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Editor-in-Chief's Introduction to the Autumn Issue of Volume IV of the De Lege Ferenda

It is with great pleasure that I introduce the Autumn Issue of Volume IV of De Lege Ferenda. Conceived as the Cambridge Law Review's supplementary undergraduate law journal, De Lege Ferenda serves as a platform for undergraduate students to make their first entry into academia. The high quality of submissions combined with the rigorous review of the Editorial Board have made De Lege Ferenda, in a short period of time, one of the most successful undergraduate law reviews worldwide.

As with the Spring Issue, for the Autumn Issue we received a record number of high-quality submissions. The articles published in this Issue deal with a wide range of contemporary legal topics and jurisdictions. Nirmalya Chaudhuri ("Artificial Intelligence and International Law: Towards a New Accountability Framework") writes on the contentious topic of the legal regulation of artificial intelligence. After discussing various modes of accountability under international law, he argues that none of the legally established mechanisms can satisfactorily ensure accountability for actions of AI entities. For the author, absolute State liability could be a possible solution, which would entail holding the State accountable for transnational consequences caused by the actions of AI entities used by the State, its citizens, and corporate nationals. According to the author, the proposed accountability regime, which closely mirrors that governing outer space activities, could go a long way in international regulation of AI without hindering technological progress.

In her article "Planning Challenges and Environmental Claims by Interested Parties Under Aarhus: Still Prohibitively Expensive?", Giselle Vega

provides an analysis of the litigation costs for interested parties under the Aarhus Convention. The article focuses on the prohibitively expensive character of appeal processes concerning environmental claims against planning decisions made by public authorities and discusses possible reforms.

Daniel Mooney writes in the areas of constitutional law and property law. His article "Balancing Private Property and The Common Good: Is the Irish Constitution a Barrier to Rent Control?" examines the constitutional jurisprudence arising out of conflicts between private property and the common good. It concludes by positing that Ireland's constitution is not a barrier to rent control and that a well-drafted legislative scheme would in fact be in keeping with the constitution's aim of balancing private property with the exigencies of the common good.

In her article "How Ante-Nuptial Agreements Perpetuate Male Dominance: A Critical Feminist Analysis of *Radmacher v Granatino*" Beatrix Mosey critically evaluates the Supreme Court's decision in *Radmacher v Granatino* which dealt with the enforceability of ante-nuptial agreements in the United Kingdom. The article presents a critical feminist analysis detailing the ways in which the newfound enforceability of ante-nuptial agreements can be viewed as a tool permitting heterosexual men to legally reinforce dominance over their female spouses.

In the last article of this Issue, ("Horizontal Enforcement of Queer Rights in India: A Constitutional Solution") Satyajit Bose and Rhea Paul explore constitutional questions that arise in the enforcement of queer rights in India. The article examines whether the Constitution of India provides any protection to queer sexual minorities against private acts of discrimination. It argues that a remedy may be found in Article 17, which prohibits the practice of untouchability by both State and non-State actors. To that end, the article presents normative and historical arguments in favour of an expansive interpretation of Article 17, which would encompass all forms of group exclusion rooted in the notions of purity and pollution.

Overall, the five articles included in the Autumn Issue of De Lege Ferenda constitute exceptional pieces of academic work that enrich the literature in their respective fields. They provide valuable insights into the selected areas of research, constituting enjoyable reads that would be of interest to British and international, academic and professional audiences alike. I owe heartfelt thanks to the Managing Board and to our team of Associate, Senior, and International Editors for their dedication and work during these challenging times. Despite the difficulties caused by the COVID-19 pandemic and the subsequent lockdowns, the Editorial Board worked tirelessly to ensure the highest standards of quality for this Issue. I would also

like to express my gratitude to the Honorary Board for their invaluable guidance and to the Cambridge University Law Society for their continued support, without which this Issue would not have been possible. I wish the incoming Editorial Board every success with the fifth volume and I look forward to the future growth of the De Lege Ferenda.

Despoina Georgiou
Editor-in-Chief

Cambridge Law Review

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Artificial Intelligence and International Law: Towards a New Accountability Framework

Nirmalya Chaudhuri*

Abstract

Artificial intelligence, despite its revolutionary potential, brings forth pressing questions of accountability when its actions result in transnational consequences. Due to the difficulty in ascertaining AI's exact functioning, coupled with the astronomical pace of technological development, it is imperative to determine whether the existing international legal regime is suitable for tackling the problem of accountability. By discussing various modes of accountability under international law, it is argued in this article that none of the legally established mechanisms can satisfactorily ensure accountability for actions of AI entities. For instance, both doctrinal and pragmatic concerns preclude the fixing of accountability on the AI entity, or holding the manufacturer of the entity accountable under international law. Similarly, due to the (often) unpredictable nature of functioning of AI, individual criminal responsibility will not be sufficient to cover all kinds of cases. While State responsibility may sound attractive, rebutting the defence of *force majeure* will often prove to be insurmountable. In this article, it is argued that absolute State liability can be a possible solution, which will entail holding the State accountable for transnational consequences caused by the actions of AI entities used by the State, its citizens, and corporate nationals. The defence of *force majeure* would also be precluded under the proposed accountability regime. In order to disincentivise hacking of AI software by foreign States or those acting under their control, accountability will be shifted onto the shoulders of a third State when it is shown that the latter was responsible for the consequences arising out of the

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actions of the AI entity. The proposed accountability regime, which closely mirrors that governing outer space activities, can go a long way in international regulation of AI without hindering technological progress.

Keywords: artificial intelligence, international law, accountability, State responsibility, absolute liability

I. Introduction

Once a topic confined to the pages of science fiction novels, artificial intelligence (AI) today plays a significant role in our daily lives. However, its transnational impact, though considerable, seems to be a neglected topic as far as the international legal order is concerned. In fact, it would not be an exaggeration to claim that international law may require significant changes in order to keep pace with the astronomical speed at which AI technology is evolving around the world.[1]

Defining the ambit of AI poses serious challenges.[2] However, it can generally be stated that the spectrum of AI broadly comprises 'weak' or 'narrow' AI with simpler algorithms and lesser computational ability, and 'strong' AI with enhanced computing and autonomy.[3] At the far end of the spectrum, lies artificial general intelligence (AGI), which has not been achieved at this stage, and which would include systems that are able to self-evolve and possess more abilities than it enjoyed at the time when it was programmed.[4] The International Committee of the Red Cross (ICRC) has defined autonomous systems as those that are capable of receiving information from the environment, processing it, and taking appropriate action without human aid or intervention.[5]

Despite its revolutionary potential, AI can be subject to inadvertent failure or deliberate misuse, with its effects reaching far beyond national borders. Scholars have pointed out how AI can be used for illegal surveillance through facial recognition,

1 See Matthijs M Maas, 'International Law Does Not Compute: Artificial Intelligence and the Development, Displacement or Destruction of the Global Legal Order' (2019) 20(1) Melbourne Journal of International Law 29.

2 See Rex Martinez, 'Artificial Intelligence: Distinguishing between Types & Definitions' (2019) 19(3) Nevada Law Journal 1015.

3 Michael Guihot, Anne F Matthew and Nicholas P Suzor, 'Nudging Robots: Innovative Solutions to Regulate Artificial Intelligence' (2017) 20(2) Vanderbilt Journal of Entertainment and Technology 385, 395-396.

4 ibid.

5 International Committee of the Red Cross, 'Autonomy, artificial intelligence and robotics: Technical aspects of human control' (*ICRC*, August 2019), 7 <https://www.icrc.org/en/document/autonomy-artificial-intelligence-and-robotics-technical-aspects-human-control> accessed 16 May 2021.

or for interference in the electoral process in democracies.[6] Similarly, AI profiling can possibly violate human rights of migrants and asylum seekers, by imputing negative labels to racial or ethnic minorities, through the use of facial recognition technology.[7] Moreover, the decisions made by AI systems often do not perfectly follow a cause-and-effect relationship, leading to unpredictable results.[8] Due to the 'black-box' nature of functioning of AI and the accompanying uncertainty, it has been contended that unregulated AI can potentially lead to serious violations of transnational law.[9] Technologically advanced 'neural networks', that are meant to operate like the human brain, can learn from its external environment in complex ways that cannot be predicted by humans at the time of the initial programming.[10] Such concerns are not unfounded, since the unpredictable consequences flowing from automated decision-making has is already happening.[11] For instance, the use of AI in financial markets has led to sudden flash crashes, owing their origin to uncertain decision-making and interaction with other AI algorithms.[12] In addition to such drawbacks, studies have shown that AI systems are not immune from errors and systemic bias.[13]

In the face of such serious dangers, it is imperative to evolve a legal mechanism by which accountability can be fixed for the actions of AI, especially when such consequences transcend national borders. Accountability, its practical manifestation in the form of granting access to effective remedies, and their enforcement in cases of violation, constitute the cornerstones of international

6 Axel Walz and Kay Firth-Butterfield, 'Implementing Ethics into Artificial Intelligence: A Contribution, from a Legal Perspective, to the Development of an AI Governance Regime' (2019) 18(1) Duke Law and Technology Review 176, 194.

7 Ana Beduschi, 'The Big Data of International Migration: Opportunities and Challenges for States Under International Human Rights Law' (2018) 49(3) Georgetown Journal of International Law 981, 1010-1011.

8 Ryan Abbott and Alex Sarch, 'Punishing Artificial Intelligence: Legal Fiction or Science Fiction' (2019) 53(1) UC Davis Law Review 323, 331.

9 ICRC Report (n 5) 10-11.

10 Ashley Deeks, 'The Judicial Demand for Explainable Artificial Intelligence' (2019) 119(7) Columbia Law Review 1829, 1832-1833.

11 See Matthew O Wagner, 'You Can't Sue a Robot: Are Existing Tort Theories Ready for Artificial Intelligence?' (2018) 1(4) RAIL: The Journal of Robotics, Artificial Intelligence and Law 231, 231.

12 Yavar Bathaee, 'The Artificial Intelligence Black Box and the Failure of Intent and Causation' (2018) 31(2) Harvard Journal of Law and Technology 889, 924.

13 See Sonia K Katyal, 'Private Accountability in the Age of Artificial Intelligence' (2019) 66(1) UCLA Law Review 54.

law.[14] Due to the unpredictability and complexity associated with AI decision-making, it becomes extremely difficult to pinpoint blame on any single actor, leading to further complications at the remedial stage. While this conclusion can be reached for any AI system in general, the argument of lack of accountability has been extensively raised in the case of autonomous weapon systems (AWS),[15] resulting in a clarion call to ban such armaments.[16] Christof Heyns argues that the absence of a mechanism to ensure accountability in matters of life and death is itself a violation of the right to life and human dignity, and this accountability vacuum created by AWS can be a legitimate ground for banning such weapons.[17]

Keeping similar concerns in mind, the European Union decided to incorporate certain limited safeguards in the General Data Protection Regulation (GDPR).[18] For example, Article 22(1) provides for the right not to be legally affected by decisions or profiling made solely by an automated system. The provision for compensation in cases where the GDPR is violated can be seen as providing for a remedy, thus satisfying the need for accountability.[19] More importantly, it has been contended that the GDPR grants a right of explanation to determine the process

[14] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 2(3); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res. 60/147 (21 March 2006) UN Doc A/RES/60/147.

[15] Human Rights Watch & Harvard Law School International Human Rights Clinic, 'Mind the Gap: The Lack of Accountability for Killer Robots' (9 April 2015) <https://www.hrw.org/report/2015/04/09/mind-gap/lack-accountability-killer-robots> accessed 16 May 2021. Note that this report does not discuss State responsibility.

[16] Human Rights Watch & Harvard Law School International Human Rights Clinic, 'Losing Humanity: The Case Against Killer Robots' (19 November 2012) <https://www.hrw.org/report/2012/11/19/losing-humanity/case-against-killer-robots> accessed 16 May 2021.

[17] Christof Heyns, 'Human Rights and the use of Autonomous Weapons Systems (AWS) During Domestic Law Enforcement' (2016) 38(2) Human Rights Quarterly 350, 373. However, certain authors have pointed out that potential gaps in fixing accountability cannot be the sole reason to ban AWS. See Charles J Dunlap, Jr, 'Accountability and Autonomous Weapons: Much Ado About Nothing' (2016) 30(1) Temple International and Comparative Law Journal 63, 66.

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

[19] ibid art 82(1).

adopted by the automated system in arriving at its conclusions, as well as providing safeguards against discrimination.[20]

In the case of AWS, it has been contended that "meaningful human control" should be a prerequisite, so that a human being can take the final call on whether to use force or not, rather than delegate such a function to a machine.[21] As Heyns argues, "meaningful human control"[22] can only be achieved when human beings have the sole ability to take decisions on not only how to use force; but also determine as to when, where, and against whom such force is to be used. Yet, as the ICRC has noted, the problem with this 'human-on-the-loop' approach is that the person charged with taking the final decision may not have full knowledge of the situation and act with automation bias. They may also simply want to shift accountability to the AI system for fear of making an erroneous decision.[23] Automation bias refers to the tendency of humans to act in accordance with machine-generated output, rather than searching for information that could refute the inference arrived at by the machine.[24] Moreover, studies have shown that in the face of sophisticated automation technology, persons charged with monitoring the functioning of the machine exhibit over-reliance on automation, and show reduction in skill levels along with decreased awareness.[25] This nullifies the purpose of the entire exercise. Therefore, such solutions are unlikely to help as far as accountability for the actions of AI are concerned.

In Part II of this article, the various modes of accountability under international law are discussed, in order to show that none of them are suitable for the satisfactory regulation of AI on the international plane. In Part III, a model of absolute State liability is put forth as a possible solution to this legal vacuum, which

[20] Brandon W Jackson, 'Artificial Intelligence and the Fog of Innovation: A Deep-Dive on Governance and the Liability of Autonomous Systems' (2019) 35(4) Santa Clara High Technology Law Journal 35, 44.

[21] Heyns (n 17) 375.

[22] ibid 375-376.

[23] ICRC Report (n 5) 9.

[24] Mary L Cummings, 'Automation and Accountability in Decision Support System Interface Design' (2006) 32(1) The Journal of Technology Studies 23, 25.

[25] ibid 24.

would involve holding the State accountable for transnational consequences of AI used by its own organs, citizens, and corporate nationals. Part IV concludes.

II. Inapplicability of Traditional Modes of Accountability Within the International Legal Framework

A. Responsibility of the AI system

The first possible contender for fixing accountability is the AI system itself. There has been considerable debate on the question of whether AI systems should be granted legal personality,[26] so that they can be held accountable for their actions. Certain scholars point out that throughout history, legal personality under municipal law has been extended to inanimate objects such as ships and idols. It has also been extended to entities which are not natural persons, such as corporations and governmental bodies.[27] On the other hand, it has been contended that the analogy between corporations and AI ignores the undeniable fact that corporations act through human agents; while the AI system, once programmed, does not require humans to act as agents for performing its tasks.[28] While this contention sounds attractive, achieving legal personality under municipal law and under international law are quite distinct, as discussed under Part II.B below using corporations as an example.

Further, it has been argued that since AI systems lack moral agency, it would be difficult to hold them responsible for even grave breaches of international law.[29] On this question however, Hallevy feels that modern AI with significant cognitive ability can be shown to possess both *mens rea* (the mental element) and the *actus reus* (the act or omission) required to commit a crime.[30] Even if that argument is accepted, practical difficulties would not allow for accountability to be fixed. For instance, even if the AI system is convicted, the logical course of punishing the AI would lead to absurd results. It is not too difficult to guess that robots cannot be imprisoned or even fined, as they would generally lack bank accounts, assets,

[26] See Lawrence B Solum, 'Legal Personhood for Artificial Intelligence' (1992) 70(4) North Carolina Law Review 1231.

[27] ibid 1239.

[28] Vikram R Bhargava and Manuel Velasquez, 'Is Corporate Responsibility Relevant to Artificial Intelligence Responsibility?' (2019) 17(Special Issue) Georgetown Journal of Law & Public Policy 829, 841.

[29] UN Human Rights Council, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns' (9 April 2013) UN Doc A/HRC/23/47, 14, para 76.

[30] Gabriel Hallevy, 'The Criminal Liability of Artificial Intelligence Entities: From Science Fiction to Legal Social Control' (2010) 4(2) Akron Intellectual Property Journal 171, 187-188.

or cash.[31] This shortcoming would even make civil liability for AI systems only a remote theoretical possibility. Yet, Hallevy contends that the common modes of punishment can be applied to AI - deletion of software instead of capital punishment, restricting its freedom of action for a limited period instead of imprisonment, and compulsory use of the AI system for the benefit of the community instead of fines or community service.[32] While such novel propositions seem attractive, assigning responsibility to AI systems is still at the deliberative stage, and cannot be relied upon as a mechanism for fixing international accountability.

B. Corporate responsibility in international law: holding the corporation using AI accountable

One of the most appealing solutions is to hold the corporation using AI accountable, given the fact that private corporations would be a major user of advanced AI technology. However, there is a glaring lack of consensus regarding whether corporations can be considered as subjects of international law, which is still primarily State-centric in nature.[33] Apart from academic materials, the decisions of American courts on the interpretation of the Alien Tort Statute (ATS)[34] provide useful guidance on this point. However, on the question of whether corporations are liable for violation of international law, the decisions have been far from consistent.[35]

Recently, in *Jesner v. Arab Bank*,[36] the United States (US) Supreme Court refused to conclusively answer this question, and observed that it was doubtful whether corporations can indeed be held responsible under international law. On a broader scale, the issue remains unsettled and debatable.[37] As Julian Ku observes, international legal instruments generally desist from imposing direct liability on private actors. Instead, the respective states are given the onus of imposing obligations on private entities or individuals within their respective domestic

31 ibid 199.

32 ibid 196-199.

33 See Emeka Duruigbo, 'Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges' (2008) 6(2) Northwestern Journal of International Human Rights 222.

34 Alien Tort Statute, 28 U.S. Code § 1350.

35 See, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 149 (2nd Cir. 2010) asserting that the notion of corporate liability for violating customary international law is not universally accepted. But see, *In re South African Apartheid Litigation: Ntsebeza v. Ford Motor Company*, 15 F.Supp.3d 454, 464-465 (S.D.N.Y. 2014) stating that there is no basis to claim that corporate liability is not recognized under customary international law.

36 *Jesner v. Arab Bank Plc*, 138 S. Ct. 1386, 1402 (2018).

37 Julian G Ku, 'The Curious Case of Corporate Liability under the Alien Tort Statute: A Flawed System of Judicial Lawmaking' (2011) 51(2) Virginia Journal of International Law 353, 377.

jurisdictions.[38] This proposition logically follows from the fact that private actors like corporations do not have the authority to enter into binding treaties under the international legal order.[39] Ku further fortifies his argument by stating that after the Second World War, although individual responsibility was imposed on persons involved in the operations of I.G. Farben for crucially assisting the Nazis, the firm itself was never charged under international law.[40] In the present-day context, the Rome Statute expressly limits the jurisdiction of the International Criminal Court (ICC) to natural persons, thus excluding juristic persons like corporations from being held criminally liable under international law.[41]

However, the growing influence of multinational corporations (MNC) has led to scholars calling for corporations to be held liable for wrongful actions under international law, including through corporate criminal responsibility.[42] It has been contended that in order to preclude the situation in which corporate entities enjoy complete immunity, corporations should at least be recognized as 'participants' in the international legal regime for them to be held responsible for their actions.[43] Recognising corporations as 'participants' in international law signifies a realisation of the fact that they play a significant role in the formulation of the rules of international law, especially in certain areas like international investment law.[44] This shift has been made possible by giving corporations the right to participate in various fora, where the rules of international law are formulated and deliberated upon.[45] Simply put, accepting corporations as 'participants' in the international legal order signifies the undeniable reality that international law shapes and is, in turn, shaped by the actions of transnational corporations.

The test laid down in the *Reparation for Injuries* case has been widely accepted as laying down the criteria for determining whether an entity possesses international legal personality.[46] According to this test, an entity must possess rights and duties

[38] ibid 384.

[39] ibid.

[40] ibid 379.

[41] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute) art 25(1).

[42] Thompson Chengeta, 'Accountability Gap: Autonomous Weapon Systems and Modes of Responsibility in International Law' (2016) 45(1) Denver Journal of International Law & Policy 1, 37-38.

[43] UN Human Rights Council, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie- Business and human rights: mapping international standards of responsibility and accountability for corporate acts' (9 February 2007) UN Doc A/HRC/4/035, para 20.

[44] Jose E Alvarez, 'Are Corporations Subjects of International Law?' (2011) 9(1) Santa Clara Journal of International Law 1, 9.

[45] ibid.

[46] Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) [1949] ICJ Rep 174.

on the international plane, and must also be legally equipped with the ability to enforce its rights by bringing claims that are enforceable in international law.[47] Responsibilities of corporate entities are certainly not unknown in international law.[48] Coupled with the fact that corporations often enjoy various rights and the power to enforce them under specialised regimes like international investment law, one can argue that transnational corporations should be granted international legal personality.[49] Yet, as has been discussed above, plausible arguments to the contrary also exist and have often been accepted in judicial decisions. Therefore, unless this hurdle of doctrinal uncertainty is cleared, it would be extremely risky to fix accountability for the actions of AI on the sole premise of corporate responsibility in international law.

Even if we assume that corporations can be legally sued for contravening international law, more obstacles arise due to the peculiar nature of AI technology. Due to the 'black box' nature of AI, it would be difficult to prove that high ranking officials of the corporation were involved in the breach caused by the actions of the AI entity. This is a prerequisite for fixing corporate criminal responsibility in many jurisdictions.[50] In the case of corporate civil responsibility, a heavy burden is placed upon the aggrieved party to file a civil suit before a foreign court.[51] More importantly, it is uncertain as to how product liability regulations would apply to AI entities,[52] since it would be difficult to prove that the manufacturer had foreseen the harm caused by a machine that can act autonomously, learn from its external environment, and function differently from how it was originally programmed.[53]

[47] ibid 179.

[48] See for example 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' (2011) UN Doc HR/PUB/11/04, Principles 11-24.

[49] Karsten Nowrot, 'Transnational Corporations as Steering Subjects in International Economic Law: Two Competing Visions of the Future' (2011) 18(2) Indiana Journal of Global Legal Studies 803, 825-826.

[50] Geneva Academy of International Humanitarian Law and Human Rights, 'Autonomous Weapon Systems under International Law' (Academy Briefing No. 8, November 2014), 22 <https://www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Academy%20Briefings/Autonomous%20Weapon%20Systems%20under%20International%20Law_Academy%20Briefing%20No%208.pdf> accessed 16 May 2021.

[51] UN Human Rights Council (n 29) 15, para 79.

[52] ibid.

[53] Daniel N Hammond, 'Autonomous Weapons and the Problem of State Accountability' (2015) 15(2) Chicago Journal of International Law 652, 666-667.

