transition. This meant an independent hierarchical court system reflecting UK principles and ideology, despite struggles to execute it successfully.³⁴⁵ Common judicial practices, including removal mechanisms, took longer to

³⁴⁴ 1st Attorneys, “Upholding Independence: The Judiciary’s Role in Nigeria,” September 7, 2023, <https://1stattorneys.com/articles/2023/09/07/upholding-independence-the-judiciarys-role-in-nigeria/>.

³⁴⁵ M. A. Ikhariale, “The Independence of the Judiciary under the Third Republican Constitution of Nigeria,” *Journal of African Law* 34, no. 2 (1990): 145–58, <https://doi.org/10.1017/S0021855300008287>.

develop due to decades of militarisation and an unstable political environment.³⁴⁶

However, the start of the Fourth Republic came with the establishment of the National Judicial Council (NJC), which became responsible for recommending appointments and removals, as well as disciplining officers for misbehaviour. The removal process varies by office: specified heads of court may be removed by the President or a state Governor following an address supported by a two-thirds majority of the relevant legislature, while other judicial officers may be removed by the President or Governor on the recommendation of the NJC.³⁴⁷ The establishment of the NJC pulled the structure of the judiciary even closer to the British system: both have an external advisory and disciplinary system designed to deal with misbehaviour yet lacking the capacity to remove high-ranking judges. Further, they both have a seldom-used and difficult impeachment process reserved for a small set of serious offences in the name of judicial independence.³⁴⁸

The mirrored court and removal structures produced similar risks of corruption; in Nigeria, these developed into a systemic problem. The UK is considered to have low levels of public-sector corruption overall, but integrity risks and instances of personal corruption may occur; the evidence base on domestic corruption has also historically been limited.³⁴⁹ Nigeria's comparable system of judicial independence faces these risks in a more acute form, including widespread unchecked personal corruption as well as systemic political influence associated with broader politicisation.³⁵⁰ Personal corruption is widespread, and the structures established to deal with it lack the capacity to do so effectively because of the large population, number of corruption cases, and weakness and inefficiency of government structures.³⁵¹

The types of corruption can therefore be seen to resemble those identified in the UK, while the extent to which that corruption is able to proliferate rises sharply with a lack of effective and efficient government to hold judges accountable. This case helps to illustrate that even a small lack of accountability in an influencing structure, like the UK's lack of capacity to deal with lower-level personal accountability, is mirrored and expanded considerably when states import these structures to their own struggling systems.

3. The Case of Vietnam: Hybrid Transplantation

Vietnam's case is markedly different from most of my other cases insofar as the structures, ideologies, and practices employed today reflect mixed influences, integrating influential U.S.S.R. structures with other states' practices. Vietnam has experienced a variety of judicial structures since achieving independence from the French

³⁴⁶ 1st Attorneys, "Upholding Independence."

³⁴⁷ Constitution of the Federal Republic of Nigeria 1999, s. 292(1)(a)–(b); Third Schedule, Part I, para. 21(b), (d).

³⁴⁸ Raoul Berger, "Impeachment of Judges and 'Good Behavior' Tenure," *Yale Law Journal* 79, no. 8 (1970): 1475–1531, <https://doi.org/10.2307/795270>; Andrew Le Sueur, "Developing Mechanisms for Judicial Accountability in the UK," *Legal Studies* 24, nos. 1–2 (2004): 73–98, <https://doi.org/10.1111/j.1748-121X.2004.tb00241.x>.

³⁴⁹ Transparency International, Corruption Perceptions Index 2025, <https://www.transparency.org/en/cpi/2025>; see also Home Office, Assessing the Evidence Base of Domestic Corruption in the UK (December 8, 2025), <https://www.gov.uk/government/publications/assessing-the-evidence-base-of-domestic-corruption-in-the-uk/assessing-the-evidence-base-of-domestic-corruption-in-the-uk>.

³⁵⁰ Vasudev Das, "Judicial Corruption: The Case of Nigeria," *Journal of Financial Crime* 25, no. 4 (2018): 926–39, <https://doi.org/10.1108/JFC-02-2017-0011>; Yusuf Sulayman, "Judicial Legislation: The Supreme Court of Nigeria's Model for Strategic Decision-Making?" *Journal of African Law* 69, no. 2 (2025): 233–51, <https://doi.org/10.1017/S0021855324000330>.

³⁵¹ Das, "Judicial Corruption"; Sulayman, "Judicial Legislation."

in 1954. At first, Vietnam followed the socialist Soviet model closely: courts served the Communist Party in Vietnam and largely subordinated rule-of-law concerns to party priorities.³⁵² This meant that accountability measures were directed not towards respecting the law but towards complying with party decrees and norms. Furthermore, the judicial system was not fully codified, and tenure—including removal—was determined exclusively by party leaders.³⁵³ However, with the decline of the U.S.S.R. and a push for modernisation, Vietnam began to reflect Western and Chinese values, ideologies, and structures alongside socialist Soviet ones.