In a nutshell, relying on corporate accountability is a risky venture, both due to doctrinal and practical shortcomings.

C. Individual criminal responsibility: holding the individual responsible for the functioning of AI accountable

The third potential target for fixing accountability is the individual who is responsible for the consequences arising out of the use of AI. In cases of armed conflict, individual responsibility or command responsibility can be seen as a potential avenue to fix accountability for the unlawful use of AWS technology. Concerns have been raised that AWS that can choose and attack targets at will without human intervention may breach the principles of proportionality and distinction, i.e. the obligation to distinguish between civilian and military targets and attack only the latter.[54] This would result in a serious violation of international humanitarian law (IHL)[55] and may even be regarded as war crimes.[56] It has, therefore, been contended that the person deploying the AWS and the commander authorizing or monitoring such conduct should be held criminally responsible.[57]

Under the Rome Statute, it must be proved that the person possessed the requisite intent and knowledge in committing the elements constituting the crime, for criminal liability to be invoked.[58] Similarly, under command responsibility, a superior commander is responsible for the actions of a subordinate, only if the commander knew that the subordinate was going to commit a violation of international law, and having known so, failed to make reasonable efforts to prevent the act, or punish for such a course of conduct.[59]

It is the fulfilment of these basic preconditions, coupled with the autonomy and unpredictability of AI systems, that make the imposition of criminal responsibility difficult. As Hammond rightly points out, a commanding officer, who had no role to play in the programming of the AWS, would not know how the machine would function in every conceivable situation, and whether it would violate the legal standards during armed conflict.[60] In such situations, proving

54 ibid 673-674.

55 Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3 (Additional Protocol I) art 51(4).

56 ibid art 85. Note, however, that the acts have to be committed wilfully, in order to be classified as war crimes, as contemplated by Article 85.

57 Kelly Cass, 'Autonomous Weapons and Accountability: Seeking Solutions in the Law of War' (2015) 48(3) Loyola of Los Angeles Law Review 1017, 1066.

58 Rome Statute (n 41) art 30. Note, however, that the intent or knowledge does not have to be proved if such a requirement has been explicitly excluded by the Statute, as expressed by the wording of Art. 30.

59 Additional Protocol I (n 55) art 86(2).

60 Hammond (n 53) 664-665.

intention becomes a Herculean task.[61] In most cases, the prosecution can at most show that the commander or the deploying officer should have been more careful and undertaken due diligence measures to prevent harm. Yet, such a finding, even if proved, may be insufficient for conviction, since it is debatable whether mere negligence or recklessness satisfies the standard of the mental element required for committing international crimes.[62]

Undoubtedly, individual responsibility can be proved in those simpler cases where it can be shown that the manufacturer wilfully programmed the AI system in such a way that it would violate IHL, or the deploying officer used such technology with the intention to commit war crimes.[63] Realistically speaking, such simple fact scenarios are unlikely to materialise in practice.[64]

Moreover, holding the manufacturer criminally liable may be impractical under most circumstances. Besides the ability to learn from environmental stimuli and prior use,[65] most forms of AI technology have multiple uses, only some of which may result in violations of international law.[66] An argument on similar lines was accepted in the trial of persons connected with the affairs of I. G. Farben after the Second World War. The tribunal held that though it was shown that the company supplied the deadly Zyklon B gas to the Nazis, it could not be proved, in the absence of conclusive evidence, that the persons running the company could have known the purpose for which the gas was being used, namely, extermination of the victims in the concentration camps. According to the tribunal, the gas had a legitimate use as an insecticide, and it could reasonably be argued that the officials of the company felt that it would be used for that purpose.[67] Similarly, in the case of AI, it would be open for the manufacturer to contend that the use and functioning of the AI system as contemplated during its manufacture and programming would not have violated international law. It would be quite difficult to rebut this contention, given the fact that advanced AI systems can potentially 'learn' from its external environment, as discussed elsewhere in this article. Therefore, as in the

61 Rebecca Crootof, 'War Torts: Accountability for Autonomous Weapons' (2016) 164(6) University of Pennsylvania Law Review 1347, 1375-1376.

62 Carrie McDougall, 'Autonomous Weapon Systems and Accountability: Putting the Cart before the Horse' (2019) 20(1) Melbourne Journal of International Law 58, 67.

63 Crootof (n 61) 1376-1377.

64 Even in such situations, individual criminal responsibility does not preclude the possibility of State responsibility, and vice versa. See, Rome Statute (n 41) art 25(4); International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (2001) 2(2) Yearbook of the International Law Commission 26, UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2) (ILC Draft Articles) art 58.

65 Hammond (n 53) 666-667.

66 Chengeta (n 42) 40.

67 *United States v. Krauch ("The I. G. Farben case")*, 8 Trials of War Criminals before the Nuernberg Military Tribunals Under Control Council Law No. 10, 1169.

case of corporate accountability, individual criminal accountability cannot also be used to satisfactorily regulate AI on the international plane.

D. State responsibility: holding the state using AI, or allowing AI to be used, accountable

The last possible contender for fixing responsibility for the actions of AI systems, and possibly the most appropriate,[68] is the State. As has been rightly pointed out, the development and operation of autonomous systems involve the contribution of a large number of people, and it is difficult to pinpoint blame on a few isolated individuals to assign criminal responsibility.[69] In such group-centric activities, the proper course would be to hold the State responsible,[70] and make it liable to pay reparation.[71] This proposition is attractive, and is in conformity with the larger ideal of international law that States should be held accountable if they use, or allow to be used, its territory for infringing the rights of other States and their people.[72]

It is well settled that in order to hold the State responsible, the wrongful act or omission has to be attributed to it.[73] It is easy to guess that the major users of AI technology will be private actors, including corporations. Coupled with the autonomy of AI systems, the problem of attribution would often be insurmountable. A possible approach is to consider the AI system as an 'entity' under Articles 5 and 7 of the Draft Articles on State Responsibility, so that both foreseen and unforeseen conduct could be attributed to the State.[74] However, the problem with this approach is that the AI system must perform functions that fall within 'governmental authority', leading to a restriction on attribution.[75] In the *Nicaragua* case, the ICJ held that State responsibility would be incurred for the actions of non-State actors, only if it could be shown that the State enjoyed "effective control" [76] over them. In that case, the US was not held responsible for the

[68] In the context of AWS, see Hammond (n 53) 668-671.

[69] Charles P Trumbull IV, 'Autonomous Weapons: How Existing Law Can Regulate Future Weapons' (2020) 34(2) Emory International Law Review 533, 592.

[70] ibid.

[71] *Case concerning the Factory at Chorzow (Germany v. Poland)* (Merits) PCIJ Rep Series A No 9.

[72] *Corfu Channel (United Kingdom v. Albania)* (Merits) [1949] ICJ Rep 4, 22; *Trail Smelter case (United States v. Canada)* (1941) 3 RIAA 1905, 1965.

[73] ILC Draft Articles (n 64) art 2.

[74] Christopher M Ford, 'Autonomous Weapons and International Law' (2017) 69(2) South Carolina Law Review 413, 476.

[75] ILC Draft Articles (n 64) 43, Commentary to art 5.

[76] *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States*) (Merits) [1986] ICJ Rep 14, 64-65, para 115.

actions of the Contra rebels, even though it had trained and funded the Contras, supplied them with weapons and even substantially taken part in the selection and attacking of targets. The Court observed that though the Contras were highly dependent on the US, the State was not responsible since it was not proved that the US directed and enforced the commission of illegal acts by the Contras.[77]

If such a fact scenario is juxtaposed with the use of modern AI technology, it can well be argued that private corporations are not under the "effective control" of the State, in that they are free to undertake activities and take decisions without the State directing them to do so. Even if AI technology is used by the State (without being regarded as organs of the State),[78] it could be legitimately argued that since the final decisions on whether and how to act in a given situation rests with the AI entity, the State cannot be said to exercise "effective control" over it. Therefore, it has been contended that the "effective control" test provides an avenue for the State to violate its international obligations by letting private entities commit unlawful acts, and plead lack of "effective control" to avoid responsibility.[79]

In the field of human rights,[80] it has been recognized that the obligation of States extends not only to respecting human rights, but also to ensure that private actors within its territory or jurisdiction do not violate human rights.[81] It is precisely due to this reason that obligations are imposed upon States to ensure that corporations do not commit acts that are in violation of international human

[77] ibid. But see, *Prosecutor v. Tadic* (Judgment) ICTY IT-94-1-A (15 July 1999) 56, para 131 holding that a lesser standard of "overall control" would be sufficient in the case of organized military groups, which would include not only funding and training, but also assisting in committing illegal acts. The International Court of Justice (ICJ), however, reverted back to the test laid down under Art. 8 of the ILC Draft Articles (n 64) art 8. See, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, 210, para 406.

[78] The actions of organs of the State can be directly attributed to the State. See, ILC Draft Articles (n 64) art 4; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62, 87, para 62 stating that this principle has attained the status of customary international law.

[79] Mark Gibney, Katarina Tomasevski, and Jens Vedsted-Hansen, 'Transnational State Responsibility for Violations of Human Rights' (1999) 12 Harvard Human Rights Journal 267, 287-288.

[80] For an assessment of the impact of the use of AI by MNCs on basic human rights, see generally Emilie C Schwarz, 'Human vs. Machine: A Framework of Responsibilities and Duties of Transnational Corporations for Respecting Human Rights in the Use of Artificial Intelligence' (2019) 58(1) Columbia Journal of Transnational Law 232.

[81] UN Human Rights Committee, 'General Comment No. 31: The nature of the general legal obligations imposed on State Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 (General Comment 31) para 8; UN Human Rights Committee, 'General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation' (8 April 1988) UN Doc HRI/GEN/1/Rev.9 (Vol. I) paras 8-9.

rights law, instead of placing such a duty upon the corporations directly.[82] In this regard, States will incur international responsibility for the acts of private entities, if they fail to exercise due diligence in preventing the violation, and punishing the perpetrators.[83]

The logical corollary of this argument is that States would not be responsible for the actions of private individuals or entities, if it undertook due diligence efforts, irrespective of whether or not the violation took place.[84] In situations involving advanced technology, such as cyber activities and AI, directly attributing such actions to the State is challenging considering the complex mechanism of functioning that is involved.[85] Moreover, the problem with the due diligence approach in cases such as cyberattacks is that States can plead that though they employed the best possible means considering their resource constraints, the technology was too sophisticated for them to avert the damage caused.[86] In cases of AI, with its inherent uncertainty, States may argue that an isolated incident that could not be reasonably foreseen despite best efforts should not be cited as a ground to make them internationally responsible.

Even if the first hurdle of attribution is crossed, States would still be free to plead *force majeure* for those actions of the AI system that could not be anticipated,

[82] David Weissbrodt, 'Human Rights Standards Concerning Transnational Corporations and Other Business Entities' (2014) 23(2) Minnesota Journal of International Law 135, 154-156; UN Sub-Commission on the Promotion and Protection of Human Rights, 'Economic, Social and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (26 August 2003) UN Doc E/CN.4/Sub.2/2003/12/Rev.2, para 1.

[83] *Velasquez Rodriguez v. Honduras*, Inter-American Court of Human Rights Series C, No. 4 (29 July 1988), 30-31, paras 172-174; *Social and Economic Rights Action Centre and Centre for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 155/96, 30th Ordinary Session (13-27 October 2001), paras 57-58 holding Nigeria responsible for the violation of rights of the Ogoni people by private oil companies and the State machinery; *Lopez Ostra v. Spain* [1994] ECHR 46 holding Spain responsible for not taking sufficient steps to prevent interference with the petitioner's right to respect for the home due to the activities of a private company; *Guerra v. Italy* [1998] ECHR 7 holding Italy responsible for not informing the petitioners of the risks involved due to the emission of toxic smoke by a factory owned by a private corporation.

[84] N L J T Horbach, 'The Confusion About State Responsibility and International Liability' (1991) 4(1) Leiden Journal of International Law 47, 57; Danwood Mzikenge Chirwa, 'The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights' (2004) 5(1) Melbourne Journal of International Law 1, 14-15.

[85] Peter Margulies, 'Sovereignty and Cyber Attacks: Technology's Challenge to the Law of State Responsibility' (2013) 14(2) Melbourne Journal of International Law 496, 502-504; Jovan Kurbalija, 'State Responsibility in Digital Space' (2016) 26(2) Swiss Review of International and European Law 307, 325.

[86] Ian Yuying Liu, 'State Responsibility and Cyberattacks: Defining Due Diligence Obligations' (2017) 4(2) Indonesian Journal of International and Comparative Law 191, 254.

in an attempt to evade responsibility.[87] Due to the uncertain nature of functioning of AI, it is possible that certain actions may be totally unforeseen and unexpected, leading to a potential argument of *force majeure*.[88] In the *Rainbow Warrior* arbitration, the tribunal held that the circumstance of *force majeure* would apply only when the prevailing situation makes the performance of the obligation an "absolute and material impossibility", and not merely because it would pose a heavy burden upon the State to discharge its duty.[89] In effect, the conduct is not borne out of the free will of the State, making it involuntary.[90] In the case of AI, situations may arise where its conduct could lead to total loss of control, and would make the performance of obligations utterly impossible.

However, *force majeure* does not apply if the State was responsible for the occurrence of the situation, or if the State had assumed the risk of the said situation arising.[91] The State cannot be held responsible if it, unknowingly and in good faith, contributed to the situation that arose; the situation must have been *caused* by its actions,[92] or through its neglect.[93] A possible example of *force majeure* would be the unlawful entry of aircraft, which got deflected due to atmospheric conditions, into the airspace of another State.[94] Such an example can be equated with autonomous AI systems, since its inherent unpredictability can be attributed to changes in its external environment and its complicated decision-making process, rather than being directed by the State. Moreover, even though the State can be said to have contributed to the situation by using or deploying the AI system in the first place, it would be difficult to prove causation in cases where the AI entity takes decisions and acts on them without any human intervention at any stage.

While it has been argued that force majeure should not apply when States neglect to regulate activities that can potentially cause harm,[95] it is almost impossible to predetermine the response of advanced AI entities to a stimulus before they are used, making regulation difficult.[96] The argument on assumption of risk may also be futile, since it mainly encompasses circumstances where the State had unequivocally agreed in advance to undertake the risk, or not plead force majeure, possibly through

87 Chengeta (n 42) 49.
88 ILC Draft Articles (n 64) art 23(1).
89 The Rainbow Warrior Affair (New Zealand v. France), (1990) 20 RIAA 215, 253, para 77.
90 ILC Draft Articles (n 64) 76, Commentary to Art. 23.
91 ibid Article 23(2).
92 ibid 78, Commentary to Article 23.
93 ibid 76-77.
94 ibid 77.
95 Myanna Dellinger, 'Rethinking Force Majeure in Public International Law' (2017) 37(2) Pace Law Review 455, 490.
96 Schwarz (n 80) 277.

its actions or international agreements.[97] Therefore, the existing legal standards governing State responsibility are insufficient for ensuring accountability for the actions of AI systems.

III. Absolute State Liability as a Possible Solution to the Problem of Accountability

The previous part shows the importance of creating a new regime of responsibility for fixing account of actions of AI. Some authors have argued in favour of a strict liability regime of State responsibility, especially in the field of AWS, by citing the inherently unpredictable and dangerous consequences flowing from the actions of AI.[98] The International Law Commission (ILC) too has tried to end the debate revolving around the need to prove fault in invoking State responsibility, by basing the nature of responsibility upon the content of the primary obligation involved.[99] Moreover, intention or the lack of it on the part of the State is irrelevant, except where it is a specific prerequisite for breach of the international obligation in question.[100]

What is being proposed in this paper is that States should be held responsible under an absolute liability regime, for the transnational consequences flowing from the use of AI entities by its organs, citizens, and corporate nationals. In effect, it would closely resemble the framework outlined in the Outer Space Treaty, 1967, according to which States are held responsible for "national activities" in space, including those carried out by private corporations and entities.[101] Such a step would preclude the necessity of using debatable legal propositions such as corporate responsibility or the legal personality of AI, and avoid the difficulty in attribution and countering the contention of *force majeure*. This mechanism recognizes that the major users of AI would be corporations and private actors.[102] Therefore, whenever corporations violate international law, they may be proceeded against by the State under their own legal framework, since corporate liability is well settled

97 ILC Draft Articles (n 64) 78, Commentary to Article 23.

98 Yannick Zerbe, 'Autonomous Weapons Systems and International Law: Aspects of International Humanitarian Law, Individual Accountability and State Responsibility' (2019) 29(4) Swiss Review of International and European Law 581, 604-605 (arguing for a high standard of State responsibility, bordering on absolute liability, in regulation of AWS, similar to the legal regimes that govern nuclear activities and outer space); Crootof (n 55) 1394.

99 ILC Draft Articles (n 64) 34-35, Commentary to Article 2.

100 ibid 36.

101 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (adopted 19 December 1966, entered into force 10 October 1967) 610 UNTS 205 art VI.

102 Note, however, that in the case of AWS, the State would generally be the sole user.

under municipal law. In order to finance reparations that the State would be liable to pay owing to the activities of private corporations or individuals, States would be completely free to devise their own methods, including similar absolute liability regimes under national law[103] for private entities using AI technology.

The proposed mechanism differs slightly from the "strict liability" frameworks found in existing literature on the topic. One strand of the existing literature deals with strict liability as understood under tort law, and therefore, AWS are sought to be regulated through the mechanism of "war torts".[104] The second strand proposes a more radical model where *force majeure* and other circumstances precluding wrongfulness are not permitted to be raised as possible defences, but which generally focusses on the international humanitarian law (IHL) aspects of AWS regulation.[105] The problem with the former is that strict liability under tort law recognises defences such as act of God,[106] which can possibly backfire due to the unpredictable nature of functioning of AI. Similarly, the latter being focussed only on the IHL aspects of AWS, cannot be satisfactory employed to regulate the use of AI for peaceful purposes and that too, by private actors acting independently of the State. Therefore, the proposed model in this article would not allow defences like *force majeure* or act of God to be raised, while also ensuring that the State is held responsible for the acts of its citizens and corporate nationals acting independently. As a result, the proposed model is much more expansive as far as the extent of State liability is concerned.

States are normally responsible for activities occurring within their territory.[107] Yet, the proposed framework would naturally entail a certain degree of extraterritoriality, since MNCs operating abroad would be the most frequent users of AI. In this respect, pragmatic concerns dictate that the home State (where the MNC or its parent company is incorporated or registered) should shoulder the responsibility, instead of the host State (where the MNC or its subsidiaries operate) doing so. Host States, which are generally developing nations with resource constraints, would often be powerless to act against influential MNCs. Invoking responsibility of States which do not have the capacity to regulate powerful

[103] For example, in India, industries that are engaged in hazardous activities bear absolute liability for the consequences arising out of their activities. The traditional defences against strict liability such as act of God, or fault of the victim, are not available. See, *M. C. Mehta v. Union of India*, (1987) 1 SCC 395, 420-421, para 31.

[104] Crootof (n 61) 1394.

[105] Zerbe (n 98) 604.

[106] *Rylands v. Fletcher* (1868) LR 3 HL 330, 339-340.

[107] See, e.g., Convention on Nuclear Safety (adopted 17 June 1994, entered into force 24 October 1996) 1963 UNTS 293, Preamble (iii) the State exercising jurisdiction over a nuclear installation is responsible for ensuring nuclear safety.

corporations would be unfair.[108] Further, as McCorquodale and Simons argue, home States provide vital concessions to their corporate nationals in the form of loans, assistance through export credit agencies, and investment guarantees. Consequently, they should be held responsible if the actions of such corporations are such that they would have led to State responsibility if they had been committed by the home State directly.[109]

Moreover, although the parent company of an MNC and its foreign subsidiaries are legally distinct from each other, State practice has shown that home States of the parent company often regulate the activities of its foreign subsidiaries operating in other countries.[110] For instance, in certain cases where the subsidiary was economically dependent upon the parent company, the actions of the former had been attributed to the latter by treating both of them as a single economic unit in the field of competition law.[111] Recently, the Court of Appeals in France allowed charges of financing of terrorist outfits to be framed against the French company Lafarge for payment of money to the Islamic State by its Syrian subsidiary.[112] These cases show that 'piercing the corporate veil' to hold parent companies accountable for the misdeeds of its foreign subsidiaries is not unheard of.

Even under the Outer Space Treaty, it has been argued that the State where the corporation or the parent company (in case of MNC) is registered, should be the State that would be held responsible under Article VI of that treaty.[113]

[108] Chirwa (n 84) 26-28.

[109] Robert McCorquodale and Penelope Simons, 'Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70(4) *Modern Law Review* 598, 613-614.

[110] ibid 616-617.

[111] Case 48/69, *Imperial Chemical Industries Ltd. v. Commission of the European Communities* (1972) ECR 619.

[112] Claire Tixeire, Cannelle Lavite and Marie-Laure Guislain, 'Holding Transnational Corporations Accountable for International Crimes in Syria: Update on the Developments in the Lafarge Case (Part I)' (*Opinio Juris*, 27 July 2020) <http://opiniojuris.org/2020/07/27/holding-transnational-corporations-accountable-for-international-crimes-in-syria-update-on-the-developments-in-the-lafarge-case-part-i/> accessed 18 July 2021.

[113] Kofi Henaku, 'Private Enterprises in Space Related Activities: Questions of Responsibility and Liability' (1990) 3(1) Leiden Journal of International Law 45, 51-52. For the subtle nuances governing the issue of State responsibility in this field, see generally Krystyna Wiewiorowska, 'Some Problems of State Responsibility in Outer Space Law' (1979) 7(1) Journal of Space Law 23.

Similarly, in the field of human rights, extraterritoriality is not unprecedented in international law.[114]

Under the proposed framework, although States would not be permitted to plead force majeure, they should be exempted from responsibility if they can prove that the damage caused by the AI system was the direct result of an act of agencies, private individuals, or corporations within the jurisdiction of another State[115]. In this case, the latter State should be held responsible. This exception is especially important in the field of AI systems, in order to provide a disincentive against hacking of AI software, and stopping culpable actors from claiming reparations for harm arising out of their own fault.

IV. Conclusion

Due to the autonomy and unpredictability of AI, traditional modes of accountability would fail miserably, highlighting the need for a novel approach that does not ignore the astronomical pace of technological development. In a primarily State-centric international legal order, the onus should fall upon States, with their massive regulatory and enforcement powers, to take responsibility for the perils that AI has to offer. In this respect, a model of absolute State liability on the international plane has been proposed in this paper, which is flexible enough to allow States to devise tailor-made strategies in the domestic sphere, in accordance with their unique national circumstances.

The question arises as to why States might be willing to bind themselves within such a restrictive liability framework. The answer is obvious: the only alternative to legal regulation of AI is a complete ban on such technology. Activists all over the world have called for banning AI technology in the field of facial recognition, AWS, and algorithmic vetting of asylum seekers, focusing primarily on the adverse impact such systems have on human rights. The voices will only grow louder unless an acceptable mode of accountability is arrived at. In the midst of such campaigns, States may wish to pay a small price in order to enjoy the benefits that AI can offer, both material and strategic.