Especially with more modern shifts towards law and development, Vietnam began structural judicial expansion and shifted away from complete party control towards the rule of law in the 1980s and 1990s.³⁵⁴ When the 2013 Constitution of Vietnam was written, it affirmed both socialist Soviet legacies of party leadership over political messaging, ideology, and decision-making, and modern codification of structural and removal systems.³⁵⁵ Notably, despite codification, Vietnam still does not conceive of the judicial branch as fully independent from the state or leading party, and the appointment and removal of officers are processes carried out by other governmental branches and overseen by party leadership.³⁵⁶

Consequently, Vietnam has experienced a hybrid of the forms of corruption and institutional influences associated with these states. Before codification, political influence was inherent, and politically influenced denial of renewed tenure was commonplace.³⁵⁷ As I explore later, this indicates a potential for higher levels of personal corruption, as judges experience less pressure to have good behaviour.

This potential has at times in Vietnam's recent history been realised: bribery and misconduct (frequently linked to inadequate education or training) are well known to the public and judicial sector and taken as common practice.³⁵⁸ Vietnam's experience is not the only hybrid one: socialist states across the globe have looked to modernise court and removal systems by incorporating great-power states' codification and regulatory structures.³⁵⁹ Despite the unique hybrid structural transplantation these states experience, Vietnam's case demonstrates that my theory of transplanted structural issues still holds. Vietnam's structural transplantation over the past 75 years closely correlates with shifts in corruption over the same period, and today Vietnam experiences forms of corruption reflecting both historical socialist Soviet influence and more recent Chinese codification practices.

4. Widened Comparative Dataset

This section presents judicial practices and structures across 4 powerful (structurally influential) states and 6

³⁵² Penelope Nicholson, *Borrowing Court Systems: The Experience of Socialist Vietnam* (Martinus Nijhoff Publishers, 2007), p. 260.

³⁵³ Nicholson, *Borrowing Court Systems*, p. 260.

³⁵⁴ Ngoc Son Bui, "Vietnam: Legal Reform and Legal Convergence," in *Legal Reform in the Contemporary Socialist World* (Oxford University Press, 2024), pp. 105–86.

³⁵⁵ Constitution of the Socialist Republic of Vietnam, 2013, arts. 2, 4, 70, 88, 104, https://www.constituteproject.org/constitution/Socialist_Republic_of_Vietnam_2013.

³⁵⁶ Bui, "Vietnam: Legal Reform and Legal Convergence," pp. 105–86.

³⁵⁷ Nicholson, *Borrowing Court Systems*, pp. 258–60.

³⁵⁸ Nicholson, *Borrowing Court Systems*, pp. 258–60.

³⁵⁹ See other chapters in Ngoc Son Bui, *Legal Reform in the Contemporary Socialist World* (Oxford University Press, 2024), for additional examples of hybrid judicial structures.

developing states, incorporating information on constitutional origins, removal procedures, and corresponding corruption levels and types.

The UK judiciary is formally independent and structured through hierarchical courts, with a strong cultural emphasis on impartiality.³⁶⁰ Corruption is not considered widespread, but the judiciary is aware of integrity risks and has recently introduced measures to address them, though with mixed success. Debate continues regarding the most effective accountability practices.³⁶¹ The Judicial Conduct Investigations Office (JCIO) plays a central role in reviewing misconduct complaints. Final disciplinary responsibility is shared by the Lady Chief Justice and the Lord Chancellor. Removal is available for sufficiently serious misconduct but is uncommon, reflecting the UK's prioritisation of judicial independence alongside judicial discipline.³⁶²

India's judiciary is structured as an independent, hierarchical system culminating in the Supreme Court.³⁶³ Research often highlights frequent personal rather than politically driven corruption.³⁶⁴ Institutional boundaries sometimes appear blurred, complicating accountability.³⁶⁵ The Supreme Court can discipline judges internally, but external removal is only possible through impeachment—a process widely regarded as ineffective or unsuccessful and therefore rarely pursued.³⁶⁶ Limited removal mechanisms make addressing misconduct difficult; while corruption does not dominate the entire system, its presence raises questions about whom the courts ultimately serve and how effectively the judiciary functions.

Nigeria's judiciary is legally designed to function as an independent, hierarchical system headed by the Supreme Court, but in practice it struggles primarily with widespread personal corruption, which sometimes becomes political.³⁶⁷ Scholars describe corruption as a “virus,” highlighting its reach throughout the system.³⁶⁸ Numerous investigative and disciplinary committees exist, including the National Judicial Council (NJC), which is responsible for reviewing misconduct and recommending dismissals. However, these bodies often operate inefficiently and struggle to address widespread low-level corruption.³⁶⁹ Conflicting and overly complex laws also impede accountability efforts.³⁷⁰ Despite efforts to combat corruption, its persistence continues to undermine public trust, electoral confidence, and the perception that courts ultimately serve citizens fairly.³⁷¹

The United States maintains a hierarchical federal judiciary with strong formal safeguards for

³⁶⁰ Berger, “Impeachment of Judges”; Transparency International, Corruption Perceptions Index 2025; Home Office, Assessing the Evidence Base of Domestic Corruption in the UK.

³⁶¹ Le Sueur, “Developing Mechanisms for Judicial Accountability in the UK.”

³⁶² Judicial Conduct Investigations Office, “Judicial Conduct Investigations Office,” *Courts and Tribunals Judiciary*, <https://www.judiciary.uk/related-offices-and-bodies/judicial-conduct-investigations-office/>.

³⁶³ Arghya Sengupta, “In-Tenure Questions: Mechanisms for Judicial Discipline,” in *Independence and Accountability of the Higher Indian Judiciary*, ed. Arghya Sengupta (Cambridge University Press, 2019), pp. 63–99.

³⁶⁴ Sengupta, “In-Tenure Questions”; see also Akhil Gupta, “Blurred Boundaries: The Discourse of Corruption, the Culture of Politics, and the Imagined State,” *American Ethnologist* 22, no. 2 (1995): 375–402.

³⁶⁵ Gupta, “Blurred Boundaries.”

³⁶⁶ Sengupta, “In-Tenure Questions.”

³⁶⁷ Ikhariale, “Independence of the Judiciary”; Sunday Bontur Lugard, “Judicial Corruption as a Self-Inflicted Impediment to the Independence of the Judiciary in Nigeria,” *KAS African Law Study Library* 4, no. 3 (2017): 310–21, <https://doi.org/10.5771/2363-6262-2017-3-310>.

³⁶⁸ Das, “Judicial Corruption.”

³⁶⁹ Constitution of the Federal Republic of Nigeria 1999, s. 292(1)(a)–(b); Third Schedule, Part I, para. 21(b), (d).

³⁷⁰ Das, “Judicial Corruption”; Emmanuel Luka Madaki, “An Analysis of the Legal Framework on Corruption and Its Attendant Effect on Judicial Performance in Nigeria,” *International Review of Law and Jurisprudence* 7, no. 2 (2025): 105–12.

³⁷¹ Waziri B. Adisa, “Judicial Corruption, Institutional Reform, and the Electoral Process in Nigeria,” *Journal of Anti-Corruption Law* 1, no. 1 (2017): 88–106.

independence from the other branches of government.³⁷² However, real-world politics can still influence judicial behaviour, and political pressure has featured prominently in scholarly discussions.³⁷³ The primary mechanism for removing Article III federal judges is impeachment and conviction; internal disciplinary processes cannot themselves remove a judge. The Constitution's "during good Behaviour" clause is not ignored: it provides the basis for life tenure and protects judges from at-will removal, while leaving formal removal dependent on impeachment.³⁷⁴ A Judicial Council of the Circuit of the U.S. courts participates in judicial oversight yet cannot execute removal, and the country promotes anti-corruption efforts both domestically and globally, though internal issues persist.³⁷⁵ Overall, U.S. courts emphasise independence, but the system's reliance on impeachment makes meaningful accountability structurally difficult.

Argentina's judiciary is formally structured as an independent, hierarchical court system, but in practice it experiences significant strains on that independence.³⁷⁶ Scholars note persistent abuse of discretion, often involving misuse of legal reasoning or strategic case manipulation.³⁷⁷ The only formal mechanisms for disciplining or removing judges are impeachment and an external disciplinary body, both of which offer limited enforcement power. This leaves the system vulnerable to executive interference, a long-discussed issue in Argentine judicial politics.³⁷⁸ As a result, corruption concerns often centre on political influence as well as some personal gain, shaping a judiciary that frequently appears to serve shifting political interests rather than the public.

The Philippines operates a hierarchical judicial system designed to be independent, with the Supreme Court at its apex. Judicial discipline is handled internally through rules of court and codes of conduct, while impeachment is the only mechanism for removing Supreme Court justices.³⁷⁹ Lower-court judges may face internal disciplinary action, but external removal options remain limited.³⁸⁰ Research highlights frequent politicisation as well as some personal corruption, including bribery concerns noted by Transparency International.³⁸¹ These issues contribute to instability in public trust and raise questions about whether courts serve impartial justice, broader political dynamics, or themselves; while anti-corruption efforts exist, institutional constraints make thorough accountability challenging.³⁸²

Under the U.S.S.R., officially dissolved in 1991, the judiciary functioned within a strictly hierarchical structure that lacked genuine independence. Courts were effectively subordinated to the legislature and, more importantly, to the Communist Party leadership.³⁸³ Judicial processes were deeply shaped by political priorities

³⁷² U.S. Constitution, art. III.

³⁷³ Alliance for Justice, *Accountable to None: The Urgent Need for Supreme Court Ethics Reform* (Alliance for Justice, 2022), https://afj.org/wp-content/uploads/2023/02/JudicialEthicsReport_Final-2.pdf.

³⁷⁴ Library of Congress, *Constitution Annotated*, "Good Behavior Clause Doctrine."

³⁷⁵ Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351–364; Lynne Wrennall, "Confronting Judicial Misconduct," *Criminal Justice Matters* 80, no. 1 (2010): 10–11, <https://doi.org/10.1080/09627251.2010.482228>.

³⁷⁶ Gretchen Helmke, *Courts Under Constraints: Judges, Generals, and Presidents in Argentina* (Cambridge University Press, 2005).

³⁷⁷ Edgardo Buscaglia, "An Analysis of Judicial Corruption and Its Causes: An Objective Governing-Based Approach," *International Review of Law and Economics* 21, no. 2 (2001): 233–49.

³⁷⁸ Helmke, *Courts Under Constraints*.

³⁷⁹ Constitution of the Philippines 1987, art. VIII, secs. 1, 6, 11; art. XI, sec. 2.

³⁸⁰ Constitution of the Philippines 1987, art. VIII, secs. 1, 6, 11; art. XI, sec. 2.

³⁸¹ Alejandro N. Ciencia Jr., "From Judicialization to Politicization of the Judiciary: The Philippine Case," in *The Judicialization of Politics in Asia*, ed. Björn Dressel (Routledge, 2012); Transparency International, Corruption Perceptions Index 2025.