The restrictive agreements relating to outer space form the basis for the proposed model in this paper. When those agreements were signed, outer space

[114] See for example United Nations Committee on Economic, Social and Cultural Rights (UNCESCR), 'General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)' (20 January 2003) UN Doc E/C.12/2002/11, para 33 calling upon States to ensure that its own citizens and corporate nationals do not violate the right to water of people living in other nations.

[115] As regards liability for damage, a similar exception exists in the regime governing space law. See, Convention on the International Liability for Damage Caused by Space Objects (adopted 29 November 1971, entered into force 1 September 1972) 961 UNTS 187, art VI.

constituted the unknown, offering opportunities as well as dangers. Similarly, AI technologies today offer infinite advantages and potentially catastrophic consequences. Coupled with limited knowledge about their inner workings, this constitutes a suitable case for experimenting with absolute State liability, through a binding international legal instrument.

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Planning Challenges and Environmental Claims by Interested Parties Under Aarhus: Still Prohibitively Expensive?

Giselle Vega*

Abstract

In 1998, the Aarhus Convention established an enhanced framework to encourage access to information, public participation in decision-making, and access to justice in environmental matters. According to Article 9(4), contracting parties are responsible for ensuring that members of the public can challenge decisions made by public or private bodies. Markedly, access to justice shall not be "prohibitively expensive". Although access to justice is guaranteed to different degrees across contracting States, in the United Kingdom, members of the public who intend to challenge a planning decision of a local authority encounter a prohibitive access to justice because of high litigation costs. In 2013, the EU Commission started proceedings against the UK since there was not a clear guidance for judges to make sure that access to justice was not prohibitively expensive. Subsequently, a fixed costs model was implemented, allowing interested parties to cap their litigation costs in the court of first instance by applying for a Protective Costs Order (PCO). In 2017, a hybrid costs model was introduced with the purpose of discouraging unmeritorious claims. It replaced the fixed costs model and resulted in renewed uncertainty for interested parties since judges had the discretion of varying litigation costs downwards and upwards when granting a PCO. In *Bertoncini* (2020), the High Court decided that an increase of costs by £10,000 was not prohibitively expensive. While the meaning of not prohibitively expensive costs is decided

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on a case-by-case basis, an increase in costs by £10,000 or more represents a significant financial risk for some members of the public. Furthermore, the fact that PCOs can only be granted in the court of first instance comes as a downside for interested parties who wish to take their case to higher appellate courts. Against this background, environmental claims and planning challenges continue to be prohibitively expensive for interested parties in the UK.

Keywords: Aarhus Convention, litigation costs, interested parties, environmental claims, justice

> "Nearly all other objectors had to raise funds by appeals to the public, coffee mornings, bring and buy sales and any other honest way of raising enough money to mount a respectable case against what they perceived to be a massive threat to the environment".
>
> – Brooke LJ[1]

I. Introduction

According to Article 9(4) of the Aarhus Convention, contracting parties *shall* ensure that members of the public can challenge decisions of public or private bodies before an administrative or judicial authority.[2] Particularly, procedures shall not be *prohibitively expensive*.[3] In 2005, the *Corner House*[4] rules were developed by the Court of Appeal, bringing greater flexibility to afford not prohibitively expensive justice in environmental litigation. Subsequently, amendments to the Civil Procedure Rules (CPR) were introduced in 2013, 2017, and 2018.[5] As a result, under CPR rr.45.41–45.45, courts are allowed to cap litigation costs by granting Protective Cost Orders (PCOs) to interested parties who bring judicial review actions before the court of first instance under Aarhus. PCOs may be granted in private law claims only if the appellant proves there is sufficient public interest.[6] While applicants can appeal

1 Brooke LJ, 'David Hall Lecture Environmental Justice: The Cost Barrier' (2006) 18(3) Journal of Environmental Law 343.

2 Convention on Access to Environmental Information, Public Participation in Decision Making and Access to Justice in Environmental Matters 1998 (United Nations).

3 Article 9(4) Aarhus Convention.

4 *R. (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192.

5 Civil Procedure (Amendment) Rules 2013; Civil Procedure (Amendment) Rules 2017; Civil Procedure (Amendment) Rules 2018.

6 Stuart Bell and others, '10. Access to environmental justice and the role of the courts' in Bell Stuart and others (eds.), *Environmental Law* (9th edn., OUP 2017) 339-343.

a decision against the local planning authority without cost, interested parties can only appeal through judicial review.[7]

This article will argue that although the CPR rr.45.41–45.45 have afforded a degree of proportionality and predictability in litigation costs, the financial risk interested parties face throughout the process of judicial review and further appeals makes them prohibitively expensive. Despite the multiple existing challenges to bring judicial review actions before the court of first instance,[8] this work specifically focuses on the analysis of litigation costs for interested parties under the Aarhus Convention and the prohibitively expensive character of appeal processes concerning environmental claims against planning decisions made by public authorities. Firstly, an analysis of litigation costs in judicial review will be provided, followed by a commentary on the application of the Aarhus Convention and a discussion of possible reforms. Given the significant overlap between planning and environmental law, some statistics in relation to public funding in environmental law will be used to support the author's argument.

II. Litigation Costs as Prohibitively Expensive

For the most part, the hybrid costs model to grant PCOs introduced in the Civil Procedure (Amendment) Rules 2017 does not afford adequate protection to interested parties. When allowing a PCO, judges must follow a subjective (an individual's financial condition) and objective (the financial condition of an ordinary member of the public) approach to evaluate the financial circumstance of an applicant.[9] Nevertheless, numerous criticisms against the model have resulted in actions against the Secretary of State brought by environmental charities such as Client Earth, Friends of the Earth, and the Royal Society for the Protection of Birds.[10] In light of the 2017 amendments, the Secondary Legislation Scrutiny Committee concluded that the Ministry of Justice had not presented a convincing case to justify the implementation of the hybrid model.[11] Further, the amendments were challenged in *RSPB v SoS*[12] since they had been incorporated with the purpose

7 ibid.

8 ibid.

9 Civil Procedure (Amendment) Rules 2017, 45.41-5.

10 Lexis PSL, 'Protective costs orders (PCOs) in environmental matters' (*Lexis PSL*, 2021) <https://www.lexisnexis.com/uk/lexispsl/environment/document/393765/5B98-DVD1-F18C-T4X8-00000-00/Protective _costs_orders__PCOs__in_environmental_matters> accessed 2 March 2021.

11 *R. (on the application of Royal Society for the Protection of Birds) v Secretary of State for Justice* [2017] EWHC 2309 (Admin) (Case comment) 286.

12 *R. (on the application of Royal Society for the Protection of Birds) v Secretary of State for Justice* [2017] EWHC 2309 (Admin).

of discouraging unmeritorious claims despite that the Ministry of Justice had not provided any figures of the number of unmeritorious claims brought under Aarhus.[13] In this sense, the fear of "legal-aid abusers" and unmeritorious claims has been overstated, resulting in policies that reaffirm a prohibitively expensive approach.

Before the implementation of the hybrid model, it was questioned if the financial means of applicants should always be irrelevant, as established in CPR (Amendment) 2013.[14] Academic scholarship considered the scenario of a wealthy individual applying for a PCO who may be in a better financial position than the body that is being challenged.[15] Although the argument is compelling, the scenario was examined only at a superficial level. In 2003, it was reported that only 7% of a number of judicial review challenges involving environmental matters received public funding.[16] Similarly, in 2004, £7 million were spent in representations for public law cases of which only 10% concerned environmental protection.[17] Consequently, the multiple amendments to the CPR and the legal costs system in the UK have unduly given most weight to potential legal-aid abusers and unmeritorious claims. Against this background, the anticipatory protection procured to interested parties through PCOs and legal aid is insufficient, prompting prohibitive justice for interested parties who fall outside the 'wealthy appellant' paradigm.

In a similar way, the cost variations in PCOs introduced in the CPR (Amendment) 2017 have resulted in a prohibitively expensive access to justice within the meaning of Aarhus. The 2013 amendments capped the liability of individual claimants to £5,000 and £10,000 for all other claims in the court of first instance.[18] Nonetheless, judges now have the power to vary the limits upwards or downwards and even remove them if, in the court's opinion, the cost variation is not prohibitively expensive.[19] In *Garner*,[20] although the subjective approach applied was consistent with the *Corner House* rules, the High Court failed to regard the underlying purpose of Article 10(a) Directive 85/337/EEC (Environmental Impact Assessment Directive), whose objective is to give "the public concerned wide access to justice".[21] Subsequently, the Court of Appeal granted special status

[13] *RSPB v SoS* (n 11).
[14] Simon Ricketts, 'Heroes and villains – challenge and protest in planning: What's a developer to do?' (2014) 13 Supplement (Power to the People?) Journal of Planning & Environmental Law 17.
[15] ibid.
[16] Brooke LJ (n 1) 353, 354.
[17] ibid 350.
[18] Civil Procedure (Amendment) Rules 2013.
[19] Civil Procedure (Amendment) Rules 2017; CPR 45.44.
[20] *R. (on the application of Garner) v Elmbridge BC* [2010] EWCA Civ 1006.
[21] ibid; Article 10(a) EIA Directive.

to Environmental Impact Assessment (EIA) and Integrated Pollution Prevention and Control (IPPC) cases so it would be easier for interested parties to obtain a PCO.[22] By way of contrast, the current legal costs system does not appreciate whether the potential liability will be prohibitively expensive for an ordinary member of the public. Particularly, the complexity behind this issue can be easily noticed when thinking about the fact that most PCOs could be justified under an objective approach, where the financial circumstance of an interested party is measured in light of the financial condition of an ordinary member of the public.[23]

As the law stands, while there is a fixed starting point, the court's discretion gives way to significant legal uncertainty since there are not codified limits as to the maximum and minimum in costs variation.[24] In the recent case of *Bertoncini*,[25] the Queen's Bench Division doubled the cost liability of a claimant and decided that an increase of costs by £10,000 was not prohibitively expensive. Thereupon, regardless of the financial position of the appellant, importance must be given to the amount of costs the court of first instance may increase and still consider not to be prohibitively expensive under Aarhus. An ordinary member of the public might see this precedent as disincentivising since there are no upper or lower limits for costs variation. Even though it may not be prohibitively expensive for a particular claimant, the risk of facing an increase in cost liability of £10,000 or more has the potential of diluting the number of Aarhus Convention claims brought by interested parties.

Further, the ample discretion given to the courts undermines the principle of predictability in litigation costs, leaving interested parties in a disadvantaged position. In *Commission v UK*,[26] the EU started proceedings because of the prohibitively expensive nature of the UK's legal cost regime.[27] EU Member States are obliged to strike a balance between predetermined tariffs and judicial discretion to ensure proportionality and predictability in their legal costs systems.[28] While the CPR (Amendment) 2017 made provision for courts' discretion, in practice, it is difficult to reconcile the predictability of potential cost liability with the courts' wide

[22] Cain Ormondroyd, 'Access to environmental justice' (2011) 3 Journal of Planning & Environmental Law 253.

[23] ibid 254.

[24] Jorren Knibbe, 'New costs limits for environmental claims under the Aarhus Convention' (Guildhall Chambers, March 2017) <https://www.guildhallchambers.co.uk/uploadedFiles/Jorren2.pdf> accessed 12 May 2021, 4.

[25] *R. (on the application of Bertoncini) v Hammersmith and Fulham LBC* [2020] 6 WLUK 174.

[26] C-530/11 *Commission v. UK* EU:C:2014:67.

[27] Janke T Nowak, 'The right to "not prohibitively expensive" judicial proceedings under the Aarhus Convention and the ECJ as an international (environmental) law court: Edwards and Pallikaropoulos' (2016) 53 Common Market Law Review 1735.

[28] ibid 1735.

discretion. The most recent alleged breach brought against the UK in January 2021 by the Aarhus Compliance Committee (ACC) concerns, *inter alia*, the prohibitively expensive access to justice in Northern Ireland (NI).[29] The submission involved a litigant in person (LIP) with no income other than benefits who appealed against the construction of a ferry terminal and had an impending invoice of £3,000 unable to pay.[30] Even though there was a costs reduction under Aarhus, in the litigant's opinion, the Appeal Court (NI) did not consider her financial situation.[31] The UK has already submitted its observations in response to the ACC's communication and requested the Committee to find the case inadmissible.[32] Markedly, the UK emphasised that the Convention intends that access to justice is not prohibitively expensive and not that environmental litigation is free of costs.[33] Consequently, the legal costs system in the UK has left interested parties in an unfair position. The absence of affordable mechanisms undermines the rights guaranteed in the Convention[34] as it is the case in NI where litigation costs impair the ability of LIPs to continue the appeal process of their environmental claim.

For the most part, litigation costs are a crucial factor to provide interested parties fair access to justice in planning challenges and environmental claims as stated in Article 10(a) of the EIA Directive and Article 15(a) Directive 96/61/EC (IPPC Directive).[35] The CJEU's interpretation of not prohibitively expensive costs in the preliminary ruling of *Edwards*[36] sheds light on the wider implications of unaffordable litigation. In this case, the Supreme Court ruled that a costs order of £25,000 was not prohibitively expensive.[37] The Environment Agency, the Secretary of State for the Department for Environment, Food & Rural Affairs, and

[29] Aarhus Convention Compliance Committee Oral Submission Introduction by Christine Gibson, PRE/ACCC/C/2020/184 (United Kingdom and European Union) (31 December 2020) <https://unece.org/sites/default/files/2021-01/frCommC184_12.01.2021_statement.pdf> accessed 22 March 2021.

[30] Testimony from Christine Gibson (28 November 2017) <https://unece.org/DAM/env/p p/compliance/C2013-90/Correspondence_Communicant/frCommC90_28.11.2017_update/frCommC90_26.11.2017_att_3b_Testimony_Gibson_redacted.pdf> accessed 22 March 2021.

[31] Testimony from Christine Gibson (n 29).

[32] Letter from Grace Adisa-Solanke to Fiona Marshall, PRE/ACCC/C/2020/184 (United Kingdom and European Union) (22 January 2021) <https://unece.org/sites/default/files/2021-01/frPartyC184_22.01.2021_comments.pdf> accessed 22 March 2021.

[33] ibid; see also Ruddie, Brian K 'The Aarhus Convention in England and Wales' in Charles Banner (ed), *The Aarhus Convention: A Guide for UK Lawyers* (Hart Publishing 2015) 34.

[34] Áine Ryall, 'The Aarhus Convention: Standards for Access to Justice in Environmental Matters' in Stephen J Turner and others (eds), *Environmental Rights: The Development of Standards* (Cambridge University Press 2019) 123.

[35] Nowak (n 27) 1728.

[36] *R. (on the application of Edwards) v Environment Agency* [2013] UKSC 78; Nowak (n 26) 1735.

[37] *Edwards* [56-57]; Ruddie (n 32) 36, 37.

the first Secretary of State applied for a review decision to uphold a cost security for £88,000, which was finally reduced to £25,000.[38] Even though the costs award against the appellant did not represent a costs burden, the same cannot be said about any other appellant.[39] Nowak has accurately pointed out this problem by considering the case of individuals who earn below £15,000 per year.[40] He has warned about the eligibility conditions for acceding legal aid and how this impacts access to justice.[41] Even though his argument mainly focuses on the compliance of cost rules with EU Directives, he believes legal aid access in the UK is a major challenge.[42] In *RSPB v SoS*, the Ministry of Justice wished to discourage legal-aid abusers, yet as it has been demonstrated, individuals without income other than benefits, as it is currently happening in NI, are subjected to financial hardship throughout the process of judicial review and further appeals. On this basis, it can be concluded that the appeal process in Aarhus claims is manifestly unfair for interested parties. Beyond the court of first instance, appellants are left without adequate financial protection to seek judicial review of planning decisions under Aarhus. Effective remedies are not provided since access to the highest court of appeal in the UK is precluded by cost rules.

The introduction of the CPR (Amendment) 2013 made provision for fixed costs; however, appeals to the Court of Appeal and the Supreme Court cannot be done under CPR 45.41.[43] In regards to orders for costs, rule 46(1) of the Supreme Court Rules 2009 states that "the Court may make such orders as it considers just in respect of the costs of any appeal".[44] While a fixed starting point is available in the courts of first instance, ultimately, costs orders in the highest appellate stage fully depend on the discretion of the court. The principle of predictability is lost after the court of first instance, putting claimants at risk claimants of what has been described as a "nasty surprise"[45] or an impending invoice of £25,000. Moreover, the financial means of claimants to fund a legal challenge is discriminatory in practice since it does not consider dependents, special needs, or outgoings.[46] Although the hybrid model made provision for this, appeals are deemed to fail if there are no appellants

38 *Edwards* [57].

39 David Hart, 'The Supreme Court on "prohibitively expensive" costs: Aarhus again' (*UK Human Rights Blog*, 11 December 2013) <https://ukhumanrightsblog.com/2013/12 /11/the-supreme-court-on-prohibitively-expensive-costs-aarhus-again/> accessed 15 March 2021.

40 Nowak (n 27) 1741.

41 Nowak (n 27) 1738.

42 ibid 1740.

43 Ricketts (n 14) OP17.

44 Supreme Court Rules 2009, Rule 46(1).

45 Paul Stookes and Jona Razzaque, 'Community participation: UK planning reforms and international obligations' (2002) Journal of Planning & Environmental Law 793.

46 ibid 794.

willing to bear the financial risk. In a case of the Environmental Law Foundation, local residents faced threats of legal costs of £126,000 when they challenged a planning decision that allowed the development of 60 acres of greenfield land.[47] The reason why the appeal survived was the willingness of one resident to take the risk of losing her home.[48] Even though the action was successful, it is worth noticing the fundamental role that litigation costs played in this case. It motivated a group of objectors to withdraw legal proceedings except for one. Along the same lines, in *Edwards*, the action survived since a second claimant stepped in to take the financial risk while the first desisted because of further litigation costs.[49] Having to pay thousands of pounds is one of the reasons why individuals and community groups are unwilling to bring actions before the courts.[50] While the anticipatory protection afforded to interested parties has provided a degree of financial security, the financial risks that objectors face throughout the appeal process impair a fair access to justice when appellants are being forced to discontinue proceedings.

III. The UK and the Aarhus Convention

On several occasions, the ACC has reported on the UK's minimum and non-compliance of Article 9(4) in light of the prohibitively expensive access to justice it provides for the protection of the environment. Even though the nature of the ACC is non-judicial, non-confrontational, and consultative,[51] the recurrent non-compliance of the UK evinces the country's weak commitment to comply with Article 9(4). Significantly, the legal force of the Convent`` As a consequence, the findings of the ACC tend to be treated as soft law, putting into question if a contracting party has as a matter of fact breached its obligations under Aarhus.[52] By the same token, the Court of Appeal in *Venn*,[53] to some extent, downplayed the legal effect of the Convention. In the words of Sullivan LJ, "it would be doubly inappropriate" to use the court's discretion to give effect to an international Convention that has not been incorporated into domestic law.[54] Further, the UK recently received a third communication from the ACC concerning the prohibitive

47 ibid (unreported case).

48 ibid.

49 Hart QC (n 39).

50 Stookes (n 45) 763; Brooke LJ (n 1) 345.

51 Gor Samvel, 'Non-Judicial, Advisory, Yet Impactful? The Aarhus Convention Compliance Committee as a Gateway to Environmental Justice' (2020) 9(2) Transnational Environmental Law 211; Ryall (n 34) 134.

52 ibid 216, 217.

53 *Venn v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1539.

54 Gayatri Sarathy, 'Costs in Environmental Litigation: *Venn v Secretary of the State for Communities and Local Government*' (2015) 27 Journal of Environmental Law 316.

access to justice in NI. Still, the UK firmly reinstated its position as being in compliance with the Convention. Nevertheless, even though there is an alleged compliance, it must be underscored that since 2011, the UK has been positioned in the lower spectrum of compliance.[55] The UK government continues defending this position, although the current legal costs system and case law make the appeal process in judicial review prohibitively expensive for interested parties.

In *Commission v Ireland*,[56] the CJEU ruled that having to pay court fees in cases involving Aarhus claims was not in breach of the Union's law.[57] Nevertheless, it has been argued that participation fees in disputes concerning environmental matters contravenes the spirit of the Convention.[58] Early engagement from civil society in decision-making processes must be given due importance.[59] For the most part, the chilling effect arising from adverse costs orders and a claimant's own legal expenditure are two main reasons why interested parties are discouraged from challenging planning decisions. Wide access to justice should allow any interested party to bring proceedings regardless of their financial circumstance.[60] Contrarily, the protection of the environment will be at the expense of the "wealthier-than-usual" individuals,[61] limiting the effectiveness of the Convention and impairing the practical relevance of Article 9(4) and (5).[62] According to the Convention's preamble, "the right to live in an environment adequate to [an individual's] health and well-being" and "to protect and improve the environment for the benefit of present and future generations" is a right that pertains to "every person", i.e. any interested party. Nonetheless, the design of a legal costs system proves inconsistent with the overall aim of the Convention when access to justice results prohibitively expensive to some objectors.[63]

In practice, higher administrative authorities often decide on the development of large-scale construction projects, leaving interested parties in a weak position *vis-á-vis* the wider public benefit of the development.[64] While some EU countries allow the exemption of court fees to individuals and ENGOs in certain

55 Samvel (n 51) 225.

56 C-216/05 *Commission v. Ireland* ECLI:EU:C:2006:706.

57 Jan Darpö, 'Effective Justice?: Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union' (*European Commission*, 11 October 2013) <https://ec.europa.eu/e nvironment/aarhus/pdf/synthesis%20 report%20on%20access%20to%20justice.pdf > accessed 5 May 2021, 39.

58 ibid.

59 ibid.

60 ibid 39, 40.

61 Knibbe (n 24) 5.

62 ibid; Ryall (n 34) 124.

63 Knibbe (n 24) 5.

64 Darpö (n 58) 10.

environmental cases, others, such as the UK, have gained special international attention because of the high court fees underlying environmental litigation.[1] Even though CPR rr.45.44(3) and (4) have incorporated the CJEU's approach to litigation costs, such rules offer interested parties limited guidance on the likely outcome of their case and legal expenditure.[2] Even more worrying is the fact that there is not a specific procedure for interested parties to challenge the level of costs limits. Consequently, by seeking a variation in the applicable cap, the level of costs of an individual case can be increased at the final stage of court proceedings, putting interested parties at financial risk in their litigation process from beginning to end.[3] According to the ACC, the fairness requirement in Article 9(4) primarily focuses on the claimant and not the public authority. Against this background, it is worth questioning if such financial risk is fair for interested parties, especially for individual claimants. At the surface level, the practical implications to bring a case before the court of first instance produce a dissuasive effect on potential claimants; however, once claimants have engaged in a planning challenge, they find themselves walking on thin ice.

The degree of compliance with the Convention by a contracting party can vary as a result of uncertainty in litigation costs and judicial discretion. In the *Irish costs* case,[4] it was decided that the possibility of not putting in place a costs order by way of judicial discretion did not meet the requirement of not prohibitively expensive access to justice under Aarhus. The mere possibility of exempting claimants from paying their litigation costs and other legal expenditures on a case-by-case basis could not be equated with a not prohibitively expensive access to justice.[5] It follows that there is not an easy answer to ensure minimum uncertainty to interested parties. Minimum uncertainty or zero uncertainty would only be achieved with a complete relief of costs, a scenario far from reality. While in Sweden, the challenge of environmental decisions is free of costs, the costs of judicial proceedings in the UK continues to be a barrier for environmental justice.[6] In 2008, the ACC concluded that the UK was in breach of Article 9(5) as a result of the absence of a clear and legally binding direction for the legislature and the judiciary to guarantee not prohibitively expensive access to justice.[7] After legal reforms, the implementation of the hybrid costs model in 2017 left the law on litigation costs in a similar state. Even though there is a clear starting point,

1 ibid 17.
2 Knibbe (n 24) 4.
3 ibid.
4 C-427/07, *Commission v. Ireland*, ECLI:EU:C:2009:457.
5 Darpö (n 58) 38.
6 ibid 17.
7 Ryall (n 34) 136.

the variation in cost limits once again has resulted in considerable uncertainty for interested parties who genuinely wish to protect the environment. Moreover, according to Article 3(8), national courts are allowed to "award reasonable costs in judicial proceedings"; however, the reasonableness behind adverse costs orders and financial risks is far from clear-cut.

Although authoritative interpretations have been developed, the lack of specific standards to define not prohibitively expensive access to justice has left a broad margin of interpretation to the practical meaning of the Convention's provision.[1] As a result, the effectiveness and practical implementation of Article 9(4) and (5) are largely influenced by the national arrangements of each contracting State and the character of its legal costs system.[2] Notably, the standards to achieve full compliance of Article 9(4) and (5) must be articulated with more specificity. Loose ends not only have a negative impact on the prohibitively expensive nature of environmental litigation but also have given way to other procedural hurdles, namely limited judicial standing and undue delays with ambiguous wordings such as "wide" access to justice and "timely" review procedures as stated in Article 9(4).[3] In addition, regarding litigation costs, it is useful to raise the question on the practical meaning under Aarhus of the wording "judicial review procedures" and the access afforded to members of the public or, more specifically, to interested parties. In the UK, while there is a degree of financial protection to interested parties in the court of first instance, the limited access to judicial review at the higher appellate courts, namely the Court of Appeal and the Supreme Court, gives the impression of placing such courts beyond the scope of the 'judicial review procedures' that are generally referred to in Article 9. Further clarification by Parliament in this particular matter would be of great convenience to an interested party when assessing the financial risks attached to their individual case and the potential of the case to be appealed after a decision has been reached in the High Court.

As a last point, the legal costs system has key implications in the public interest character of Aarhus claims. In *Venn,*[4] even though the applicant had a private interest, Lang J in the High Court considered the fact not to be of major importance since the claim clearly was an environmental one.[5] Nonetheless, in *Austin v Miller,*[6] the Court of Appeal refused to make a PCO since the appeal

1 ibid 125.
2 ibid.
3 ibid.
4 *Venn v Secretary of State for Communities and Local Government* [2013] EWHC 3546 (Admin).
5 Sarathy (n 55) 315, 316.
6 *Austin v Miller Argent (South Wales) Ltd* [2014] EWCA Civ 1012.

involved a strong element of private interest.[7] Although the judgment of Lang J is not good law anymore as it was reversed in the Court of Appeal, it is useful to discuss further the legal weight given to the environmental matter engaged in the planning challenge in *Venn*. The public-private interest divide of applicants and appellants is a decisive factor for a judge to grant a PCO. In effect, the environmental dimension of an appeal is likely to be sidelined by the public-private interest divide. As a consequence, individuals who apply to quash a planning permission that has an inherent private interest are likely to be subjected to prohibitively expensive access to justice. In this regard, it is worth noticing how as a case moves forward throughout the appeal process, from the court of first instance to the Supreme Court, the number of appellants decreases because of litigation costs.[8] Arguably, the public interest loses force when an appeal originally brought by a group of individuals reaches the highest appellate stage with a single individual bearing the entire financial burden. Ultimately, the design of the legal costs system in the appeal process affects the character of an appeal. At the higher appellate stage, the only appellant left may give the impression of having a private interest instead of a public one, and thus, be denied adequate protection.

IV. Towards Reform

Discussions on the reform of legal costs systems have been put forward since 1999 with the attempt by Mr Justice Dyson to issue the first PCO.[9] Nonetheless, as it has been noted, the financial risks faced by interested parties in appeal proceedings is manifestly unfair. Sullivan LJ in *Venn* stated that "the [Aarhus] Convention is arguably broad enough to catch most, if not all, planning matters".[10] Accordingly, it is understood that the Convention has and will continue influencing litigation costs in the appeal process of planning challenges and environmental claims. In the years to come, planning law may become less prohibitively expensive by the impact of the Convention and the increasing pressure by civil society to afford environmental justice. It should be noted that legal precedent exists in other jurisdictions. In *New Zealand Maori Council v AG of New Zealand*,[11] the Privy Council decided not to award a costs order against the Maori Council since the proceedings concerned "an important part of the heritage of New Zealand".[12] Even though this case is only persuasive, the judgment reflects on the necessity to hear and decide

7 ibid.
8 See *Edwards* (n 34); Stookes (n 45).
9 Brooke LJ (n 1) 353.
10 *Venn* (n 52) [11]; Sarathy (n 55) 317.
11 New Zealand Maori Council v Attorney General of New Zealand [1994] 1 AC 466.
12 Brooke LJ (n 1) 347.

cases whose fundamental motive is the public interest,[13] but more importantly, to ensure effective protection to the environment and a country's natural heritage.

With respect to public funding, in *Steele Ford and Newton v CPS (No. 2)*,[14] the House of Lords decided that a court could not order the payment of litigation costs from the central funds even if it considered it to be just. Despite recommendations by former judges to give courts the power to order the payment of costs of public law litigation with sufficient public interest from the central funds, these have been ignored for almost 20 years.[15] Therefore, it is for Parliament to discuss and amend the costs rules, namely rule 46(1) of the Supreme Court Rules 2009, in light of public interest cases relating to planning challenges. Alternatively, Parliament could make provision for the application and grant of PCOs in the Court of Appeal and Supreme Court. Consultation papers would have to be produced to assess the impact of potential reform. Still, as it has been discussed, public funding concerns are ill-founded. It follows that there are workable proposals to afford fairer access to justice to interested parties to seek judicial review of planning decisions affecting their environmental rights as guaranteed under Aarhus.

V. Conclusion

The CPR (Amendments) 2013, 2017, and 2018 have afforded a degree of financial protection to interested parties in light of Article 9(4) of the Aarhus Convention.[16] Before the first amendments were introduced, there was neither predictability nor proportionality as to litigation costs for claimants undertaking planning challenges. Against this background, significant progress has been achieved in the last years as a result of the radical reform in the UK's legal costs system as a result of the amendments.[17] Still, judicial review of planning decisions remains prohibitively expensive. The discretion given to the courts after the 2017 amendments has left interested parties without sufficient protection. For the most part, appellants discontinue proceedings *vis-à-vis* financial hardship and significant uncertainty as to the outcome of their case. Comparatively, the UK's minimum compliance with the Aarhus Convention has left interested parties in a manifestly unfair position. The fact that PCOs cannot be granted in the highest appellate courts is one of the many difficulties underlying the limited effectiveness of the Convention in the UK. Thereupon, planning challenges and environmental claims are fair to the extent an interested party is willing to bear the financial burden of

[13] ibid; see also *Oshlack v Richmond River Council* [1998] HCA 11.
[14] *Steele Ford and Newton v CPS (No 2)* [1994] 1 AC 22.
[15] Brooke LJ (n 1) 346.
[16] Darpö (n 58) 12.
[17] Ormondroyd (n 22) 255.

litigation and does not wish to appeal against the decision of the court of first instance. Markedly, while access to justice remains prohibitively expensive there is scope for legal reform.

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Balancing Private Property and The Common Good: Is The Irish Constitution a Barrier to Rent Control?

Daniel Mooney*

Abstract

Ireland currently faces the largest housing crisis in its modern history. With spiralling rents, a lack of housing supply and record levels of homelessness, clearly state action of some kind is needed. Rent control is one such measure that has been consistently proposed by opposition parties and housing activists. Despite this, the Irish government has repeatedly refused to countenance rent control, claiming that it would violate the Irish constitution's protections for private property pointing, to legal advice to that effect. Though the Irish constitution does have protections for private property, these protections are expressly to be balanced with the principles of social justice and the courts have explored this balance throughout the substantive jurisprudence. It is submitted that to suggest that the constitution is a barrier to rent control is misguided and fails to take into account the nuances of the case law developed by the courts over the past several decades. The case law surrounding the interaction between private property and the common good in Ireland's constitution is complex, varied and often context-specific. In spite of this however, key principles can be clearly identified. This article examines the constitutional jurisprudence arising out of conflicts between private property and the common good, considering the drafting background and the interpretive approaches adopted throughout the case law. It will distil the core principles, critically analyse and then apply said principles to rent control specifically. It concludes by positing that Ireland's constitution is not a barrier to

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rent control and that a well-drafted legislative scheme would in fact be in keeping with the constitution's aim of balancing private property with the exigencies of the common good.

Keywords: rent control, constitutional interpretation, property rights, social justice, proportionality

I. Introduction

In Article 43 of *Bunreacht na hÉireann* (herein, 'the Constitution'), the Irish State acknowledges the natural right to private property and,[1] further, pledges never to pass a law abolishing the rights of ownership, alienation and inheritance of such property.[2] In Article 40.3.2, the State also promises to protect from "unjust attack" the property rights of every citizen. While it is clear from these provisions that property rights are explicitly protected by the Constitution, this right is far from absolute. Indeed, the Constitution makes it clear in the that these principles should be regulated by the principles of social justice[3] and that the State may "delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good".[4] The question as to what social justice and the exigencies common good are, and to what extent they can delimit property rights, has been the subject of a great degree of litigation and judicial consideration throughout the superior courts' jurisprudence.

While some of the case law concerning property rights is of considerable vintage, never before has housing policy been more relevant in this jurisdiction. Questions concerning the relationship between the constitutional right to private ownership and the legality of rent control measures has taken on particular relevance and urgency in recent years. Ireland has faced, without doubt, the worst housing crisis in its modern history with record levels of homelessness.[5] While Ireland has been considered as an international posterchild for economic recovery following the financial crisis of 2008, the high levels of growth belie serious market failure and a lack of state intervention in the housing sector, resulting in soaring rents with critical housing supply issues.[6] Dublin, a relatively small city by European

1 Article 43.1.

2 Article 43.1.2.

3 Article 43.2.1

4 Article 43.2.2.

5 Noel Baker, 'Homeless Figures Hit Record High' *The Irish Examiner* (30 April 2019). It should be noted that these figures have reduced somewhat since the publication of the article. This is largely due to distortions in figures caused by emergency measures introduced as a response to the Covid-19 pandemic.

6 Ed O'Loughlin, 'Housing Crisis Grips Ireland a Decade After Property Bubble Burst' *The New York Times* (8 August 2019).

standards, is one of the top ten most expensive rental markets in the world.[7] With high rents, a lack of affordability and record homelessness, it is beyond apparent that urgent action is needed to rectify the situation. Several such measures aimed at enacting rent control that have been introduced in the *Oireachtas* (the Irish lower house of parliament),[8] have been criticised by the Irish Government as being *prima facie* unconstitutional,[9] with the clear implication that any form of significant rent control would be considered repugnant to the Constitution. This position, it is submitted, is debateable at best.

While exploring this issue is of course of pertinence to policy-makers in Ireland, the housing crisis and assorted issues outlined above are far from unique to that jurisdiction. The debate around the balancing of private property rights and the broader needs of society are relevant to observers in Britain, the wider common law world and beyond. This article aims to examine in-depth, the legal relationship that exists between legislative attempts to control rent and the Constitution's protection of the right to private property. In doing this, it will first briefly consider the drafting background to both Constitutional provisions before moving on to examine the considerable case law surrounding the issue of restrictions on the right to private property. The article will critically analyse the position taken by the courts throughout the substantive jurisprudence, assessing to what extent the decisions have balanced the right to private property with general societal concerns with a key focus on distilling the core principles that underlie the courts' decisions. The article then will outline one of the most recent proposals for rent control measures; analysing whether it could be viable given the aforementioned principles from case law. Finally, the article will conclude by seeking to answer the question as to whether and in what form rent control is permissible in accordance with the Constitution.

II. Drafting Context and Early Case Law

For outside observers who may not be in any way familiar with the legal background of the current Constitution, it is helpful to first begin by exploring the provisions relating to property and the cultural context within which the framers

7 ibid.

8 For example, the Rent Freeze (Fair Rent) Bill 2019, Dáil Éireann, No. 99 of 2019. This Bill is discussed further below.

9 See, for example, Minister for Housing, Eoghan Murphy TD's comments below, note 77.

drafted said provisions. For clarity, the provisions of Article 40.3.2 and 43 read as follows:

> Article 40.3.2: "The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen".
>
> Article 43:
>
> "1.1 The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.
>
> 1.2 The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.
>
> 2.1. The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.
>
> 2.2. The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good".

While the 1922 Constitution of the Irish Free State did not contain any provisions pertaining to property rights,[10] the current Constitution bears many of the hallmarks of Catholic social teaching popular at the time of its drafting.[11] This ethos, heavily inspired by the Church's views on the moral nature of property, sought to firmly protect the institution of private property against the perceived threat of socialism. Though the role of the Catholic Church in the drafting of the Constitution has at times been overstated, that influence is nonetheless evident

[10] Gerard Hogan, Gerry Whyte, David Kenny and Rachel Walsh, *Kelly: The Irish Constitution* (5th edn., Bloomsbury 2018) 2348.

[11] Rachel Walsh, 'Private Property Rights in the Drafting of the Irish Constitution: A Communitarian Critique' (2011) 33(1) DULJ 86, 115.

in the text and offers clues as to the balance the framers sought to strike between private property and the social concerns considered important to Catholic teaching.

While the case law has long since departed from these roots,[12] it is still important to note the origins of the provisions when considering their development and why such confusion has arisen in relation to their impact. It should also be noted from the outset, that interpretations of Article 40.3.2 and Article 43 have been the subject of uncertainty and the Courts have taken a number of approaches to their interaction with one another. This pertains specifically to the question of which Article actually protects property rights and whether they should be read as protecting separate concepts of property or holistically as a wholesale protection of property in all its forms. Arguably, this delineation is of little modern relevance and not strictly relevant to the current question facing legislators, thus it shall not be explored in extensive detail, save only to observe that the older case law generally regarded Article 43 as being the principle protection of the concept of private property whilst Article 40.3.2 protected other forms, i.e. intellectual property, etc.[13] In modern times, however, the courts have largely looked to both of these provisions as having a very close relationship to one another.[14]

An area of uncertainty with far more relevance is the delimiting clauses in Article 43, especially the meaning of "social justice" and "the exigencies of the common good". This question has been the subject of both academic and judicial commentary. Indeed, the aforementioned Catholic social teachings in respect of property would seem to be of particular relevance here in determining what the framers may have envisaged in respect of the balancing of property rights with societal needs.[15]

Initial judicial consideration of the interaction between fetters on property rights and their protection in the Constitution generally held that the concepts of social justice and common good were unquantifiable and a matter for the *Oireachtas* rather than the Courts.[16] In *Pigs Marketing Board v Donnelly*,[17] this reasoning is clearly expressed by Hanna J commenting on the meaning of social justice:

> "In a court of law, it appears to me to be a nebulous phrase, involving no question of law for the courts, but questions of ethics, morals, economics and sociology, which are, in my opinion,

[12] Gerard Hogan, 'The Constitution, Property Rights and Proportionality' (1997) 32(1) The Irish Jurist 373, 382.

[13] See for example *Attorney-General v Southern Industrial Trust* [1957] 94 ILTR 161.

[14] *Re Article 26 and the Health (Amendment) (No 2) Bill 2004* [2005] 1 IR 105.

[15] Walsh (n 11) 88.

[16] See for example Gavan Duffy J's comments in *Fisher v Irish Land Commission* [1948] IR 3 at 57.

[17] *Pigs Marketing Board v Donnelly (Dublin) Ltd* [1939] IR 413.

beyond the determination of a court of law".[18]

A more assertive role for the Courts was envisaged in *the Sinn Féin Funds* case.[19] In the Supreme Court, O'Byrne J held that the Act, which in that case concerned the appropriation by the State of monies belonging to the old Sinn Féin party, was repugnant to Article 43 of the Constitution. The Court further held that the suggestions advanced by the Attorney General to the effect that Article 43 only existed to prevent the total abolition of private property were incorrect.[20] The case of *Foley v Irish Land Commission*[21] similarly refused to recognise the claim that the *Oireachtas* had sole discretion as regards deciding on the limitations of property rights.[22]

In summary, much of the early case law and jurisprudence concerning the practicalities of the constitutional text were built upon in the *Blake v Attorney General*[23] case as well as the antecedent judicial developments. The early case law defined the role of the Courts in reviewing such restrictions on property although complex questions about the importance of the text remained.

III. Modern Jurisprudence: Proportionality Is Key?

The seminal case in the area of restrictions on constitutional property rights is the case of *Blake v Attorney General*[24] (herein '*Blake*'). *Blake* involved a challenge to the constitutionality of the Rent Restrictions Act 1960 (as amended), specifically to parts II and IV of the Act, which the plaintiffs claimed were invalid with regard to Article 43 of the Constitution. Parts II and IV of the Rent Restrictions Act 1960 concerned restrictions on rent and restrictions on recovery of possession respectively. The background to the aforementioned act revolves around restrictions on rent which were originally introduced by the Increase of Rent and Mortgage Interest (War Restrictions) Act 1915.[25] The Act and its various restrictions were repeatedly renewed in subsequent legislation until the Rent Restrictions Act 1960 aimed to make them permanent. The rented properties subject to these rents were thus restricted to greatly depressed values, in some instances for properties who potential rent was valued at nineteen times that of what was permissible under

[18] ibid, Hanna J at 418.
[19] *Buckley & Ors v Attorney General* [1950] IR 67.
[20] ibid.
[21] *Foley v Irish Land Commission* [1952] IR 118.
[22] Hogan and others (n 10) 2372.
[23] *Blake v Attorney General* [1982] IR 117.
[24] ibid.
[25] ibid 210.

the act.[26] It was on the basis that the plaintiff landlords sought to challenge the act, claiming that the level of restrictions was an unjust act on their property rights and was not regulated by any principle of social justice.

It was held in both the High Court and unanimously in the Supreme Court that the rent control measures in the act were repugnant to the Constitution. In his judgment, O'Higgins CJ set out a number of reasons why the legislation constituted an "unjust attack" under Article 40.3.2 and was "unfair and arbitrary".[27] Higgins CJ points to a number of untenable aspects of the legislation – specifically, the lack of compensation, the absence of any power to modify the restriction itself, the fact that there was no regard for the financial needs of landlords and the lack of review mechanism for the rents themselves.[28] The last ground was in and of itself unconstitutional according to O'Higgins CJ and was labelled as "an inherent injustice which cannot be ignored".[29] The Court also took issue with the fact that the burden of providing cheap social housing had been unfairly placed on landlords. With Part II found to be unconstitutional, the Court further held that Part IV was unable to exist independently from the impugned Part II and thus fell also.[30]

On the surface, this would seem a resounding repudiation to rent control measures however, it is submitted, that upon reading the judgment of O'Higgins CJ, it is clear that the legal position is more nuanced. Despite the fact that the key test for proportionality, as established in *Heaney v Ireland*,[31] had not been set out, it is clear that the same core reasoning underlining that decision is present in the instant judgment. It is submitted that the fundamental issue in *Blake* was not the restriction of property rights *per se*, but rather the unreasonable manner in which said restrictions were implemented.

Following the ruling in *Blake*, the Government responded by introducing the Housing (Private Rented Dwellings) Bill 1981 which aimed to plug the legislative gap that had left many of the previously controlled tenancies in an uncertain position.[32] The 1981 Bill aimed to phase out rent control by providing a rebate scheme for landlords although payments were still substantially below market

[26] ibid 122.
[27] ibid, 140.
[28] ibid.
[29] ibid.
[30] *Blake v Attorney General* [1982] IR 117, 141.
[31] *Heaney v Ireland* [1994] 3 I.R. 593.
[32] See Higgins CJ's comments contemplating such issues in *Blake v Attorney General* [1982] IR 117, at 141-142.

value.[33] This continued restriction was again viewed as an unjust attack and as a result, the Bill did not survive its Article 26 reference to the Supreme Court.[34]

Subsequent key cases have built upon the principles set out in *Blake*. One of these key cases is *Re Article 26 and Part V of the Planning and Development Bill 1999*.[35] Here, the Court held that the restriction on developers and landowners was appropriate as it did not unfairly discriminate and that the unequal treatment was permissible. Further, the Court recognised the need for discretion to be given to the *Oireachtas* in legislating. The proportionality test was again evident in the judgment and the application of proportionality has been repeatedly endorsed subsequently.[36]

One of these is another seminal case concerning restrictions on property rights, *Re Article 26 and the Health (Amendment) (No 2) Bill 2004*.[37] In that case, the proposed Bill sought to retroactively make certain charges for public healthcare that had been unlawfully applied at the time, lawful.[38] The charges were to disproportionately hit elderly persons of limited means and would deprive them of any right to recovery. In striking down the Bill, the Supreme Court found that the retroactive element was repugnant to the protections on property rights contained within Article 40.3.2 and Article 43.[39] The Court held that the Bill would have impacted vulnerable, elderly people and that their rights deserved particular protection from unjust attack.[40]

As has been shown throughout these key cases, the modern jurisprudence has largely settled many of the questions regarding the standard required for assessing the constitutionality of a restriction of property rights, in particular introducing a harmonious reading of both Articles 40.3.2 and 43. The decision in *Blake* provides particular guidance in examining the permissibility of rent control.

[33] J.C.W. Wylie, *Landlord and Tenant Law* (Bloomsbury 2014) para 1.26.

[34] *Re Reference under Article 26 of the Constitution of the Housing (Private Rented Dwellings) Bill 1981* [1983] IR 181. These tenancies would eventually be governed by the Housing (Private Rented Dwellings) Act 1982 which is still in operation. For further see J.C.W. Wylie, *Wylie on Irish Land Law* (Bloomsbury 2020) para 20.32.

[35] *Re Art. 26 and Part V of the Planning and Development* Bill [2001] 2 IR 321.