³⁸² Björn Dressel, *The Judicialization of Politics in Asia* (Routledge, 2012).

³⁸³ Peter H. Solomon Jr., "The Dynamics of Stalinist Justice: Bureaucratic and Political Pressures on Legal Officials," in *Soviet Criminal*

rather than legal principles, and judges could be removed at the discretion of executive or party authorities. Official disciplinary systems were minimal or largely irrelevant, as adherence to party directives superseded formal rules.³⁸⁴ The Soviet legal system thus demonstrated minimal commitment to the rule of law, with courts ultimately serving political control rather than justice in any autonomous or impartial sense.

Cuba's judiciary retains important features of the Soviet-influenced socialist model, but the 2019 Constitution formally provides that courts are functionally independent and that judges owe obedience only to the law.³⁸⁵ At the same time, the Constitution places the Communist Party of Cuba as the superior driving force of society and the state, while the People's Supreme Court reports to the National Assembly and judges are removed by the bodies that elect them. These features place formal judicial independence within a one-party constitutional order.³⁸⁶ Historical accounts also record bribery and other misconduct within the Cuban criminal justice system.³⁸⁷

China's judicial system is hierarchical and formally codified, but subservient to the Chinese Communist Party, which maintains significant control over legal processes and judicial appointments.³⁸⁸ Lubman (2000) described the courts as operating within a "cage" of political constraints, despite reforms introduced towards commercial-law-related codification.³⁸⁹ Discipline and court organisation are defined by state regulations, but these mechanisms reinforce political supervision rather than judicial independence. While anti-corruption campaigns exist, they also operate through party-led channels, raising questions about transparency and impartiality. Ultimately, Chinese courts largely serve state and party objectives, with limited autonomy. Corruption at the personal and lower levels is somewhat present, largely occurring in individual bribery or abuse of discretion cases.³⁹⁰

Vietnam's 2013 Constitution outlines a judicial hierarchy of courts designed for both criminal and civil cases for the people. By law, judges are independent in adjudication and obey only the law, while Article 4 of the Constitution establishes the Communist Party as the leading force of the state and society. Political influence in judicial decision-making is therefore inherent.³⁹¹ For senior judicial offices, removal powers are divided between the National Assembly and the State President: the National Assembly may remove the President of the Supreme People's Court and approve the removal of Supreme People's Court judges, while the State President exercises removal powers over judges in accordance with Article 88.³⁹² Judicial structure is borrowed heavily from Soviet

Justice under Stalin (Cambridge University Press, 1996).

³⁸⁴ Solomon, "The Dynamics of Stalinist Justice."

³⁸⁵ Constitution of the Republic of Cuba, 2019, arts. 5, 147–50, 154–55, https://www.constituteproject.org/constitution/Cuba_2019; Ngoc Son Bui, "Cuba: Legal Reform and Updating Socialism," in *Legal Reform in the Contemporary Socialist World* (Oxford University Press, 2024), pp. 275–310.

³⁸⁶ Bui, "Cuba: Legal Reform and Updating Socialism," pp. 275–310.

³⁸⁷ Ray Michalowski, *World Factbook of Criminal Justice Systems: Cuba* (U.S. Department of Justice, 1993), <https://bjs.ojp.gov/library/publications/world-factbook-criminal-justice-systems-cuba>.

³⁸⁸ Randall Peerenboom, *China's Long March Toward Rule of Law* (Cambridge University Press, 2002).

³⁸⁹ Stanley B. Lubman, "Bird in a Cage: Chinese Law Reform after Twenty Years," *Northwestern Journal of International Law & Business* 20, no. 3 (2000): 383–424.

³⁹⁰ Ling Li, "Order of Power in China's Courts," *Asian Journal of Law and Society* 10, no. 3 (2023): 490–515, <https://doi.org/10.1017/als.2023.16>.

³⁹¹ Nicholson, *Borrowing Court Systems*.

³⁹² Constitution of the Socialist Republic of Vietnam, 2013, arts. 70, 88, 104.

structures and moulded to reflect Vietnamese culture where necessary.³⁹³ Bribes and other misbehaviour occur with some frequency.³⁹⁴ However, historical, renewed, and increasing Chinese influence has led to continued Confucian moral principles along with increased use of capitalist economics.³⁹⁵

State	Judicial Emphasis	Removal System	Corruption/Influence	CPI
UK	Independent, codified	Impeachment, external disciplinary office	Personal: minimal Political: none	70
→ Nigeria	Independent, codified	Impeachment, external disciplinary office	Personal: frequent Political: some	26
→ India	Independent, codified	Impeachment, internal disciplinary office	Personal: frequent Political: minimal	39
U.S.	Independent, codified	Impeachment, internal disciplinary office	Personal: minimal Political: some	64
→ Philippines	Independent, codified	Impeachment, internal disciplinary office	Personal: some Political: frequent	32
→ Argentina	Independent, codified	Impeachment, internal disciplinary office	Personal: some Political: frequent	36
U.S.S.R.	Served Communist Party	Executive or party removal	Personal: some Political: frequent	N/A
→ Cuba	Serves Leading Party	Executive or party removal	Personal: some Political: frequent	40
→ China	Serves Leading Party, codified	Executive/party removal, internal disciplinary practice	Personal: some Political: frequent	43
→→ Vietnam	Serves Leading Party, codified	Executive/party removal, internal disciplinary practice	Personal: some Political: frequent	41

Figure 1. Summary of Data Collected. Arrows indicate structures drawn from the influencer states above.