[36] See for example in *BUPA Ireland Ltd v The Health Insurance Authority* [2006] IEHC 431 and recently in *Rafferty v Minister for Agriculture* [2014] IESC 61.

[37] *In the matter of Article 26 of the Constitution and in the matter of the Health (Amendment) (No.2) Bill 2004* [2005] IESC 7.

[38] s1(5) Health (Amendment) (No 2) Bill 2004, Dáil Éireann, No. 57 of 2004.

[39] *In the matter of Article 26 of the Constitution and in the matter of the Health (Amendment) (No.2) Bill 2004* [2005] IESC 7.

[40] Brendan Glynn, 'A Cold Front – The Development and Theory of the Proportionality Test in Constitutional Law and Its Application To The Question Of The Constitutionality Of The Purported Rent Freeze' (2020) 38(5) I.L.T. 70-72.

In the subsequent jurisprudence, the Court has clearly expressed preference for the proportionality test.[41]

IV. Critical Analysis

While the text of the Constitution clearly envisages restrictions on property rights, the case law has further fleshed out the meaning of the delimiting provisions and has given clarity as to the key concerns that the State must have regard to when utilising these provisions. It is submitted that what consistently arises from the case law is that proportionality is essential to assessing any measure that aims to restrict property rights. As Walsh notes, the proportionality test as set out in *Heaney* is prevalent through many of the aforementioned judgments in this area of law[42] as well as, *inter alia, Iarnród* Éireann *v Ireland*[43] and *Gorman v Minister for the Environment.*[44]

As aforesaid, the proportionality test was first set out in *Heaney v Ireland*[45]and it is a three-limbed test. The measure must be rationally connected to the objective and not arbitrary unfair etc.; must impair the right as little as possible and; must be such that their effect on rights is proportionate to the objective. As will be illustrated, each case turns on its facts and there are a variety of factors that are taken into consideration by the Courts when evaluating a challenged measure.

Deference of the courts to the policy decisions of the *Oireachtas* is a key element of development within the jurisprudence; Indeed, such hints of that deference can be observed in some of the earliest case law dealing with the courts' role in interpreting Article 43.[46] This principle will be applied when considering the first part of the proportionality test, i.e. that the measure is rationally connected to its objective. Generally speaking, a degree of deference has been shown by the Courts in assessing whether a measure is rational and objectively justified; something that has been noted throughout the case law. For example, in *Shirley v A. O'Gorman Co. Ltd,*[47] Peart J, in rejecting the plaintiffs claim, noted that a certain level of deference was required when considering these measures and that the Court

[41] Rachel Walsh, 'Opinion on the Implications of Constitutional Property Rights for Responses to the Housing Crisis' (2021), <https://www.academia.edu/41273377/Opinion_on_the_Implications_of_Constitutional_Property_Rights_for_Responses_to_the_Housing_Crisis> accessed on 21 July 2021, see 14.

[42] Rachel Walsh, 'The Constitution, Property Rights and Proportionality: A Reappraisal' (2009) 31(1) DULJ 1-34, 5.

[43] *Iarnrod Eireann v Ireland* [1996] 3 IR 321.

[44] *Gorman v Minister for the Environment* [2001] 2 IR 414.

[45] *Heaney v Ireland* [1994] 3 I.R. 593. This decision imported the test from the Canadian case of *Chaulk v R* (1990) 3 SCR 1303.

[46] See Hanna J's comments (n 18).

[47] *Shirley v O'Gorman* [2012] 2 IR 170.

should be slow to substitute its own views for those of the *Oireachtas*.[48] In applying the principles of proportionality, the Court will defer to the *Oireachtas*' judgment in respect of the validity of a law's objectives as was seen in *Re Article 26 and Part V of the Planning and Development Bill 1999*.[49] As Maddox notes, clearly the Courts are required to have a large degree of deference in these matters in order to respect the separation of powers and allow the *Oireachtas* to legislate effectively.[50] However, it should be clarified that while the Courts will grant a wide amount of discretion, they will still require that the objective not be entirely vague.[51]

When considering the second and third limbs of the test, the Courts have examined a number of issues including the ways in which measures affect parties concerned and the exercise of their property rights with regard to the needs of the society. In *Blake*, the Court clearly took issue with the fact that the social objective of achieving cheap housing had been unfairly passed onto a specific group in society - landlords. This shifting of the burden was something the Court felt was disproportionate and constituted an unjust attack on property rights. Unfair restrictions on a certain class or discrimination have also led to measures being struck down. One such instance of this was in *Re Article 26 and the Employment Equality Bill 1996*.[52] In this case, the proposed bill aimed to provide for disabled workers by requiring that employers change their premises to accommodate any special facilities that may be required for disabled workers. The Court noted the laudable aim of the legislation but took issue with the onerous obligation on employers.[53] As was noted by Humphreys J there was no provision made for smaller firms and, given the wide definition of disability under the Bill, it was impossible to estimate the potential cost implications for employers of implementing these changes. The Bill was in effect transferring the cost and burden of providing special facilities onto employers which was found to be repugnant to the Constitution.[54] This echoes the sentiments expressed in *Blake*.

With respect to the foregoing however, it is submitted that this case law does not mean a section or division of society cannot be required to fund or bear the burden of a specific policy. Examples of such restrictions include compulsory acquisition,[55] requirements to pay property tax,[56] the seizure or forfeiture of assets

[48] ibid para 204.
[49] *Re Art. 26 and Part V of the Planning and Development* Bill [2001] 2 IR 321.
[50] Neil Maddox, 'Rent Control and the Constitution' (2020) (3) CPLJ 25.
[51] See Budd J's comments in *An Blascaod Mór Teo v Commissioners of Public Works (No 3*) [1998] IEHC 38.
[52] *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321.
[53] ibid 331.
[54] ibid.
[55] *Egan v An Bord Pleanála* [2011] IEHC 44.
[56] *Madigan v Attorney General* [1986] ILRM 136.

subject to suspicions of criminal acquisition.[57] One of the key cases in this line of case law is *O'Callaghan v Commissioners for Public Works.*[58] The facts of this case concerned a landowner's challenge to a preservation order issued under s8 of the National Monuments Act 1930 in respect of a historic hillfort on the landowner's property. The landowner claimed that the order, which forbade any disturbing of the ground within proximity of the hillfort without permission from the Commissioners, effectively deprived him from his right to enjoy the land and that the burden borne by him was an unjust attack on his property rights. The Supreme Court in a judgment by O'Higgins CJ plainly dismissed the challenge. The Court noted that the preservation of the land was an exigency of the common good and that the burden of society could be shifted to certain classes in such circumstances. Minimising the impact on landowners while prioritising the public good was a key focus of the Court in the case,[59] again reflecting the broader principles of proportionality - balancing the rights to achieve the most appropriate level of restrictions and freedoms.

The Court has taken issue with unfair restrictions as was seen in *Daly v Revenue Commissioners.*[60] In that case, the High Court considered a challenge to the constitutionality of s26 of the Finance Act 1990. The section resulted in a certain group of taxpayers, self-employed taxpayers, being required to pay a large amount of their income tax in advance, including the plaintiff who was under considerable financial strain as a result. Considering the constitutionality of the section, Costello J (as he then was) applied the proportionality test and held that the section had a disproportionate impact on the plaintiff's property rights. Further, he held that as it was a permanent measure that could apply to all tax payers, that it failed the proportionality test and thus was unconstitutional. Finally, the Court has shown general disapproval toward measures that are outdated or do not take into account modern economic circumstances. Such disapproval was apparent in *Blake* and also featured heavily in *Brennan v Attorney General,*[61] a case in which the Supreme Court set aside legislative provisions which provided for land valuations based on methods from the 19th century.

The issue of compensation is another factor that should be considered in brief. Again, proportionality comes into play with the decision of Denham CJ in *Rafferty v Minister for Agriculture.*[62] In *Rafferty*, the Court stated that someone who has their property rights restricted is entitled in principle to compensation for total

[57] *Gilligan v Criminal Assets Bureau* [1998] 3 IR 185.
[58] *O'Callaghan v Commissioners for Public Works* [1985] ILRM 365. O'Higgins CJ at 370.
[59] Maddox (n 50) 26.
[60] *Daly v Revenue Commissioners* [1995] 3 IR 1.
[61] *Brennan v Attorney General* [1984] ILRM 355.
[62] *Rafferty v Minister for Agriculture* [2014] IESC 61, Denham CJ at para 45.

loss sustained. However, there are legitimate reasons why a right may be restricted and less than full compensation can be given although this is subject to strict scrutiny. Compensation is not required in all occasions however[63] and arguably the restriction in *Rafferty* was an extreme example.[64]

Further consideration should also be given to the Courts' general acceptance of and deference to the fact that emergency measures can allow for greater infringement on property rights.[65] In examining this, a major example is the case law arising from the Financial Emergency Measures in the Public Interest (FEMPI) legislation.[66] For example in *J & J Haire v Minister for Health*,[67] a challenge was made to the constitutionality of retrospective amendments to a contract between the State and pharmacists made by virtue of FEMPI. Similar conclusions were reached in *Unite the Union v Minister for Finance*.[68] In both of these cases, the Court clearly identified the financial crisis as a key consideration in deferring to the *Oireachtas* when considering the permissibility of the infringement on property rights.[69] One would expect a similar reasoning would be applied by the courts in any challenge to some of the restrictions on property rights introduced to deal with the Covid-19 public health crisis, although the issue has yet to be litigated.[70]

Overall, it can be observed that there are clearly a number of key principles that can be distilled from the core jurisprudence. Firstly, the proportionality test would appear to be the main metric used by the courts to consider the constitutionality a restriction on property rights such as rent control. The courts have moved away from focusing on a purely text-based analysis seen in some of the earlier case law and have adopted a harmonious reading of both Article 40.3.2 and Article 43 in line with the proportionality test. While it has been argued elsewhere that there is uncertainty as to whether or not the traditional proportionality test is the standard that will definitely be used for the courts,[71] it is submitted that proportionality is the most consistent standard utilised throughout the case law and is the most appropriate in assessing the constitutionality of rent control. In utilising the test, the courts will clearly have regard to a number of factors, namely: the level at which the burden is placed on one group of society; whether the

63 *Dreher v Irish Land Commission* [1984] ILRM 94, 97.

64 *Rafferty* involved the culling of the plaintiff's entire sheep flock by the defendant as a precaution for the spread of Foot and Mouth disease.

65 Hilary Hogan and Finn Keyes, 'The Housing Crisis and The Constitution' (2020) 65 Irish Jurist (N.S.) 87.

66 Financial Emergency Measures in the Public Interest (FEMPI) 2009.

67 *J & J Haire & Co Ltd v Minister for Health* [2010] 2 IR 615.

68 *Unite the Union and Paul Gallagher v The Minister for Finance and Others* [2010] IEHC 354.

69 Hogan and Keyes (n 65) 90; see also *NAMA v Downes* [2014] IEHC 21.

70 Hogan and Keyes (n 65) 92.

71 Hogan and others (n 10) 2348.

restriction itself could be discriminatory or unfair; whether there is any provision for compensation and; whether there are any specific emergency circumstances that would further re-enforce the necessity of the measure. It is posited that this standard of proportionality is key in examining the constitutionality of any restriction on property rights, including rent control.[72]

V. Application to Rent Control

Having now established the main principles that have emerged from the case law, the issue of rent control can now be turned to in more depth. While *Blake* dealt specifically with rent control, there have been few other major attempts to control rent in domestic legislation until relatively recently. It is proposed that we now turn to the most recent of these attempts to introduce rent control and, using the above established principles, evaluate whether it could be constitutional in light of the case law.

The Rent Freeze (Fair Rent) Bill 2019 is currently at third stage in *Dáil* Éireann. By way of background, the Bill was first introduced by Sinn Féin TD, Eoin Ó Broin and aimed to amend the Residential Tenancies Act 2004 by introducing a three-year rent freeze.[73] It also compelled the Minister for Finance to initiate a report into a proposed tax credit for renters.[74] During the debating of this Bill in Dáil Éireann, the Minister for Housing at the time, Eoghan Murphy remarked that "[W]e have seen without even opening up this Bill is that it is unconstitutional".[75] While the former minister's position is certainly not an uncommon one, it is submitted that it is misguided and based on an incorrect understanding of the jurisprudence.

In analysing this Bill, it important to bear in mind that it bears several key differences from the Act that was held to be unconstitutional in *Blake*. Firstly, the Bill does not propose a permanent freezing of rents, something that would almost certainly be unconstitutional in light of previous authorities. *Blake* should not be considered as authority that a rent freeze is unconstitutional *per se,*[76] rather it acts as guide to what kind of proportionality requirements should be taken into account when drafting a statutory scheme. The provision under s2 of the Bill for the assessment of new tenancies would also help to alleviate potential concerns. While such a rent freeze certainly would be a major restriction of property rights,

[72] Finn Keyes, 'Property Rights and Housing Legislation' (2019) Oireachtas Library and Research Centre Briefing Paper 12.

[73] S2 The Rent Freeze (Fair Rent) Bill 2019.

[74] ibid.

[75] Dáil Debate, Tuesday 10 December 2019, Vol 991, No. 1.

[76] Maddox (n 50) 27, 32.

it is proffered that it is far from the unreasonable and disproportionate situation that arose in *Blake* and that landlords would still be in a position to collect rents that are at market value. No compensation is provided although, it is submitted that it would not be necessary in this case as it can easily be distinguished from the far more severe impact of the restrictions in *Rafferty.*[77] It would not involve the permanent fixing of rents to a level that essentially deprived landlords of any form of reasonable income and arguably would survive any challenge to its constitutionality.

There are other factors that would fall in favour of a bill such as the above. In respect of deference in emergency scenarios, arguably the Court would be minded to show similar deference were the case to made that rent controls were necessary to mitigate the impact of the housing crisis, the seriousness of which the Supreme Court itself has recently commented on.[78]

It is submitted that lessons in this respect could be learned from the enactment of the Residential Tenancies and Valuation Act 2020 alongside the Emergency Measures in the Public Interest (Covid 19) Act 2020 which both were brought into being by the *Oireachtas* in response to the Covid-19 pandemic. Both of these acts contained wide-ranging provisions which, *inter alia*, provided for a rent freeze[79] and a total moratorium on evictions.[80] Clearly, in the circumstances of an unprecedented public health emergency, the State saw the merit in allowing the common good prevail over the rights of landlords to evict their tenants. Disappointingly, the Government ended these protections once the most severe lockdown measures were lifted and returned to its default position of doubting the constitutionality of rent freezes.[81] The near complete volte face aside, it is arguably puzzling that the Government is unwilling to recognise that emergency measures taken to safeguard the common good would be protected by the Constitution's exception to private property rights. Unfortunately, from an academic point of view, the above legislation was never challenged although again it is likely that the Courts would have shown due deference to the *Oireachtas* during times of crisis. It has also been argued that rent controls have been allowed under proportionality justifications in ECHR jurisprudence, something that gives added weight to the

[77] *Rafferty v Minister for Agriculture* [2014] IESC 61, para 45.

[78] *Fagan v Dublin City Council* [2019] IESC 96 Irvine J at para 41.

[79] S4(5) Residential Tenancies and Valuation Act 2020. This legislation limits the freeze to 'relevant persons' and was given a sunset clause by virtue of statutory instrument.

[80] S5 Emergency Measures in the Public Interest (Covid-19) Act 2020

[81] Jack Power, 'More than 360 people served eviction notices after ban lifted' *The Irish Times* (26 January 2021).

assertion that rent controls would be constitutionally permissible in Ireland under the proportionality doctrine.[82]

VI. Conclusion

As mentioned, it is vital that action is taken to address Ireland's rental crisis and the efforts to strike a balance between protecting property rights and serving the needs of society are of relevance to policy-makers and analysts from any country. It is posited that the Irish constitutional situation is a great example of the clash between these two aims. The Constitution and its framers contemplated such issues. As has been examined throughout this article the Constitution, informed by the courts' analysis, clearly allows for a balancing of rights. Suggestions that an amendment to the Constitution specifically recognising a right to housing would be required to allow for a robust response to the rental crisis are misguided and unnecessary.[83] The author argues that, while it is easy to imagine that amending the Constitution would be the simplest solution, it is in fact overly costly and ultimately not required. It is submitted that by following the principles of proportionality, the *Oireachtas* could take decisive interventionist action along the lines examined above.

In conclusion it is posited that rent control is certainly constitutionally permissible in Ireland. As has been seen through examining the, admittedly complex and often context-specific case law and from analysing the key principles, the courts have adopted a balanced approach to considering the restriction of property rights, on the whole favouring the proportionality test throughout the substantive jurisprudence. It is submitted that with well drafted legislation that provides for proportionate restrictions, rent control would not only be constitutionally permissible in Ireland but would in fact be in keeping with the spirit of the Constitution's desire to balance property rights and the principles of social justice.

[82] Brendan Glynn, 'The Big Freeze' (2020) 38(4) I.L.T. 55-57.
[83] Maddox (n 50) 27, 34.

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How Ante-Nuptial Agreements Perpetuate Male Dominance: A Critical Feminist Analysis of *Radmacher v Granatino* [2010] UKSC 42

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Abstract

The Supreme Court's decision in *Radmacher v Granatino* dealt with the enforceability of ante-nuptial agreements in the United Kingdom. In doing so, it was held that such agreements were to be given weight if they were freely entered into by each party, with a full appreciation of its implications, unless in the circumstances prevailing it would not be fair to hold the parties to their agreement. In wake of this decision, this article presents a critical feminist analysis detailing the ways in which the newfound enforceability of ante-nuptial agreements can be viewed as a tool permitting heterosexual men to legally reinforce dominance over their female spouses. Ante-nuptial agreements by their very nature deprive non-moneyed spouses from the financial entitlements that they would otherwise be owed upon divorce. Therefore, by only benefitting the wealthier spouse, ante-nuptial agreements disproportionately harm women because of society's unequal distribution of resources along gender lines. Indeed, this fact serves to undermine the *Radmacher* enforceability criteria, as such women are faced with a 'dilemma of choice' in which they do not have the true capacity to 'freely enter' into an agreement that harms them. Similarly, ante-nuptial agreements are inherently unfair, which therefore undermines the Supreme Court's caveat of 'fairness' when giving weight to these

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agreements. Upon further inspection, even where the courts do intervene with the administration of ancillary relief, the non-financial contributions that many women make within their marriage are difficult, if not impossible, to quantify. When viewing such agreements through the lens of heterosexual relationships, it becomes clear that the women who adhere closely to heteronormative ideals are more likely to be perceived as being more deserving of ancillary relief. Therefore, it can be witnessed that ante-nuptial agreements perpetuate the dominant position that men hold over women sociologically, by allowing them to retain their wealth. This thus renders their non-moneyed wives financially submissive and vulnerable to poverty should they wish to divorce.

Keywords: ante-nuptial agreements, family law, critical feminism, ancillary relief, marriage

I. Introduction

Radmacher v Granatino[1] is a landmark case which introduced the presumption that, following prescribed considerations, ante-nuptial agreements are to be given effect in court. In making such a decision, the Supreme Court placed a strong focus on upholding individual autonomy on the caveat that it must be fair to hold the parties to their agreement.[2] In critically analysing this decision, this article argues that the conception of both autonomy and fairness in this context have a disproportionate and detrimental effect on women. In presenting this argument, this article takes place in four main parts. Part II will provide a brief explanation of the facts of the case, whilst contextualising this by laying out the legal landscape of ancillary relief. Part III will explain that the *de jure* equality that Liberal Feminism purports to have achieved regarding women's earning capacities has not resulted in *de facto* equality. As a result, this part argues that women are more likely to be the non-moneyed spouse in heterosexual relationships, meaning that they are the most likely to suffer as a result of ante-nuptial agreements. Part IV of this article will discuss the concept of autonomy. In doing so, this article will utilise Radical Feminist perspectives to argue that men can exercise autonomy more freely than women because of the power dynamics associated with gender, and that autonomy is a 'Masculinist' concept. Finally, Part V will argue that despite the court holding that only fair ante-nuptial agreements will be given weight, the way in which the court conceives fairness does not adequately protect women. This claim is supported by Marxist Feminist discussions about the unpaid work that women do in the home,

1 [2010] UKSC 42.
2 ibid.

alongside questioning whether the court's conceptions of fairness are shaped by heteronormative ideals.

II. Background Information

A. The legal landscape of ancillary relief

The Matrimonial Causes Act 1973 provides judges with discretion over how financial relief is to be afforded to divorcing parties. Additionally, *White* introduced the "yardstick of equality", in which the courts were encouraged to make financial allocations based on needs, compensation, and sharing.[3] This change therefore constituted a great improvement for those fulfilling the 'homemaker' role within a marriage, as this case introduced the presumption that this work is to be compensated. However, in response to the greater financial divisions that primarily women received under such presumptions, the prevalence of nuptial agreements began to rise. This is reflective of Smart's critique when women resort to the law to improve their situation; the law is counter-used to re-establish traditional rights.[4] This is highlighted by the contrast between the pre-*White* case of *Cocksedge*, in which nuptial agreements were found to be void,[5] and the post-*White* case of *Crossley*, in which they were described as "a factor of magnetic importance".[6] In amongst the increasing prevalence of ante-nuptial agreements, the court in *Radmacher* conclusively held that nuptial agreements, both ante and post, were capable of decisive weight.[7] This Supreme Court decision therefore facilitates the use of ante-nuptial agreements as a mean through which the ancillary equality established in *White* can be side-stepped.

B. The facts of *Radmacher*

The parties in *Radmacher* had been married for eight years and had two children. Ms Radmacher proposed that Mr Granatino signed an ante-nuptial agreement to prove that he was marrying her for her love, and to protect her inherited wealth. The agreement was written in German, a language not spoken by Mr Granatino, and had the effect of preventing either party from making a claim on the other in the event of divorce. Ms Radmacher failed to officially disclose the exact value of her assets to her fiancé, nor was Mr Granatino provided with a

3 *White v White* [2000] UKHL 54.
4 Carol Smart, *Feminism and the Power of Law* (1st edn, Routledge 1989) 138.
5 *Cocksedge v Cocksedge* [1844] 14 Sim 244.
6 *Crossley v Crossley* [2007] EWCA Civ 1491 para 15.
7 *Radmacher* (n 1).

verbatim English translation of the agreement. Although he was provided with the opportunity to do so, he did not receive independent legal advice.