³⁹³ Nicholson, *Borrowing Court Systems*, see esp. ch. 6, p. 231.

³⁹⁴ Nicholson, *Borrowing Court Systems*, see esp. ch. 6, p. 231.

³⁹⁵ Bui, "Vietnam: Legal Reform and Legal Convergence," pp. 105–86.

Independent indicates equal and nonpolitical positioning in government; codification indicates hierarchisation and/or establishment of precedent akin to common law. Corruption/Influence is determined based on the qualitative data collected and is indicated first for personal corruption or malpractice and second for political influence. Corruption Perceptions Index score for each state is shown in the final column.³⁹⁶

5. Analysis

5.1. Observations from the Data, Postcolonial Applications, and the Need for Origins

In this section I analyse the data previously collected to find key correlations before determining their implications. The most obvious correlation, denoted in Figure 1, is the alignment between great-power states and states influenced by them in structure. The structure of the judiciary is closely mirrored by the younger, developing states. Cuba's judicial system, for example, is intensely similar to the Soviet system it was derived from: courts hold a subservient position both to the state legislature and the ruling political party.³⁹⁷ This follows the overall trend of Cuba's replicating Socialist Soviet governmental structures beginning in the 1970s. Thus, we can see judicial systems as derivatives of their influencing state's structures, and as part of systemic shifts to mirror great-power states' structures.

This observation can be extended to the removal structures put in place to address corruption among judicial officers. States influenced by the U.S. share similar impeachment requirements and processes as mechanisms for removal; judicial officers in states influenced by the Soviet model were often removable by political or party authorities. In China, despite codification and "guiding cases" being established after independence was achieved, judicial officers are responsible to the executive officer and have little protection from political disapproval.³⁹⁸ Soviet judges, in turn, were accountable to party and state authorities and could be removed by them. Influence by great-power states again has shaped structural realities: removal structures and limits are closely correlated between influencing and influenced states.

Likewise, the chart indicates that types of corruption can be traced from influencer states to those they influenced. The U.S.'s repeated executive intervention and judicial misbehaviour, whether it be administrative or adjudicative, are mirrored by both Argentina and the Philippines, which struggle constantly in similar ways.³⁹⁹ They both struggle with executive intervention and politicisation of cases, as well as smaller misbehaviours which often go neglected under the pretence of judicial independence.⁴⁰⁰ Conversely, the UK literature cited here focuses

³⁹⁶ Transparency International, Corruption Perceptions Index 2025.

³⁹⁷ Bui, "Cuba: Legal Reform and Updating Socialism," pp. 275–310.

³⁹⁸ Benjamin M. Chen et al., "Detecting the Influence of the Chinese Guiding Cases: A Text Reuse Approach," *Artificial Intelligence and Law* 32 (2024), p. 482, <https://doi.org/10.1007/s10506-023-09358-7>.

³⁹⁹ Berger, "Impeachment of Judges"; Constitution of the Philippines 1987, art. VIII, secs. 1, 6, 11; art. XI, sec. 2; Helmke, *Courts Under Constraints*.

⁴⁰⁰ Ciencia, "From Judicialization to Politicization of the Judiciary"; Transparency International, Corruption Perceptions Index 2025; Helmke, *Courts Under Constraints*; Buscaglia, "An Analysis of Judicial Corruption and Its Causes."

more on individual integrity risks than on systemic judicial corruption.⁴⁰¹ This trend can similarly be observed in both Nigeria and India, where the federal state plays a small role in the courts, but corruption on the individual or local level is so extreme that some scholars label it a “virus.”⁴⁰²

Thus, it can be concluded that as states transplant judicial structures and removal practices, so too do they transplant potential forms of corruption, misbehaviours, and other struggles.⁴⁰³ Placing this within a postcolonial conceptualisation, postcolonial independence pushed states to rewrite governmental infrastructure; when states transplanted judicial structures into their own societies, the institutional normative corruption was transplanted as well.⁴⁰⁴ In other words, as judicial structures embedded with issues in influencer states were transferred, so were their issues. Where an imported structure struggles, importing states will continue to struggle until significant changes can be made.

Moreover, where removal structures are lacking, like in the case of the U.S., the removal structures in influenced states will similarly struggle. Consequently, corruption will persist with at least equal rigour. As some scholars and governmental officers have noted, corruption may even worsen in both the influencer and influenced states because a lack of successful removal systems may create a culture of impunity.⁴⁰⁵ In India, for example, Gupta’s broader study of everyday state bureaucracy shows how unequal access to legal and administrative knowledge can create opportunities for officials to extract bribes.⁴⁰⁶ Such dynamics can persist where accountability structures are weak or ineffective.⁴⁰⁷ Overall, therefore, influential states’ problematic structures give rise to inescapable mirrored and amplified corruption, misbehaviour, and other struggles with the judiciary.

Importantly, forms of corruption are not simply replicated exactly by structure-importing states for two key reasons. First, systems are designed for individual societies, and transplanting often ignores political and socioeconomic realities of the receiving societies. Ethnic conflicts and biases, state/regime strength, different values, systems or government structures, existing infrastructure, population and demographics, and history all impact the reception of the system significantly.⁴⁰⁸ This misalignment with replicated structures has consistently worsened corruption. This has been particularly noticeable in India and Nigeria, where weak state capacity and large populations have coincided with high levels of personal—especially financial—corruption among local officials.⁴⁰⁹

Second, even in the original states which created or employed them, judicial structures still have issues and are frequently being improved with the help of a strong state to support the improvements. Without a strong

⁴⁰¹ Le Sueur, “Developing Mechanisms for Judicial Accountability in the UK”; Transparency International, Corruption Perceptions Index 2025; Home Office, Assessing the Evidence Base of Domestic Corruption in the UK.

⁴⁰² Das, “Judicial Corruption”; Gupta, “Blurred Boundaries.”

⁴⁰³ Key transplant research scholarship agrees: see, for example, Daniel Berkowitz, Katharina Pistor, and Jean-François Richard, “The Transplant Effect,” *American Journal of Comparative Law* 51, no. 1 (2003): 163–204, <https://doi.org/10.2307/3649143>.

⁴⁰⁴ For similar postcolonial logics, see Homi K. Bhabha, *The Location of Culture* (Routledge, 1994), and Edward Said, *Orientalism* (Penguin, 2003), who together argue that coloniser structures were reproduced, or mimicked, in colonised states, including the reproduction and distortion of the coloniser states’ struggles and dysfunctions.

⁴⁰⁵ U.S. Congress, Senate, *Congressional Record*, 74th Cong., 2nd sess., April 23, 1936, p. 5934, <https://www.govinfo.gov/content/pkg/GPO-CRECB-1936-pt6-v80/pdf/GPO-CRECB-1936-pt6-v80-2.pdf>; supported and updated by Berger, “Impeachment of Judges.”

⁴⁰⁶ Gupta, “Blurred Boundaries.”

⁴⁰⁷ Gupta, “Blurred Boundaries.”

⁴⁰⁸ Watson, “Introduction to Legal Transplants”; Voigt and Gutmann, “On the Wrong Side of the Law.”

⁴⁰⁹ Gupta, “Blurred Boundaries”; Das, “Judicial Corruption.”

state to replicate these shifts as needed, importing states can be seen as stuck with flawed and inapplicable inherited judicial structures. Viewed through a postcolonial perspective, this combination of contextual mismatch and already-flawed imported systems can create a path dependency towards similar yet amplified corruption struggles.⁴¹⁰ Again, struggles in influencer-state structures will persist in influenced states so long as the structures remain borrowed and accepted.

5.2. Typification in Academia and Different Conceptions of Accountability

Similar structures create similar corruption types. This is far from a new concept, as many scholars have traced these structure-corruption trends. One example maps particularly well onto the Western-oriented dataset used here: Gong (2004) presents a matrix comparing the strength of judicial independence with the strength of judicial accountability, creating 4 types of states characterised by political or personal corruption.⁴¹¹ Figure 2 attempts to incorporate the dataset used here into Gong's matrix:

	Strong Accountability	Weak Accountability
Strong Independence	Characterised by low political and personal corruption	UK → Nigeria, India Characterised by low political but high personal corruption
Weak Independence	U.S. → Philippines, Argentina Characterised by high political but low personal corruption	Characterised by high political and personal corruption *Gong identifies China in this group.

Figure 2. Gong (2004) with this article's dataset overlaid

However, Gong's analysis struggles to apply accurately to the previously socialist states. This is because these states conceive of judicial position and thus political corruption/accountability dynamics differently. States in which the judiciary is completely subordinate to the ruling political party treat political influence in courts differently, so a lack of judicial independence is not necessarily conceptualised domestically as an accountability failure. In other words, where a constitutional system prioritises party leadership over liberal conceptions of judicial independence, political influence may not be categorised domestically as corruption, and accountability

⁴¹⁰ Bhabha, *The Location of Culture*; Said, *Orientalism*.

⁴¹¹ Ting Gong, "Dependent Judiciary and Unaccountable Judges: Judicial Corruption in Contemporary China," *China Review* 4, no. 2 (2004): 33–54, <https://www.jstor.org/stable/23461883>.

mechanisms may target different forms of misconduct. This reality demonstrates that mainstream academia takes a liberal-centric approach to judicial law and fails to address non-liberal governments like that of the socialist states worldwide.⁴¹² Focusing on structural origins only partially addresses this issue, as corruption/accountability dynamics are still perceived very differently in non-liberal states than they are in mainstream academia. In addition to focusing on origins, then, the strength and use of removal structures to deal with corruption and misbehaviour could be employed instead of the mainstream approach of ‘accountability’ featured in Gong’s matrix.

Still, Gong’s matrix offers us a foundational context in which we can categorise states by judicial structures and forms of corruption combined. Taking Gong’s typification and incorporating what our data reveals about postcolonial path dependencies and corruption persistence, we can reconstruct the matrix more accurately. Replacing strength of independence with the structural types and their origins (i.e. Socialist Soviet influence on Cuba’s party-supportive judiciary) would increase accuracy and applicability of Gong’s matrix. Additionally, shifting from strength of accountability to strength of removal processes would allow for value differences in non-liberal states and still account for corruption differences. Figure 3 is a matrix incorporating these shifts and the resulting states’ locations within it. Each proposed resulting category would bear different trends in corruption, removal, and effective government.

	High accountability (strong structures or common removals)	Low accountability (weak structures or uncommon removal)
British Influence		UK, Nigeria, India
American Influence	Argentina	U.S., Philippines
Socialist Soviet Influence	U.S.S.R.	
Socialist Chinese Influence	Vietnam	China

Figure 3. Matrix: rows – structural origins, columns – strength/frequency of removal.