In 1998, the Home Office laid out proposed safeguards to assess when a nuptial agreement is to be set aside.[8] Though such safeguards were never implemented, at first instance Baron J noted that the agreement in *Radmacher* did not comply with these safeguards because the parties had children, Mr Granatino did not receive independent legal advice, and there was no full disclosure of assets. Because of this, she concluded that the agreement was "manifestly unfair", and instead based her decision of ancillary distribution upon the yardstick of equality. Following Ms Radmacher's appeal, the Court of Appeal overturned this decision and instead the award that they provided to Mr Granatino was only enough to "provide for his role as a father rather than a former husband".[9] Upon a further appeal, this decision was upheld by the Supreme Court, where Lord Phillips held that nuptial agreements are given effect by the courts where they are "freely entered into by each party with full appreciation of its implications, unless in the circumstances prevailing it would not be fair to hold the parties to their agreement".[10]

Thompson has noted that this decision subsequently denotes how the court had "a new respect for autonomy"[11] when giving weight to ante-nuptial agreements. However, this article argues that this decision failed to adequately assess the detrimental impact that this will disproportionately have on women, and how the court's conception of 'fairness' as a protective safeguard does not remedy this.

III. Why Women Are Disproportionately Affected by Ante-Nuptial Agreements

This article acknowledges the inherent heteronormativity in focussing a critique of ante-nuptial agreements on heterosexual married couples who conform to the stereotypically gendered roles of the 'breadwinner' and 'homemaker'. Furthermore, it must be acknowledged that in this case the parties did not conform to such roles, with Ms Radmacher being the moneyed spouse. In defending a focus upon women who fulfil this stereotypical role, this article notes that these women are the most vulnerable to the harms that ante-nuptial agreements present. This was a consideration adopted by Lady Hale in *Radmacher*, where in her dissent, she stated

8 Home Office, *Supporting Families: A Consultation Document* (Stationery Office 1998).

9 *Radmacher v Granatino* [2009] EWCA Civ 649 para 50.

10 *Radmacher* (n 1) para 129.

11 Sharon Thompson, *Prenuptial Agreements and the Presumption of Free Choice: Issues of Power in Theory and Practice* (Bloomsbury 2015) 13.

that "the object of an ante-nuptial agreement is to deny the economically weaker spouse the provision which she – it is usually although by no means invariably she – would otherwise be entitled".[12] This argument is supported by Brod, who notes that in protecting the wealth and earnings of a prospective spouse from being distributed to the other, ante-nuptial agreements generally disadvantage women.[13] It follows that as a class, women earn less than men; a disparity which can be seen even in the wages of the most highly paid women.[14] Therefore, such agreements magnify society's unequal distribution of resources along gender lines.

Brod's claims are situated within a critique of the Liberal Feminist aims of equality of the sexes. Liberal Feminists place emphasis on autonomy and egalitarianism, whilst arguing that gender equality is to be achieved by legal and political reform. In the context of the gender pay gap, they claim that Affirmative Action is to be used to aid women in achieving high paying roles and that doing so will, in turn, close the earning gap between men and women. It follows that this aim is achieved through the implementation of anti-discrimination laws. However, this has not resulted in substantive equality. Brod notes that the ratio in *Radmacher* was formed as a result of the "distorted or idealised perception by lawmakers that women have achieved de facto equality by men".[15]

In rebuttal to this, Brod presents a Radical Feminist argument by noting that instead of Liberalist ideals, the court should focus upon a woman's 'de jure equality', as she claims that women are still structurally discriminated against in the workplace.[16] This is evidenced by the fact that within most service sector organisations, women are at the bottom of the wage hierarchy.[17] Furthermore, Fineman notes that because of the expectations that women are to be caretakers for children,[18] they do not comply with the image of the 'ideal worker' who has no family demands other than earning a living.[19] Brod's work is reflective of Fineman's contentions that when laws are constructed in a gender neutral way, they do not recognise the individual vulnerabilities that women face, and they, therefore, have a harmful impact on women in the context of their socioeconomic status.[20]

In accordance with this, George has branded the decision in *Radmacher* to be "an explicit judicial endorsement of gender discrimination".[21] This claim is reflected

[12] *Radmacher* (n 1) para 137.

[13] Gail Frommer Brod, 'Premarital Agreements and Gender Justice' (1994) 6 Yale JLF 229-295.

[14] ibid.

[15] ibid 253.

[16] ibid.

[17] Joan Acker, 'Inequality Regimes. Gender, Class, and Race in Organisations' (2006) 20 Gender and Society 441-464.

[18] Martha A. Fineman, *The Neutered Mother, The Sexual Family, and Other Twentieth Century Tragedies,* (Routledge 1995).

[19] Acker (n 17) 449.

[20] Martha A. Fineman, *The Illusion of Equality* (University of Chicago Press 1991).

[21] Rob George, *Ideas and Debates in Family Law* (Hart Publishing 2012) 102.

by the studies of ante-nuptial agreements in Australia which found that, because of the weaker economic position that women have to men, in thirty-three out of thirty-nine reported cases an economically subordinate wife was seeking to avoid her agreement.[22] Fineman has argued that where women fulfilling a caregiving role earn less money than their male partners, a "derivative dependency" arises in which women become economically dependent upon a wage-earning partner.[23] As a result, where women have succumbed to agreeing to ante-nuptial agreements, they may find themselves "preserving emotionally disastrous unions"[24] for fear of the weak economic position that they will find themselves in upon divorce. Therefore, ante-nuptial agreements can be seen as a patriarchal tool whereby the preclusion of the yardstick of equality provides the economically superior husband with legally enforceable financial domination. Furthermore, at a more conceptual level, Thomas notes that "protecting these assets by [ante-nuptial agreements] effectively protects the structural inequalities that lead to these gender differences", and that therefore it can be claimed that the decision made by the Supreme Court in this case is not only detrimental to the economically vulnerable women coerced into these agreements, but also to women as a whole.[25]

IV. Can Non-Moneyed Women 'Freely Enter' Into Ante-Nuptial Agreements?

In upholding the ante-nuptial agreement in *Radmacher*, Lord Phillips held that the court should show a "respect for individual autonomy", and that it would be "paternalistic and patronising to override their agreement simply on the basis that the court knows best".[26] This notion is a further reflection of the court's Libertarian values, a perspective that this article argues enables male dominance within this private sphere. This article argues that women are not free to exercise autonomy in the same way that men can, meaning that they cannot freely enter into ante-nuptial agreements.

A. Feminine experiences of automony

This article argues that a Liberal conception of autonomy is detrimental to women because of the structural issues which prevent them from freely exercising

[22] Belinda Fehlberg and Bruce Smyth, 'Binding Pre-Nuptial Agreements in Australia: The First Year' (2002) 16 Intl JL, Policy and the Family 127-140.

[23] Fineman (n 20) 161-164.

[24] Candice A. Garcia-Rodrigo, 'An Analysis of and Alternative to the Radical Feminist Position on the Institution of Marriage' (2009) 11 JL and Family Studies 121.

[25] Sharon Thompson, 'In Defence of the "Gold-Digger"' (2016) 6 Onati Socio-Legal Series 1231.

[26] *Radmacher* (n 1) para 78.

autonomy in the way that men can. In her dissent, Lady Hale questions whether ante-nuptial agreements should in fact be viewed as an agreement which "benefits the strong at the expense of the weak".[27] Thompson has noted that the division of power between the moneyed spouse, who is asking for the ante-nuptial agreement, and the non-moneyed spouse will always be unequal.[28] This is because ante-nuptial agreements commonly only reflect the autonomy of the moneyed spouse, who is intending on protecting their property, by avoiding the default system of ancillary relief upon divorce.[29] In furthering the notions of strong vs weak that occur within ante-nuptial agreements, MacKinnon has argued that gender is a hierarchy in which male is the privileged term and female is the oppressed term.[30] Therefore this suggests that the limits upon a female non-moneyed spouse's autonomy are twofold; as both her financial position and her gender place her in a weaker contractual position than her partner.

This argument is supported by Pateman who claims that women are controlled by men through contracts, as these provide them with a means through which they can "transform their natural right over women into the security of civil patriarchal rights".[31] Furthermore, because of their subordination, women are incapable of consenting to any institution that is traditionally male dominated.[32] Subsequently, it can be claimed that women are thus incapable of consenting to marriage, as this is a patriarchal institution which reinforces male domination.[33] Historically, married women were seen as the property of their husband and this historical oppression is something that can still be witnessed in modern times.[34] It follows that ante-nuptial agreements can be perceived as a male-dominated, patriarchal institution which cultivates the financial subordination of women. Furthermore, if we are to accept that women cannot consent to patriarchal institutions, they therefore cannot 'freely enter' into an ante-nuptial agreement.

In discussing how women exercise autonomy, Hadfield presents "the dilemma of choice" in which she questions the true extent to which women are able to exercise their autonomy when faced with choices that are harmful to them.[35] In utilising the work of Trebilcock, Hadfield argues that consent and autonomy are

[27] ibid para 135.
[28] Thompson (n 11).
[29] ibid.
[30] Catharine MacKinnon, 'Feminism, Marxism, Method and the State: An Agenda for Theory' (1982) 7(3) Signs 515-544.
[31] Carole Pateman, *The Sexual Contract* (Polity Press 1988) 6.
[32] Brod (n 13).
[33] Garcia-Rodrigo (n 24).
[34] ibid.
[35] Gillian K. Hadfield, 'The Dilemma of Choice: A Feminist Perceptive on the Limits of Freedom of Contract' (1995) 33 (2) Osgoode Hall LJ 337, 351.

to be seen as two separate values and, unless she is presented with normatively acceptable options from which to choose, individuals are not able to truly express autonomy.[36] It can be claimed that in reconsidering Fineman's earlier contentions of the financial dependence that women can have on wage earners,[37] some women may find that marriage is a necessity for securing financial stability. Therefore, where an ante-nuptial agreement is a prerequisite to enter into a financially secure marriage, financially insecure women are in a position in which they do not have the capacity to make an autonomous decision.

B. Autonomy as a 'masculinist' concept

The final criticism of the Liberalist emphasis on autonomy is that autonomy is a 'Masculinist' concept, and therefore the emphasis that is placed upon it furthers the androcentric nature of ante-nuptial agreements.[38] In *Radmacher*, Lord Phillips opined that "we must assume that each party […] is able to look after him or herself".[39] This article argues that in doing so, Lord Phillips' position is incorporating the Liberal Feminist ideals that both men and women are individual and autonomous beings. Such a stance however comes with the caveat that women are only provided with this autonomy when they are similarly situated with men. Therefore, this Liberal Feminist perspective can be critiqued, in that rather than creating an equal legal system, it merely includes women within a male oriented legal system.[40] This article therefore argues that the principle of autonomy which is being upheld in *Radmacher* is reflective of masculine attributes, thus rendering it inaccessible to women.

In making such a claim, this article utilises the work of Naffine, who argues that the law in itself is 'Masculinist'.[41] In this 'Masculinist' system, supposed 'universal' legal reasoning is in fact reflective of the way in which men act and think, which Naffine has labelled as "the male culture of law".[42] As a consequence of this, men are put at an advantage within this system, and women are left to adapt and replicate values which are detached from themselves. This argument is echoed by MacKinnon, who similarly argues that male perspectives are accepted as the universal standard.[43] In labelling the principle of autonomy as 'universal', its masculine nature is therefore being masked, thus preventing the inequality that

36 ibid.
37 Fineman (n 20).
38 Thompson (n 11).
39 *Radmacher* (n 1) para 42.
40 Garcia-Rodrigo (n 24).
41 Ngaire Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (Allen & Unwin 1992) 6.
42 ibid.
43 Catherine MacKinnon, *Feminism Unmodified Discourses on Life and Law* (HUP 1987).

it incorporates from being acknowledged. MacKinnon notes that autonomy, as it is currently perceived in the law, does not reflect feminine realities, which are traditionally rooted in connectedness and the nurturance of dependency.[44] Such claims are further supported by Gilligan, whose work argues that female ethics are more "relational" and based upon an "ethic of care".[45] These ethics are therefore in direct contrast with those of the "most perfectly autonomous man", who is "perfectly isolated".[46]

Of course, not every man will employ these masculine values, which is why Naffine conceptualised "the ideal man of law".[47] Naffine argues that the ideal, hegemonic man of law is a white, middle class, freestanding autonomous creature who is "rationally self-interested and hard-headed".[48] It therefore follows that the law is constructed as a monopoly to benefit this man.[49] This argument can be supported by *Radmacher*, in which Lord Phillips held that the parties' autonomous decisions are to be upheld unless they were the result of "unconscionable conduct, such as undue pressure".[50] In making this statement, Lord Phillips clearly adopts a contractual understanding of autonomy, a concept which therefore inherently reflects the freely autonomous and rational 'man of law'. Lady Hale's dissenting judgement criticises this decision by noting that the choices made surrounding ante-nuptial agreements are not made in a vacuum, and therefore factors which influence these decisions may not necessarily render the agreement unconscionable in a contractual sense.[51] It follows that on the surface, there are many non-gendered factors which can impede upon a person's ability to freely enter into an ante-nuptial agreement. Furthermore, Thompson notes how when such agreements are made prior to marriage, the parties suffer from a cognitive limitation in which their autonomous decisions are unlikely to reflect their best interests, because of their optimistic ideals of the longevity of the relationship.[52] Therefore, in believing that the agreement will never take effect, the non-moneyed spouse may fail to adequately consider the consequences of their actions. Furthermore, as ante-nuptial agreements are often used as a test of a spouse's intentions, the non-moneyed spouse does not have equal bargaining power to their partner. This is exacerbated

[44] ibid.
[45] Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (HUP 1982) 21.
[46] Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1 Yale JLF 12.
[47] Naffine (n 41) 119.
[48] ibid 164.
[49] ibid.
[50] *Radmacher* (n 1) para 71.
[51] ibid.
[52] Thompson (n 11).

by the idea that negotiating the terms of the agreement may be perceived as proof that they are not marrying for love. This can be witnessed in *Radmacher* where Ms Radmacher claimed that the wedding would not go ahead had Mr Granatino not signed the ante-nuptial agreement.[53] In failing to consider this as a limitation on Mr Granatino's autonomy, it becomes clear that despite claiming to have a 'respect for individual autonomy', the threshold for what constitutes autonomy in this instance is low and therefore fails to compensate for the feminine realities which can impede upon an individual's ability to make autonomous decisions.[54]

V. Is the 'Fairness' in *Radmacher* Truly Fair?

Once it has been established that the ante-nuptial agreement has been freely entered into, Lord Phillips holds that it is to be given weight "unless in the circumstances prevailing it would not be fair to hold the parties to their agreement".[55] In presenting the notion that only fair ante-nuptial agreements are to be given weight, it appears as though the court retains the ability to counteract the possible disadvantages that women experience from entering into these agreements. Ante-nuptial agreements however are inherently unfair, as their effect is to deprive the non-moneyed spouse of money that they would otherwise be owed. Therefore, because every ante-nuptial agreement will be unfair, the standard for fairness set in *Radmacher* is too low to sufficiently protect women. Furthermore, even when questions of fairness are considered by the court, women are not adequately compensated by such provisions.

A. Discussions of fairness in *Radmacher*

In his judgement, Lord Phillips notes that ante-nuptial agreements are capable of altering what is to be conceived as fair, and that the substantive equality approach adopted in *White* is something which should be weighed against the ante-nuptial agreement.[56] In doing so, Lord Phillips reconceptualises fairness and holds that even ante-nuptial agreements which preclude the financial compensation of the 'homemaker's' work can be held to be fair.[57] However, this caveat of fairness can occasionally be used to derogate from the ante-nuptial agreement in order to compensate a 'homemaker'. The explanation for when this can occur is limited, as Lord Phillips notes that "fairness will depend on the facts of the particular case,

[53] *Radmacher* (n 1).
[54] ibid para 78.
[55] ibid para 123.
[56] ibid.
[57] ibid.

and it would not be desirable to put down rules that would fetter the flexibility of the court".[58] In assessing what the court is to consider as an 'unfair agreement' in terms of compensation, the only guidance given by the court in *Radmacher* is "if the devotion of one partner to looking after the family and the home has left the other free to accumulate wealth", it will likely be "unfair to hold the parties to an agreement that entitles the latter to retain all that he or she has earned".[59] Despite this statement appearing to provide a remedy for the issues posed by ante-nuptial agreements to fair compensation, it is difficult to assess how this will be done in practice. Even where spouses have not entered into an ante-nuptial agreement, the awards provided to non-moneyed spouses still do not uphold a 50/50 split, as the largest award to date of £300 million only reflected a 36% share.[60] It follows therefore that even when purporting to consider 'fairness', it is unlikely that this will be achieved through balancing an already dissatisfactory approach, with an agreement whose sole purpose is financial deprivation.

B. A Marxist interpretation of fairness

It follows that, in accordance with Marxist Feminist arguments, even in instances where the court was to exercise its discretion to derogate from the ante-nuptial agreement, the likely concession afforded to the 'homemaker' is likely to be insufficient. Marxist Feminists place an emphasis upon the unpaid labour that women undertake in the home. In particular, theorists such as Benson have noted that this work ultimately results in benefitting capitalism, as by caring for children and cooking meals, wives are supporting their wage-earning husbands to perform as ideal workers within the workforce.[61] In turn, Marxist Feminism calls for women to be financially compensated for this work, and further for the definition of 'work' to be expanded to include the unpaid efforts of women within the home.[62] This is a perspective which is somewhat reflected in Lord Phillips' comment on how fairness is to be perceived. However, Marxist Feminists call for structural reform in which women are paid a wage for this work, rather than mere compensation upon divorce.[63] In absence of this structural reform, the courts are unable to sufficiently compensate women for this work because of the difficulty which comes alongside

[58] ibid para 76.
[59] ibid para 81.
[60] *Cooper-Hohn v Hohn* [2014] EWHC 4122.
[61] Margret Benson, 'The Political Economy of Women's Liberation' (1969) 21(4) Monthly Review 13-27.
[62] Angela P. Harris, 'Theorising Class, Gender, and the Law: Three Approaches' (2009) 72 LC Problems 37.
[63] Nancy Fraser, 'After the Family Wage: Gender Equity and the Welfare State' (1994) 22 Political Theory 591-618.

quantifying the monetary value which is to be attributed to this work. As a result of this, the court has an "unprincipled and chaotic approach" [64] to compensation.

This is an issue which has been discussed within the work of Starnes, who notes how "mother's myths" lead people to believe that mothering "just happens" and therefore the amount of work that goes into this role is not adequately recognised.[65] When discussing the dangers that such myths pose, Starnes notes that they distort primarily male judicial assessments of compensation.[66] In doing so, she cautions how the myth that "mothering is free" leads to judges undervaluing the true cost of this role, and as a result many mothers are left in need upon divorce.[67] Additionally, it must be noted that remaining unemployed for the duration of a marriage causes a depreciation in a wife's earning capacity.[68] This is a factor which neither Lord Phillips in his vague discussion of fairness, nor Marxist Feminist theory provides a sufficient remedy to. Even if Lord Phillips were to explicitly state that this is a factor to be considered, Starnes notes the impossibility of determining this depreciation, as there is rarely a comparative baseline against which to measure a woman's best alternative opportunity had she not become a mother.[69] This article claims that the egalitarian visions of equality that Liberal Feminism has promoted has exacerbated this issue. Starnes warns of how judges are "seduced by egalitarian visions of housewives retraining and entering the job market" upon divorce, envisioning them as being "freed" of household duties to now begin new lives.[70] In reality however, these "new lives" are ones accompanied with limited property and little support.[71] Therefore, this article holds that in purporting to consider the 'fairness' of ante-nuptial agreements, the harms that women suffer from these agreements fail to be remedied because of a lack of judicial understanding of the lived realities of these women.

The Liberal Feminist ideal of equality of status presents the idea that both parents share dual responsibilities for child-care, work full-time, and both share equal leisure time.[72] Liberal Feminism calls for gender-based assumptions of parenthood to be eliminated and instead for both men and women to participate

64 Charlotte Bendall, 'Some More 'Equal' than Others: Heteronormativity in the Post-White Era of Financial Remedies' (2014) 36 J of Social Welfare and Family L 260.

65 Cynthia Lee Starnes, 'Mothers, Myths, and the Law of Divorce: One More Feminist Case for Partnership' (2006) 13 Wm. & Mary J. Women & L 203.

66 ibid.

67 ibid 215.

68 ibid.

69 ibid.

70 ibid 220.

71 ibid.

72 ibid.

equally in child-care.[73] These ideals are in fact detrimental to women. This has been highlighted by Starnes, who notes that when assessing fair ancillary relief, judges "confuse equality of status with identity of contribution".[74] Therefore, in doing so, it is unlikely that compensation is to be afforded for the disproportionate amount of housework that the wife has endured. The disproportionate contributions that women make within the home have been discussed by Fineman, who notes that women still bear disproportionate responsibility for child-care.[75] This claim can be supported by findings that adult women in households with children under six years old spent at least 2.7 hours a day on primary child-care, as compared to the 1.2 hours that men undertake in similar households.[76] Similarly, David Demo and Alan Ackok found that even women who work full-time still assume 70-80% of all housework.[77] As a result, the disproportionate work undertaken by women in the home leads to what Fraser has called "time poverty".[78] This results in women having less leisure time than men to pursue other interests or to earn money, and this in turn further limits their earning capacity in comparison to men.[79]

Lord Phillips further holds that an ante-nuptial agreement could be set aside if one party will be left in a "predicament of real need".[80] As a result of the financial dependencies that 'homemaking' women form on their husbands however, many women are likely to be left in a 'needy' position upon divorce. This can be reinforced by studies which showed that over "40% of divorcing households headed by women saw their incomes immediately cut by more than one half".[81] Furthermore, women who participate in the workforce are even less likely to have their contributions within the home recognised by a court. This issue has been discussed by Marxist Feminists, who claim that women often endure a 'double workday' in which they return home to complete household chores. In attributing compensation for housework, the High Court, in *Cooper-Hohn v Hohn*, highlighted how this second shift is unlikely to be remedied, by holding that this was not a 'special' contribution worthy of sufficient compensation.[82] It follows that this is a stance which is similarly reflected by Lord Phillips in *Radmacher,* as his statement of what constitutes as "fair" paints a picture of a "devoted" housewife, thus implying

[73] Susan Boyd, *Motherhood and Law: Constructing and Challenging Normativity* (Aldershot 2013) 267-283.
[74] Starnes (n 65) 231.
[75] Fineman (n 20).
[76] Starnes (n 65) 209.
[77] ibid 210.
[78] Fraser (n 63) 599.
[79] ibid.
[80] *Radmacher* (n 1) para 81.
[81] Brod (n 13) 229.
[82] *Cooper-Hohn* (n 60).

that those who do not conform to this image of devotion are not afforded with compensation for their work.[83]

Indeed, the court's considerations of fairness in this instance are constructed too narrowly and will therefore preclude the allocation of compensation for the non-financial contributions which many women make during a marriage. It was held in *Radmacher* that there was no compensation factor to be considered, as it was decided that Mr Granatino's career change was not "motivated by the demands of his family".[84] This reinforces how, unless a party can show that they performed an exclusively 'homemaking' role within the marriage, the question of fairness and compensation is unlikely to be considered. This narrow construction has been further critiqued by Bendall, who argues that this is a reflection of the Supreme Court's heteronormative values, as she notes that the court cannot perceive Mr Granatino as anything other than the male 'breadwinner'.[85]

C. Are conceptions of fairness shaped by adherence to heteronormative values?

Bendall argues that perhaps one of the reasons why the court in *Radmacher* disregarded a full analysis of the fairness of the agreement was because they could not perceive Mr Granatino as being vulnerable due to heteronormativity.[86] Berland and Warner define heteronormativity as the way in which "institutions, structures of understanding, and practical orientations make heterosexuality seem not only coherent […] but also privileged".[87] In privileging heterosexuality, it follows that men and women are expected to behave in accordance with masculine and feminine values. Therefore, there is a heteronormative assumption that within marriage the husband will be a 'breadwinner' whilst the wife acts as a "homemaker"; an assumption which is not complied with in *Radmacher*. It must be noted that this article has framed its critique in accordance with these assumptions because of the way in which these roles harm women through gendered power dynamics and financial arrangements. Furthermore, this article argues that ante-nuptial agreements exacerbate these harms. Non-compliance with these gendered roles however can be similarly detrimental to the non-moneyed spouse.

Bendall argues that vulnerability is a typically feminine attribute and because of this, the courts were unable to perceive Mr Granatino as vulnerable, despite his

[83] *Radmacher* (n 1) para 81.
[84] ibid para 121.
[85] Bendall (n 64) 247.
[86] ibid.
[87] Lauren Berlant and Warner Michael, 'Sex in Public' (1998) 24 Crit Inq 548.

lack of legal advice and inability to read the ante-nuptial agreement.[88] In supporting this claim, Bendall asserts that when emphasising Mr Granatino's earning capacity, Lord Phillips describes him as "extremely able", and subsequently punishes him for failing to comply with the masculine role of the 'breadwinner' by pursuing a career in academia.[89] It must be noted that Lady Hale attempts to present a counter narrative of this subject in her dissent by claiming that this may have been a decision which benefitted his family.[90] Furthermore she notes that "happy parents make for happy children" and that even if not directly motivated by family needs, Mr Granatino's career change is likely to have had indirect benefits.[91] In accordance with this counter-narrative, Bendall similarly poses the question of how such a career decision would be interpreted if it were made by Ms Radmacher because of the association between women and child-care.[92] Therefore, Bendall concludes that even in this instance where the courts are presented with a relationship model which does not 'fit' within the heterosexual matrix, the court still applies the heteronormative ideas of the gendered division of labour to this marriage.[93] This therefore reinforces the idea that the way in which fairness is conceived in this case suggests that ante-nuptial agreements are only likely to be considered 'unfair' when both parties conform to these heteronormative assumptions.

This persuasive argument can be coupled with Lord Phillips' use of the word "devoted" when giving an example of a housewife being deserving of compensation.[94] In doing so, Lord Phillips frames his assessment of deservingness upon a wife's compliance with the heteronormative ideal of the feminine homemaker. Of course, by failing to give further explanation of how fairness is to be understood, we can only go so far in inferring what he meant by using this word. This interpretation, however, can be supported by Boyd, who argues that women are penalised for failing to conform to normative ideals of motherhood.[95] A "normative mother" is one which behaves "selflessly" for their children within the context of a heterosexual, nuclear family.[96] In accordance with this picture, this article contends that a similar image is conjured when describing a homemaker as "devout". Therefore, this article argues that just as how mothers are constructed as 'good' or 'bad' in accordance to how closely they conform to the notions of a

88 Bendall (n 64).
89 ibid referring to Lord Phillips in *Radmacher* (n 1) para 119.
90 *Radmacher* (n 1).
91 ibid para 194.
92 Bendall (n 64).
93 ibid.
94 *Radmacher* (n 1) para 81.
95 Boyd (n 73).
96 ibid 270.

'normative mother',[97] the construction of ante-nuptial agreements as being fair or unfair in *Radmacher* is similarly decided in accordance with conformity to this normative.

VI. Conclusion

In conclusion, ante-nuptial agreements can only ever be construed as a patriarchal tool in which male dominance is translated into financial dominance, whilst depriving women of the financial awards they are entitled to. It follows that regardless of the fictitious judicial considerations of 'fairness' in *Radmacher*,[98] the persistence of gendered inequalities both economically and domestically prevent any ante-nuptial agreement from ever being "fair". As this article has demonstrated throughout, the inherent unfairness associated with these agreements primarily harm non-moneyed women, though as discussed in part V, these problems can span wider than this category. This makes them a danger to all financially subordinate spouses who do not fulfil heteronormative pre-conceptions, thus reinforcing this article's cautions of the dangers that ante-nuptial agreements pose.

However, where thirty-nine per cent of marriages entered into today end in divorce,[99] it is rational for spouses to wish to agree upon a fair divorce arrangement prior to marriage. Additionally, the UK Government continually promotes the use of mediation by divorcing couples, which could undoubtedly be supported by the utilisation of ante-nuptial agreements in pre-determining their divorce settlement. It follows therefore that further discussion ought to be had to consider the possible avenues that couples can take to address their pre-marital desires to control their divorce outcomes, whilst preventing the further exploitation of the financial vulnerabilities of the non-moneyed spouse. However, it must be noted that this article's call for further discussion is accompanied by a caution voiced by Lady Hale in Radmacher that "it is difficult, if not impossible, to predict at the outset what the circumstances will be when a marriage ends".[100]

[97] Fineman (n 20).
[98] *Radmacher* (n 1).
[99] Office for National Statistics, *Divorces in England and Wales: 2018* (UK Government 2019).
[100] *Radmacher* (n 1) para 176.

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Horizontal Enforcement of Queer Rights in India: A Constitutional Solution

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Abstract

This paper explores a unique constitutional question that arises in the enforcement of queer rights in India. The rights enumerated in Part III of the Constitution of India, which were instrumental in the reading down of Section 377, can generally only be asserted *qua* the State. Therefore, this paper questions whether the Constitution of India provides any protection to queer sexual minorities against private acts of discrimination. It argues that a remedy may be found in Article 17, which prohibits the practice of untouchability by both State and non-State actors. To that end, this paper presents normative and historical arguments in favour of an expansive interpretation of Article 17, which would encompass all forms of group exclusion rooted in the notions of 'purity' and 'pollution'.

Keywords: discrimination, constitutional law, horizontal rights, disgust stigma, queer rights

I. Introduction

In 2012, a small bakery in Colorado emerged at the centre of a national controversy on queer rights.[1] Jack Philips, the owner of the bakery, had refused to bake a wedding cake for a gay couple, citing his religious opposition to same-sex marriage. In his opinion, the Holy Bible only permitted heterosexual marriage,

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1 Julie Turkewitz, 'Colorado, Once Called the "Hate State", Grapples with Cake Baker Decision' *New York Times* (Lakewood, 5 June 2018) <https://www.nytimes.com/2018/06/05/us/colorado-masterpiece-cake.html> accessed 18 August 2020.

through which he claimed that his refusal was a form of religious expression protected under the First Amendment to the American Constitution.[2] In response, the couple filed a complaint before the statutory commission under the Colorado Anti-Discrimination Act, alleging discrimination on the basis of sexual orientation.[3] After multiple rounds of litigation, the case eventually reached the US Supreme Court. In a 7-2 verdict, the Court ruled against the couple on the technical ground that the Commission had displayed religious animus against Philips.[4]

At its core, this case brings out a tension which lies at the heart of constitutional law and its intersection with queer rights.[5] In recent years, constitutional courts across the world have declared the rights enjoyed by queer sexual minorities, such as the right to dignity, equality, privacy and sexual expression.[6] The recognition of these rights has been instrumental in striking down colonial-era sodomy laws in various jurisdictions, most notably in the reading down of Section 377 of the Indian Penal Code.[7] However, the question of *who* these rights may be enforced against remains unexplored. Under the Indian Constitution, the rights enumerated in Part III are generally[8] enforced 'vertically' *qua* the State, as defined in Article 12, and not 'horizontally' against other private actors.[9] Therefore, the extent to which fundamental rights can be asserted against private acts of discrimination remains

2 See, for example, The Leviticus 18:22 ("You shall not lie with a male as with a woman; it is an abomination"); see generally Robert A.J. Gagnon, *The Bible and Homosexual Practice: Texts and Hermeneutics* (Abingdon Press 2010).

3 Colorado Anti-Discrimination Act 2017, §24-34-601(2)(a) ("It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.").

4 *Masterpiece Cakeshop Ltd. v Colorado Civil Rights Commission* 138 S. Ct. 1719 (2018).

5 The term 'queer' is used as an umbrella term to describe any sexuality or gender identity that does not conform to the heteronormative ideal; see Gautam Bhan and Arvind Narrain (eds.), *Because I Have A Voice: Queer Politics in India* (Yoda Press 2005) 3 ("It embodies within itself a rejection of the primacy of the heterosexual, patriarchal family as the cornerstone of our society […] it captures and validates the identities and desires of gay, lesbian, bisexual and transgender people, but also represents, for many, an understanding of sexuality that goes beyond the categories of 'homosexual' and 'heterosexual'.").

6 See, for example, *Navtej Singh Johar v Union of India* (2018) 10 SCC 1; In the United States of America, see *Lawrence v Texas*, 539 U.S. 558 (2003); *c.f. Ong Ming Johnson v Attorney General* (2020) SGHC 63.

7 ibid. See Robert Wintemute, 'Lesbian, Gay, Bisexual and Transgender Human Rights in India: From Naz Foundation to Navtej Singh Johar and Beyond' (2019) 12 (3-4) NUJS LR.

8 However, Articles 15(2), 17, 23 and 24 are usually regarded as the exceptions to the exclusively vertical reach of Part III.

9 For an overview of the vertical-horizontal dichotomy, see Sudhir Krishnaswamy, 'Horizontal Application of Fundamental Rights and State Action in India' in C. Raj Kumar & K. Chockalingam (eds.), *Human Rights, Justice, and Constitutional Empowerment* (2nd edn., OUP 2007).

unclear, particularly when the act in question is being justified as an exercise of constitutionally guaranteed religious or economic freedoms.[10] The significance of this issue cannot be understated – it means that while queer sexual minorities might be guaranteed formal equality under the law, they can still be discriminated against by private individuals in various spaces, such as commercial establishments, housing and employment.[11] Without eliminating horizontal discrimination, substantive equality will continue to remain elusive in India.

While this issue has been resolved through civil rights legislation in the United States of America, India has yet to follow suit in enacting a comprehensive anti-discrimination law.[12] In the absence of a statutory framework, we argue that a horizontal remedy may be found in Article 17 of the Indian Constitution, which prohibits the practice of "untouchability in any form."[13] The interpretation of Article 17 was recently considered by the Supreme Court of India in *Indian Young Lawyers Association* v. *State of Kerala*, which pertained to the entry of menstruating women into the Sabarimala temple in Kerala.[14] In his concurring opinion, Chandrachud J held that discrimination suffered by menstruating women was a form of "untouchability", which fell within the purview of Article 17.[15] In furtherance of this radical interpretation, we argue that "untouchability" under Article 17 should be expansively interpreted to include discriminated based on both gender-identity and sexual orientation.

This article begins by providing an overview of the horizontal rights debate within Indian Constitutional Law, focusing on the extent to which different fundamental rights are applicable within the private sphere (I). Through this Section, we endeavour to bring out the uniqueness of Article 17 as a horizontally enforceable provision within a predominantly vertical constitutional framework. Thereafter, we examine the treatment of horizontal discrimination within the three

[10] Ashish Chugh, 'Fundamental Rights - Vertical or Horizontal?' (2005) 7 SCC J 9, 13 ("That voluntary agreements could defeat fundamental rights by simply relying on the primacy of the freedom to contract.").

[11] While it may be possible to argue that such discrimination would violate Article 15(2), this issue has not been judicially determined as of yet.

[12] Recently, efforts have been directed towards enacting such a legislation; *see e.g.* Centre for Law and Policy Research, *The Equality Bill 2019* <https://clpr.org.in/wp-content/uploads/2019/06/Equality-Bill-2019-22nd-July-2019.pdf> accessed 4 August 2020; Tarunabh Khaitan, *Equality Bill 2016* <https://docs.google.com/viewer?a=v&pid=sites&srcid=ZGVmYXVsdGRvbWFpbnx0YXJ1bmFiaHxneDo1ZGI1MDdiNGVjYzMwZDZl> accessed 4 August 2020.

[13] The Constitution of India 1950, art 17.

[14] *Indian Young Lawyers Association v State of Kerala* (2019) 11 SCC 1.

[15] ibid [355].

landmark decisions on queer rights, *Naz*,[16] *NALSA*[17] and *Navtej*. (II). This Section provides an insight into how the Supreme Court has navigated the horizontal – vertical dichotomy in the most prominent queer rights cases. Subsequently, we begin our argumentation on Article 17 by exploring the two competing views – the narrow interpretation and the expansive interpretation (III). Finally, we contend that discrimination based on sexual orientation and gender identity is based on notions of 'purity' and 'pollution', and can accordingly be interpreted as a form of "untouchability" under Article 17 (IV).

II. Mapping the Four Corners of Part III: A Review of the State Action Doctrine in India

The horizontal effect of constitutional rights is one of the most fundamental, yet controversial issues within comparative constitutional law.[18] Most liberal democratic constitutions recognise that the exercise of state power poses a threat to individual rights and freedoms, which is why constitutional rights are generally deemed to be enforceable *qua* the State.[19] In contrast, relationships between individuals are strictly within the 'private sphere', and therefore outside the ambit of constitutional law.[20] This position reflects the vertical approach, where constitutional rights bind and impose duties on State actors only. The United States of America is regarded as a classic example of the vertical position. In the *Civil Rights Cases* of 1883, the American Supreme Court famously laid down the 'State Action' doctrine which stipulates "[…] that it is the state's conduct, whether action or inaction, not the private conduct, that gives rise to constitutional attack".[21] Individual actions that were not supported by State authority amounted to mere

16 *Naz Foundation v Government of NCT of Delhi* (2009) SCC OnLine Del 1762.

17 *National Legal Services Authority v Union of India* (2014) 5 SCC 438.

18 Charles Black, Jr., 'Foreword: "State Action," Equal Protection, and California's Proposition' (1967) 81 Harvard LR 69, 95, wherein he famously characterised this issue as a "conceptual disaster area"; *c.f.* Laurence Tribe, 'Refocusing the "State Action " Inquiry: Separating State Acts from State Actors' in *Constitutional Choices* (HUP 1985) 248 ("In my view, considerably more consistent and less muddled than many have long supposed."); see generally Richard Kay, 'The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law' (1993) 10 Constitutional Comments 329, 346.

19 Mark Tushnet, 'The Issue of State Action/Horizontal Effect in Comparative Constitutional Law' (2003) 1 Int'l J. Consti. L. 79 ("Put crudely this strand leads constitutionalists to pay primary attention to the threats to human rights that government poses.").

20 For an account and critique of the public/private divide, see Susan B. Boyd, 'Challenging the Public-Private Divide: An Overview' in Susan B. Boyd (ed.), *Challenging the Public-Private Divide: Feminism, Law and Public Policy* (University of Toronto Press 1997).

21 Civil Rights Cases, 109 U.S. 3 (1883); *c.f.* Harold Horowitz, 'The Misleading Search for "State Action"' Under the Fourteenth Amendment' (1957) 30 S. Cal. LR 208, 210.

private wrongs that were actionable under the Common Law, against which constitutional rights cannot be asserted. The sole exception to the state action doctrine is the Thirteenth Amendment, which mandates complete abolition of slavery and involuntary servitude.[22]

Over the years, this model of constitutionalism has been heavily criticised for ignoring inequalities of power within the private sphere.[23] It is often argued that individual rights can also be imperilled by extremely powerful private actors, both within economic and social spaces.[24] For example, as seen in the Temple Entry Movement, powerful religious actors can excommunicate and declare a 'social boycott' on marginalised communities, thereby denying them the constitutional right to freely practice and propagate their religion.[25] In recognition of this inequality, several constitutional systems have extended the protections of individual rights to private relationships, albeit to varying degrees. For example, the Irish Constitution provides for complete horizontal enforcement of rights through its jurisprudence of "constitutional torts".[26] The Irish Constitution is unique in this sense, for it "confers a right of action for breach of constitutionally protected rights against persons other than the State and its officials".[27]

In this section, we seek to explore the nuances of the horizontal-vertical dichotomy within Indian Constitutional Law. It is not our endeavour to provide a comprehensive theory on the nature of rights within the Indian Constitution, which is far beyond the scope of this paper. Rather, we advance the limited claim that the rights enumerated in Part III are not uniform in their scope of application within the private sphere. In doing so, we aim to emphasise on the significance of Article 17 as a directly horizontal provision within a predominantly vertical constitutional scheme. Accordingly, this section deconstructs Part III rights into

[22] Constitution of the United States, Amendment XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

[23] Stephen Gardbaum, 'The "Horizontal Effect" of Constitutional Rights' (2003) 102 Michigan LR 387, 395. See, generally, Erwin Chemerinsky, 'Rethinking State Action' (1985) 80 NWU LR. 503, 537 ("In fact under the State Action doctrine, the rights of the private violator are always favoured over the rights of the victim.").

[24] Tushnet (n 19) 79.

[25] Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (OUP 2019) 159 ("The effect of excommunication was not simply 'religious', but extended to barring the individual from exercising his civil rights; and furthermore, by forbidding social or economic contact, effectively turned him into a 'pariah'.").

[26] Gardbaum (n 23) 396; see *Meskell v Coras Iompair Eireann* I.R. 121, 133 (1973).

[27] *Hosford v John Murphy & Sons* I.R. 621, 626 (1987).

three categories – vertical (A), directly horizontal (B) and indirectly horizontal (C), and examines each of them in turn.

A. Vertical rights

As a general rule, the rights enumerated in Part III of the Constitution have traditionally been regarded as 'vertical' in nature.[28] They regulate the relationship between the individual and the state, without directly binding non-state entities. This approach is justified by the textual provisions, as well as the drafting history of the Constitution.

To begin with, Article 13(2) reads: "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void".[29] As D.D. Basu observes, Article 13(2) requires a specific form of threshold "State action" before violation of a fundamental right can be asserted.[30] There are two aspects of Article 13(2) that support this interpretation: *first*, the '*State*' is expressly identified as the sole duty-bearer, who is obligated to refrain from violating any of the rights enumerated in Part III;[31] *second*, it stipulates that '*any law*' that contravenes the rights conferred in Part III shall be deemed to be void. Article 13(3) defines 'law' as "[…] laws passed or made by Legislature or other competent authority in the territory of India", in which exercise of private power find no mention.[32] Furthermore, this interpretation is supported by numerous Articles that identify the 'State' as the duty-bearer of the corresponding right.[33] This understanding was also echoed by various parliamentarians during the Constituent Assembly Debates, where Dr.

[28] *Zoroastrian Cooperative Housing Society v District Registrar* (2005) 5 SCC 632, 659 ("The Fundamental Rights in Part III of the Constitution are normally enforced against State action or action by other authorities who may come within the provision of Article 12 of the Constitution."). For analysis of this case, *see* Gautam Bhatia, 'Horizontal Discrimination and Article 15(2) of the Indian Constitution: A Transformative Approach' (2019) 11 Asian J. of Comp. Law 1.

[29] The Constitution of India 1950, art 13(2).

[30] D.D. Basu, *Commentary on the Constitution of India* (9th Ed., LexisNexis 2014) 22 ("It applies if the following conditions are satisfied, *viz* (a)The law is made by an authority which comes within the definition of "State" under Article 12); H.M. Seervai, *The Constitutional Law of India* (4th edn., Universal Law Publishing 1991) 374; *Menaka Gandhi v Union of India* (1978) 1 SCC 248 ("What the court must consider is the "direct" or "inevitable" consequence of State action"); *R.C. Cooper v Union of India* (1970) 1 SCC 248, 284 ("Under the Constitution, protection against impairment of the guarantee of fundamental rights is determined by the nature of the right, the interest of the aggrieved party and the degree of harm resulting from the State action.").

[31] Stephen Gardbaum, 'The Indian Constitution and Horizontal Effect' in Sujit Choudhry et al (eds.), *Oxford Handbook of Indian Constitution* (OUP 2016) 577.

[32] The Constitution of India 1950, art 13(3); D.D. Basu (n 30) 22 ("The Law falls within the definition given in Article 13(3)(a)").

[33] Gardbaum (n 23).

B.R. Ambedkar noted that the scope of Part III was to bind every authority that "*has got the power to make laws*".[34] For present purposes, Articles 14, 15(1) and 19, all of which were essential in the decriminalisation of homosexuality, expressly place restrictions on the "State".

This interpretation of Part III rights can also be historically rationalised. Part III, as a charter of rights and freedoms, was born out of the "legacy of injustice" that had been perpetrated by the British within the Indian subcontinent.[35] The Constitution, as a radically transformative project[36], aimed at redefining the legal relationship between the individual citizen and the post-colonial State.[37] Under British rule, the individual had been treated as a mere subject of colonial administration, often having to bear the brunt of governmental excesses and injustices. The Constitution sought to remedy this by granting rights to the individual, with the government having limited power to curtail these rights.[38] Therefore, the vertical approach envisages a Constitution that primarily places limitations on State Power within the public domain, with the private domain being free of constitutional regulation.

B. Direct horizontal rights

There are four exceptions to the vertical interpretation of Part III. Articles 15(2), 17, 23 and 24 are directly horizontal in nature, in that they are "plainly

[34] Constituent Assembly Debates, November 25, 1948, speech by Dr. B.R. Ambedkar <https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-25>.

[35] Bhatia (n 25) 6, citing Ruti Teitel, 'Transitional Jurisprudence: The Role of Law in Political Transformation' (1997) 106 Yale LJ 2009, 2057.

[36] *See* Karl E. Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 South African J. on Human Rights 146, 150 ("By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction."). See also Upendra Baxi, 'Preliminary Notes on Transformative Constitutionalism' in Upendra Baxi et al (eds.), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (University of Pretoria Press 2013).

[37] See Moiz Tundawala, 'On India's Postcolonial Engagement with the Rule of Law' (2013) 6 NUJS LR 11 ("Contrasting the 'equality of status and of opportunity' promised in the Preamble with the British sense of superiority over the natives would have made the people of the country wonder in excitement about the limitless possibilities which lay ahead as the project of modernity with its agenda of progress, constrained by a racial hierarchy in colonialism, could now reach its logical completion.").