Regardless of typification, the correlations seen in the data indicate that shifting away from a liberal-centric perspective would improve the field of judicial law academia by assisting with accuracy and applicability of existing theories while creating space for new ones.

The boxes left blank in Figure 3 are perhaps incredibly telling. Where the British have incredibly little accountability and rarely hold mixed influence with a higher-accountability state, it is difficult to find states with high accountability rates, but which use the British as a template for their judicial system and accountability. For the other end of this scale, the U.S.S.R.’s incredibly high removal rates transferred to many influenced states,

⁴¹² Gong himself deems Chinese courts’ political influence integral to China’s rampant corruption; Bui, *Legal Reform in the Contemporary Socialist World*, helps put this into perspective by outlining how socialist states conceive of corruption largely in the personal sense.

making it difficult to find states influenced by the Soviets but that do not have high removal rates or strong removal structures. It should be noted, however, that not every state could be included in my study, and therefore there may be states which do belong in these categories. Regardless, difficulty finding them is indicative of just how impactful an influencing state can be on the structures and struggles of an influenced and developing state.

Also important to observe is the complexity of hybrid cases. Vietnam, for example, has been pulled strongly towards higher removal rates because of its drawing on Soviet removal practices, despite also incorporating other influences. The table helps to illustrate the hybrid cases I explored in my in-depth case study of Vietnam. Many developing states today exist with hybrid transplantation at the core of their judiciaries, complicating a clear vision of how transplantation of each structure impacts developing states.

5.3. Impact on Democracy and Effective Government

Thus far, I have demonstrated two concepts: first, incorporating structural origins in judicial law is necessary for understanding corruption and accountability trends because of transplanted flawed removal structures. Second, mainstream academia approaches judicial law with a liberal-centric approach that could be improved by shifting from traditional accountability perspectives towards the strength and use of removal structures. This section aims to assess the real-world impacts of structural transplantation and the resulting patterns of corruption that we've established so far. We can begin by assessing the levels of trust in various groupings of states. In Vietnam, for example, the frequency of bribery and inherent political influence frequently causes individuals to abandon the use of courts because they are too costly and are not expected to yield fair results.⁴¹³ Thus, regardless of how well the judicial system is designed, its politicisation and failure to carry out discipline against corruption inhibit the effective use of the courts. Furthermore, weak disciplinary and removal structures, as previously discussed, tend to create spaces of acceptance for personal corruption especially, constructing a cycle of reproduced corruption and struggle.⁴¹⁴

These struggles can increasingly erode the capacity of states to achieve their goals and support their citizens. In many cases of bribery, citizens are unable to benefit from courts and struggle more from needing to bribe or becoming indebted to local judicial officials.⁴¹⁵ This indicates that courts may be less able to apply and enforce national law because of a lack of opportunity to do so, and that national funding and effort put into the court system have little effective positive impact on the citizens they are intended to support.

Secondarily, Latin America's frequent abuse of discretion, especially in Argentina, indicates that a lack of established discipline and removal systems erodes national efforts to create common law, practice, and resolutions.⁴¹⁶ This misuse of cases can lead to contradictory court decisions and thus a lack of coherent practice and resolve among courts nationally.⁴¹⁷ These cases all harm government efficacy in terms of achieving goals and

⁴¹³ Nicholson, *Borrowing Court Systems*, see esp. ch. 3, p. 82.

⁴¹⁴ U.S. Congress, *Congressional Record*, p. 5934; see also Berger, "Impeachment of Judges," pp. 1515–16.

⁴¹⁵ Nicholson, *Borrowing Court Systems*, see esp. ch. 3, p. 82.

⁴¹⁶ Buscaglia, "An Analysis of Judicial Corruption and Its Causes."

⁴¹⁷ Buscaglia, "An Analysis of Judicial Corruption and Its Causes"; see also Adisa, "Judicial Corruption, Institutional Reform, and the Electoral Process in Nigeria"; Chen et al., "Detecting the Influence of the Chinese Guiding Cases," p. 482.

serving citizens; additionally, democracy is limited by the normalisation of practices like corruption, political influence, and adjudicative indecision.

The lack of effective judicial and removal structures, further, creates environments in which states struggle to put positive changes into practice. Especially in the weaker states which inherit deficient structures, coercing all the judicial officers to cooperate with new leadership and put into practice new decisions becomes increasingly difficult to execute.⁴¹⁸ Thus, even decisions voted on by the public, such as leadership or a specific new law, may be harder to realise and implement for the populace that voted for them. Furthermore, a lack of judicial regulation, discipline, or removal structures may mean that judicial officers can choose to ignore even longstanding law and tradition in their courts, as little can be done to discipline such behaviour.⁴¹⁹ Some judges even lie about education levels and operate as officers without adequate qualifications to do so; these problems, largely neglected, may cause the rule of law to be ineffective or even completely contradicted at the local judicial level.⁴²⁰

Finally, efforts to maintain judicial independence usually result in a lack of democratic input in judicial officers' tenure, discipline, and decision-making. A lack of accountability in higher-level officers is usually—intentionally or not—maintained for the protection of independence from political turmoil or conflict, as well as from majoritarian or passionately driven decision-making by the populace.⁴²¹ However, especially when the misbehaviour is found in higher-level officials, these structures create government and democratic efficacy issues because it is so difficult to remove them regardless of public opinion and disciplinary action against them is all but non-existent.⁴²²

One well-known recent case concerns Justice Clarence Thomas in the U.S.: Senate investigations and public reporting identified multiple undisclosed gifts and trips, generating substantial criticism and renewed calls for enforceable Supreme Court ethics rules.⁴²³ Thomas has amended financial disclosures but has remained in office; the public has no direct role in disciplining a Supreme Court Justice or ending a Justice's tenure, and formal removal depends on impeachment and conviction.⁴²⁴ Thus, the controversy illustrates the distinction between disclosure and ethics enforcement on the one hand, and formal judicial removal on the other, as well as the democratic accountability concerns that can arise from life tenure.

5.4. Correlation and Causality

This article has employed largely correlative analysis: both these great-power, influential states and their developing, influenced counterparts demonstrate remarkably similar struggles within their judicial branches of government depending on the accountability measures transferred. Here, I would like briefly to outline two

⁴¹⁸ Adisa, "Judicial Corruption, Institutional Reform, and the Electoral Process in Nigeria."

⁴¹⁹ Chen et al., "Detecting the Influence of the Chinese Guiding Cases."

⁴²⁰ Nicholson, *Borrowing Court Systems*, see esp. pp. 258–60.

⁴²¹ Alexander Hamilton, "Federalist No. 78," in *The Federalist Papers* (1788).

⁴²² Berger, "Impeachment of Judges."

⁴²³ United States Senate Committee on the Judiciary, "Senate Judiciary Committee Releases Revealing Investigative Report on Ethical Crisis at the Supreme Court," December 21, 2024, <https://www.judiciary.senate.gov/press/releases/senate-judiciary-committee-releases-revealing-investigative-report-on-ethical-crisis-at-the-supreme-court>.

⁴²⁴ U.S. Constitution, art. III; Library of Congress, *Constitution Annotated*, "Good Behavior Clause Doctrine."

points: first, the unique and persistent issues in judicial structures are sometimes inconsistent with the other struggles of each state. For example, most of Nigeria's issues are rooted in militarisation, ethnic rivalry, and politicisation, but its judicial branch struggles more significantly with individual instances of personal corruption, mirroring the primary struggles of the influential UK judiciary.⁴²⁵ This helps to reveal that issues faced in the judiciary are not only constructed by the other struggles of the state, but also crucially linked to the transfer of specific gaps in judicial design. Consequently, we can rule out at least one potential source of simple coincidence in the cases.

In this paper I've looked to demonstrate both the specific correlations that we have seen as well as the mechanisms by which these correlations may come to exist. Determining whether this causal relationship is firmly established remains a difficult task. Scientific hypothesis testing or experimentation isn't typically possible on an international scale when dealing with these types of issues: case studies are all unique, there is no control group, and the evidence relies on unique phenomena like (post)colonialism. What can be concluded, as I have endeavoured to demonstrate here, is that judicial structures are systemic and transferrable, and have significant gaps and weaknesses often overlooked as sources of state struggle. While far from exhaustive, this paper has hopefully served as an illustration of how these factors can and do interact in the postcolonial world. Academia must give far more weight to the impact of the judiciary, and of the transfer of structures, if it hopes to understand the root causes and lived experiences of this correlation.

Conclusion

Contemporary structural faults like lack of independence—or too much independence—and their transplantation into developing societies routinely cause a variety of different types of corruption across the world. Solving these issues requires two primary approaches: individual structural improvements which bear context-sensitive mechanisms, especially removal mechanisms, and overall systemic changes decreasing postcolonial influence and improving developing states' situations with real sustainable development. However, without shifting perspectives away from liberal centrism, supremacy, and heroism, effective systemic improvements aren't likely. Further, without long-standing sustainable infrastructures, developing societies cannot expect to shift the outcomes of imported structural faults because widespread effective structural change is so difficult. Despite the difficulties with solving these issues, however, addressing corruption where possible is fundamental to invoking real systemic change. Without effective and accountable courts to execute and adjudicate responsibly, systemic changes lose validity and ground every day. Starting reforms in more powerful and established states may help to safely test solutions to structural faults from which struggling states might learn while systemic change remains impractical.

In this essay I have strived to locate some of the biggest trends in judicial structural development and corruption, highlighting deficient judicial structures and removal mechanisms, the process and impacts of

⁴²⁵ Lugard, "Judicial Corruption as a Self-Inflicted Impediment"; Transparency International, Corruption Perceptions Index 2025; Home Office, Assessing the Evidence Base of Domestic Corruption in the UK.

structural transplantation for the judiciary, and the resulting issues in government efficacy. I evaluated cases qualitatively and quantitatively in context-sensitive detail and constructed a dataset with 10 states from across the globe in order to analyse these factors with a diverse and accurate approach. My findings included confirming the relevance of transplantation in forming both judicial structures and removal mechanisms as well as corruption types. I also found liberal-centric approaches in mainstream academia on judicial law and looked for ways to resolve this with a context-sensitive and more widely applicable approach. Finally, I used examples from the cases that demonstrated various ways in which structural faults and resulting corruption can harm government efficacy through diminished trust, efficiency, and execution of law. Understanding judicial law is key to resolving government issues of all kinds effectively, as courts are crucial in supporting the rule of law and smooth governance, as well as supporting everyday people in interacting with the government.

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