[38] Constituent Assembly Debates, November 4, 1948, speech by Dr. B.R. Ambedkar <constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-04> ("I am glad that the Draft Constitution has discarded the village and adopted the individual as its unit").

and indubitably enforceable against everyone".[39] This is clearly reflected in the text of these Articles, which do not identify specific duty bearers – rather, they call for the complete abolition of certain practices. For example, Article 17 reads "untouchability is abolished and its practice in any form is prohibited".[40] While the Constitution sought to place limits on the State Action in the public domain, the Drafters also acknowledged the unique characteristics of Indian society, wherein power was not consolidated in the hands of the State. Rather, it was distributed between social groups, communities and other private actors, creating a system of complex social hierarchies that Kaviraj describes as "two-layered sovereignty".[41] As Ambedkar observed, discrimination was conducted through community sanction on the basis of a system of "graded inequality".[42] Backed by the forces of tradition and religion, individual rights and freedoms were rendered meaningless by powerful social and economic actors. Therefore, the nationalist movement was not exclusively targeted at "colonial configurations of power", but also sought to unfetter the individual from "local configurations of power".[43] This meant that the constitutional project not only aimed at liberating India from the vice grip of a Colonial power, but also sought to bring about a "social revolution"[44] by breaking down a fundamentally unequal social order.

C. Indirect horizontal rights

In recent years, constitutional courts across the world have moved towards a 'hybrid approach' between vertical and horizontal application of rights.[45] Popularly referred to as 'indirect horizontality', this approach retains the basic premise of the vertical position that constitutional rights are applicable against the State only. However, it allows for enforcement of constitutional rights against private

[39] *People's Union for Democratic Rights v Union of India* AIR 1982 SC 1473.

[40] The Constitution of India 1950, Article 17.

[41] Sudipta Kaviraj, *Trajectories of the Indian State: Politics and Ideas* (Permanent Black 2010) 12 ("The 'sovereignty' of the state was two-layered […]. Often, there existed a distant, formally all-encompassing, empire, but actual political suffering was caused on an everyday basis by neighbourhood tyrants. There were also considerable powers of self-regulation by these communities.").

[42] Constituent Assembly Debates, November 25, 1949, speech by Dr. B.R. Ambedkar <https://www.constitutionofindia.net/constitution_assembly_debates/volume/11/1949-11-25> ("we have in India, a society based on the principle of graded inequality with elevation for some and degradation for others").

[43] Gopal Guru, 'Constitutional Justice: Positional and Cultural' in Rajeev Bhargava (ed.), *Politics and Ethics of the Indian Constitution* (OUP 2008) 235.

[44] Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Clarendon Press 1966) ("The social revolution meant 'to get (India) out of the medievalism based on birth, religion, custom, and community and reconstruct her social structure on modern foundations of law, individual merit, and secular education'."); *c.f.* Sudipta Kaviraj, 'A Critique of the Passive Revolution' (1988) 23 (45/47) Economic and Political Weekly 2429.

[45] Gardbaum (n 23) 398.

actors if state action can be indirectly linked to the act. This can take various forms. For example, in the *Dolphin Case*, the Canadian Supreme Court held that "constitutional values" can indirectly regulate private relationships, by evolving the Common Law in consonance with values contained in the Canadian Charter of Freedom.[46] The German Constitutional Court also upheld the "constitutional values" doctrine in the famous *Luth* case, where it held that "every provision of private law must be compatible with [the Basic Law's] system of values".[47] However, the German Constitution also indirectly regulates private action one step further – law authorising private action is also directly subjected to constitutional rights, and is invalid to the extent of contravention.[48]

The Indian Supreme Court has also embraced the shift towards indirect horizontality. Although the state action requirement in Article 13(2) still precludes direct horizontal application, the Court has creatively interpreted fundamental rights to indirectly subject private actors to constitutional review. This jurisprudence has evolved in two distinct forms: *first*, the imposition of "protective duties" on the State to prevent private violation of fundamental rights; *second*, by challenging the law that empowers the private violation of fundamental rights.

(i) Protective duties

The imposition of 'protective duties' identifies the State as a duty-bearer in a dual sense. As mentioned earlier, the State is primarily obligated to not directly act in a way that infringes the rights enumerated in Part III. Beyond this, the 'protective duties' approach places a positive obligation on the State to prevent non-State entities from violating fundamental rights.[49] This means that the failure to protect fundamental rights from private violation constitutes a form of "state action", which gives rise to a remedy against the State. A manifestation of this approach is seen in the celebrated case of *Vishaka* v. *State of Rajasthan*.[50] In this case, Bhanwari Devi, a social worker was gangraped by a group of men while protesting against the marriage of an infant in Rajasthan. In exercise of its powers under

[46] *Retail, Wholesale & Dep't Store Union v Dolphin Delivery Ltd.* [1986] 2 S.C.R. 573.

[47] Liith, BVerfGE 7, 198 (1958); *see generally* Greg Taylor, 'The Horizontal Effect of Human Rights, the German Model and its Applicability to Common Law Jurisdictions' (2002) 13 King's Coll LJ 187.

[48] See Peter E. Quint, 'Free Speech and Private Law in German Constitutional Theory' (1989) 48 MD LR 247, 264; Basil S. Markesinis & Hannes Unberath, *The German Law of Torts* (Hart Publishing, 4th edn., 2002) 406 ("A public law action between an individual and the state, a constitutional right will directly override an otherwise applicable rule of public law. The constitutional right will also override a statutory provision of private law if it contravenes a constitutional right.").

[49] Gardbaum (n 23) 579; Other examples of this approach can be seen in *Consumer Education and Research Centre v Union of India* (1995) 3 SCC 42 ("The State, be it Union or State government or an industry, public or private, is enjoined to take all such action which will promote health, strength and vigour of the workman.").

[50] *Vishaka v State of Rajasthan* (1997) 6 SCC 241.

Article 32, the Supreme Court formulated a set of guidelines to protect women from sexual harassment, which was a violation of Articles 14, 19 and 21.[51] One of the guidelines placed an affirmative duty on the Union and State Governments to enact "suitable measures including legislation to ensure that the guidelines laid down by this order *are also observed by the employers in Private Sector*".[52] In other words, the Court placed a positive obligation on the State to take appropriate action to prevent violation of fundamental rights in the workplace.

(ii) Laws that enable restriction of fundamental rights

Similar to protective duties, this approach does not directly subject private actions to the anvil of fundamental rights. Rather, it challenges the law that authorises the non-state entity to act in a manner that violates a fundamental right.[53] While this approach has found limited application in India, one of the landmark cases on this position is *R. Rajagopal* v. *State of Tamil Nadu*.[54] In *Rajagopal*, a magazine wanted to publish the autobiography of a prisoner who had been sentenced to death. The warden and other public officials attempted to prevent publication by filing defamation suits against the editors of the magazine. In response, the magazine argued that defamation law was being used to stifle the expression of freedom of speech under Article 19(1)(a). Eventually, the Court modified the legal standard for defamation to ensure that it cannot be used to prohibit *bona fide* exercise of the freedom of speech under Article 19(1)(a).[55]

In summary, the rights enumerated in Part III are generally enforceable against the State. In this context, the abolition of "untouchability" in Article 17 assumes enormous significance. When compared to the American Constitution, Article 17 can be seen as the "functional equivalent of the thirteenth amendment"[56]

[51] ibid [3] – [14]

[52] ibid [17]

[53] See Larry Alexander, 'The Public/Private Distinction and Constitutional Limits on Private Power' (1993) 10 Constitutional Comments 361, 362-3 ("If we couple this fact about private actions - that they occur against a background of various legal duties and immunities, which background gives them their legal status - with another fact - that these various background legal duties and immunities are paradigmatic "state action" -we come to the conclusion that all private action implicates state action.").

[54] *R. Rajagopal v State of Tamil Nadu* AIR 1995 SC 264

[55] ibid [21] ("[…] but what is called for today is a proper balancing of the freedom of the press and said laws consistent with the democratic law ordained by the Constitution.").

[56] Gardbaum (n 23) 678.

– it occupies a unique space as a directly horizontal provision within our constitutional scheme.

III. Horizontal Discrimination: Examining *Naz*, *NALSA* and *Navtej*

In recent years, the Indian Supreme Court has delivered three landmark decisions on queer rights under the Constitution of India. The first of these was *Naz*, where the Delhi High Court declared that Section 377 was unconstitutional to the extent it criminalised same-sex intercourse.[57] This was followed by *NALSA*, where the Court extended legal recognition to transgenders as constituting the "third gender".[58] Finally, in *Navtej*, the Court affirmed the holding in *Naz*, and accordingly read down Section 377 of the Indian Penal Code. Admittedly, all three cases were litigated by individual citizens/groups against the State, without directly implicating private actors for constitutional violations. However, we argue that all three decisions displayed elements of indirect horizontality in various avatars – they acknowledged the impact of private actions on fundamental rights and sought to hold the State accountable for them. In the process, we aim to shed some light on how the Supreme Court has tackled the problem of horizontal discrimination in queer rights thus far.

In this Section, we will focus on two examples of private violations that the Court sought to indirectly regulate: *first*, blackmail of queer individuals, wherein we analyse the judicial treatment of this phenomenon from *Naz* to *Navtej* (A); *second*, discrimination suffered by transgenders in public and commercial spaces, where we analyse the imposition of affirmative duties on the State in *NALSA* (B).

A. Section 377 and blackmail

In *Navtej*, the Petitioners impugned Section 377 of the Indian Penal Code, which criminalised "carnal intercourse against the order of nature".[59] In a strictly vertical sense, this provision was declared unconstitutional – it amounted to legislative action in violation of Articles 14, 15, 19 and 21.[60] However, this provision

[57] See, generally, Vikram Raghavan, 'Navigating the Noteworthy and the Nebulous in Naz Foundation' (2009) 2 NUJS LR 3.

[58] See, generally, Aniruddha Datta, 'Contradictory Tendencies: The Supreme Court's NALSA Judgement on Transgender Recognition and Rights' (2013-14) 5 JILS 225.

[59] Indian Penal Code 1860, §377 ("Unnatural offences: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years or with a death penalty, and shall also be liable to fine").

[60] For an analysis of Article 14 jurisprudence developed through these cases, see Gauri Pillai, 'Naz to Navtej: Navigating Notions of Equality' (2019) 12(3-4) NUJS LR.

had rarely been invoked by the State to criminally prosecute queer individuals, with a mere 131 cases being registered during its entire 140-year existence.[61] Therefore, the real impact of Section 377 was not felt in the courtroom, but rather in everyday society.[62] One of the many consequences of Section 377 was its widespread abuse to blackmail and extort queer individuals, so much so that it resembled a "blackmailer's charter".[63] As the Delhi High Court remarked in *Naz*, the real effect of Section 377 was that:

> "Even when the penal provisions are not enforced, they reduce gay men or women to what one author has referred to as 'unapprehended felons' thus entrenching stigma and encouraging discrimination in different spheres of life. Apart from misery and fear, a few of the more obvious consequences are harassment, blackmail, extortion and discrimination".[64]

The significance of this analysis lies in the recognition that Section 377 effectively stigmatised homosexuals as criminals, which meant that they were vulnerable to exploitation in the form of blackmail and extortion. For the blackmailer, Section 377 provided both moral and legal legitimacy for criminal activity. It provided legal immunity as the victim was unlikely to report the blackmail and risk both criminal prosecution and social sanction. It also provided moral justification. As Gupta observes, Section 377 constructed a "parallel order of sexual morality" that was weaponised to police non-conforming sexual expression.[65] This emboldened the blackmailer to extort and blackmail with impunity, all under the garb of enforcing and protecting social morality.

Four years later, the Supreme Court of India overturned the Delhi High Court's decision in *Suresh Kumar Koushal* v. *Naz Foundation*.[66] In stark contrast, the Supreme Court held that the "[…] section is misused by police authorities and

[61] See Alok Gupta, 'The History and Trends in the Application of the Anti-Sodomy Law in the Indian Courts' (2001) 16 The Lawyers Collective 7, 9.

[62] The significance of the decision is by no means restricted to the impact on blackmail and extortion. However, for the purposes of this claim, we will be focusing on the role of Section 377 in facilitating blackmail.

[63] Arvind Narrain & Alok Gupta, 'Introduction' in Arvind Narrain and Alok Gupta (eds.), *Law Like Love: Queer Perspectives on Law* (Yoda Press 2011).

[64] *Naz Foundation* (n 16) [50].

[65] Alok Gupta, 'The Moral Order of Blackmail' in Arvind Narrain and Alok Gupta (eds), *Law Like Love: Queer Perspectives on Law* (Yoda Press 2011) 502 ("The blackmailer is a non-institutional avatar of the Morality Sena, albeit without any overt political backing. But like the Sena, he justifies his criminal actions by falling back on cultural homophobia as well as legal proscriptions against homosexuals"); On violence perpetrated on account of Section 377, *see also* Akshay Khanna, 'The Social Lives of 377: Constitution of the Law by the Queer Movement' in Arvind Narrain and Alok Gupta (eds), *Law Like Love: Queer Perspectives on Law* (Yoda Press 2011)

[66] (2014) 1 SCC 1.

others is not a reflection of the vires of the section".[67] Finally, in *Navtej*, the Supreme Court overruled *Koushal*, and read down Section 377. On the issue of blackmail, the Court noted that, "Sexual orientation has become a target for exploitation, if not blackmail, in a networked and digital age. The impact of Section 377 has travelled far beyond the punishment of an offence. It has been destructive of an identity which is crucial to a dignified existence".[68]

At its core, the judges in *Koushal* differed from their counterparts in *Naz* and *Navtej* on whether state action is required to violate a fundamental right. In *Koushal*, the judges conceptualise fundamental rights as exclusively vertical - abuse of Section 377 by non-state entities, even if it deprives an individual of the right to a dignified existence under Article 21, does not meet the threshold requirement of state action. Accordingly, the only issue is whether Section 377, a direct form of State Action, is in contravention of the fundamental rights. In comparison, the judges in *Naz* and *Navtej* move beyond the strictly vertical approach. Accordingly, in *Navtej*, the Court explores the extent to which Section 377 has been exploited by private individuals to deny the homosexual's dignity, which is held to be an integral facet of the right to life and liberty under Article 21. In doing so, the Court has adopted the second form of indirect horizontality, where all private violations are deemed to take place in the backdrop of laws i.e., Section 377, thereby satisfying the requirements of the State Action rule.

There are two caveats that are necessary here. *First*, admittedly, the threat of blackmail is not completed eliminated by the reading down of Section 377. It is still possible to blackmail individuals who are not openly homosexual, and threaten to '*out*' them to society. However, the impact of *Navtej* is that it holds the State responsible to the extent to which it has enabled private blackmail. The existence of Section 377 precluded individuals from seeking any legal remedy while being blackmailed, which exacerbated the problem. *Second*, the abuse of Section 377 alone cannot be an independent ground to declare it unconstitutional. It is only when State Action is routinely exploited to deny a fundamental right, such as the right to a dignified existence, that the State is responsible to that extent. Therefore, the *Navtej* judgement is indirectly horizontal as it holds the State accountable to the

[67] ibid [76]

[68] *Navtej Singh Johar* (n 6) [377].

extent to which it has facilitated private blackmail, which led to denial of the right to dignity.

B. Protective duties in *Nalsa*

In *NALSA*, the Petitioners did not challenge a specific legislative or executive action. On the contrary, they sought legal recognition of transgender identity, arguing that the State's failure to do so violated their fundamental rights under Articles 14 ,19 and 21.[69] The Petitioners further claimed that non-recognition of their gender identity had resulted in denial of their legal and constitutional rights – this had manifested in social discrimination, lack of access to medical facilities, physical harassment and sexual violence in public and private spaces, to name a few consequences.

These claims point to the scale of discrimination suffered by transgenders at the hands of non-state entities. In 2019, the International Commission of Jurists published a report on discrimination based on sexual orientation and gender identity in India ('ICJ Report').[70] The ICJ Report notes, inter alia, that transgenders face widespread discrimination within public spaces, housing and employment. This can take various forms. The Report details accounts of humiliating and discriminatory commercial practices that transgenders face, such as denial of entry into commercial establishments.[71] In the realm of housing, transgenders are often segregated into low-income neighbourhoods, without access to drinking water, sanitation and basic amenities.[72] Even within the families, transgenders and queer individuals face abuse and oppression. The recent death of a 21-year old bisexual woman from Kerala, who was forced to undergo conversion therapy further illustrates this point.[73]

This argument was viewed favourably by the Court, which held that the absence of legal recognition of transgenders had "left them vulnerable to

[69] *National Legal Services Authority* (n 17) [2].

[70] International Commission of Jurists, *Living with Dignity - Sexual Orientation and Gender Identity Based Human Rights Violations in Housing, Work, and Public Spaces in India* (2019) <https://www.icj.org/wp-content/uploads/2019/06/India-Living-with-dignity-Publications-Reports-thematic-report-2019-ENG.pdf> accessed 18 August 2020.

[71] ibid 128 ("Transwomen who work on streets all day or who have been seen on streets as sex workers or beggars will never be allowed into malls. They think we will create nuisance inside the malls, or solicit or beg, so they don't allow us. If they do allow us, a security guard will follow us inside to each and every shop or food court where we go").

[72] ibid 28.

[73] Cris, 'Kerala student dies in Goa, death puts focus on inhuman 'conversion therapy' on queer people' (*News Minute*, 16 May 2020) <https://www.thenewsminute.com/article/kerala-student-dies-goa-death-puts-focus-inhuman-conversion-therapy-queer-people-124683> accessed 18 August 2020.

harassment, in public spaces, at home and in jail".[74] In *NALSA*, the Court held the State accountable for failing to protect the fundamental rights enjoyed by the transgender community. In direct contrast to *Naz* and *Navtej*, the state action requirement is met by demonstrating 'State inaction' to protect fundamental rights. In other words, it relies on the "protective duties" approach by placing a positive obligation on the State to act in a manner that prevents fundamental rights from being violated. Much like *Vishaka*, the judgement concludes by issuing directives to the State to frame and implement laws that protect the fundamental rights enjoyed by transgenders.[75]

Through our analysis of *Naz*, *NALSA* and *Navtej*, there are two useful conclusions that can be drawn. First, in the realm of queer rights, all three judgements display elements of indirect horizontality. This is born out of the recognition that queer sexual minorities suffer widespread harassment and exploitation within the private sphere, which necessitates moving beyond a strictly vertical approach. Second, somewhat paradoxically, all three cases continue to uphold the state action requirement – primarily because these cases were litigated against the State. This means that while combating private discrimination, an individual is still required to show that discriminatory conduct can be attributed to the State in some form, either directly or indirectly.

There are numerous examples of private discrimination that do not meet this requirement. Take the example of a private employer that refuses to employ homosexuals by exercising the freedom of trade under Article 19(1)(g). The State cannot be held indirectly responsible when an individual exercises a constitutionally guaranteed economic freedom. Why is this a problem? As Khaitan argues, one of the goals of discrimination law is to ensure that members of marginalised groups get adequate opportunities.[76] While cases such as *NALSA* and *Navtej* ensure formal equality under the law, they do little to address the substantive group disadvantage accruing to various queer communities. In light of this, we suggest the solution to combat horizontal discrimination lies in Article 17, which is directly enforceable against private entities.

IV. Sabarimala and the Radical Interpretation of Article 17

Located in the Western Ghats of Kerala, the Sabarimala temple houses the deity of Lord Ayyapan. It is popularly believed that the deity took up a vow of eternal celibacy – or 'Naishtik Brahmachari' – due to which devotees who

[74] *National Legal Services Authority* (n 17) [62].

[75] ibid [135] ("The Central and State Governments should take proper measures to provide medical care to TGs in the hospital and also provide them separate public toilets and other facilities.").

[76] See Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015).

undertake a pilgrimage to this temple are required to observe 41 days of strict penance, or 'vratham'. This includes complete abstinence from drinking alcohol or consuming meat, engaging in sexual relations with your spouse, or even interacting with women at all.[77] To ensure that the deity's celibacy was not affected in any way, it was a custom for women of menstruating age to not enter the temple. In 1955, the Travancore Devaswom Board noted that the requirements of 'vratham' were not being observed sincerely by the devotees. At the same time, mature women were also found to be breaching the custom by entering the temple premises. Hence, in 1955, the Board issued a notification that barred menstruating women between the age of 10 and 55 from entering the temple premises, to uphold "the sanctity and dignity of this great temple and keep up the past traditions".[78] In 1965, the State Government of Kerala followed this up by enacting the Kerala Hindu Places of Public Worship (Authorization of Entry) Act, of which Section 4 empowered the State Executive to frame rules to preserve public order and decorum, as well as ensure the due performance of rights and ceremonies.[79] Pursuant to Section 4, the Kerala State Government further issued a set of regulations titled the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules. Rule 3(b) of the Regulations prohibited women from entering places of public worship when "they are not by custom and usage allowed to enter".[80] This provision was subsequently challenged before the Supreme Court in *Sabarimala*.

There are numerous issues that were raised by the Petitioners. *Prima facie*, the crux of this issue pertains to the relationship between Articles 25 and 26 of the Constitution, as well as the application of the 'essential practices test' to this case.[81] On this point, by a 4-1 majority, the Court declared that the exclusion of menstruating women from a public temple was unconstitutional.[82] Beyond this, the *amicus curiae* also advanced an argument under Article 17 – that the practice

[77] *Indian Young Lawyers Association* (n 14) [231].

[78] ibid [233]

[79] Kerala Hindu Places of Public Worship (Authorization of Entry) Act 1965, §4.

[80] Kerala Hindu Places of Public Worship (Authorization of Entry) Rules 1965, Rule 3(b) ("The classes of persons mentioned here under shall not be entitled to offer worship in any place of public worship or bath in or use the water of any sacred tank, well, spring or water course appurtenant to a place of public worship whether situate within or outside precincts thereof, or any sacred place including a hill or hill lock, or a road, street or pathways which is requisite for obtaining access to the place of public worship: […] (b) Women at such time during which they are not by custom and usage allowed to enter a place of public worship.").

[81] See generally Mary K. Dominic, 'Essential Religious Practices as a Cautionary Tale: Adopting Efficient Modalities of Socio-Cultural Finding' (2020) 16 Socio-Legal Review 46.

[82] For analysis of this decision, *see* Suhrith Parthasarathy, 'An Equal Right to Freedom of Religion: A Reading of the Supreme Court's Judgement in Sabarimala' (2020) 3 Ox. Human Rights Hub J. 123; Deepa Das Acevedo, 'Pause for Thought: Supreme Court's Verdict on Sabarimala' (2018) 53(43) Economic and Political Weekly 12.

of excluding women of menstruating age was a form of "untouchability" that was expressly barred by the Constitution of India. In adjudicating this argument, a clear split emerged within the bench. Malhotra J opined that the prohibition on untouchability was a specific reference to historical caste-based discrimination, which was not analogous to the treatment of women.[83] In direct contrast, Chandrachud J held that Article 17 was not restricted to caste-based untouchability, but included all forms of hierarchical social exclusion along the axis of 'purity' and 'pollution'.[84]

This interpretative clash is by no means new. It arose during the Constituent Assembly Debates, when members repeatedly pointed to the vagueness of Article 17. It reared its head in 1962, when the Supreme Court considered a challenge to temple entry legislation. The divergence between the Malhotra J and Chandrachud J represents the two poles on Article 17 – the traditional interpretation (A) and the radical thesis (B). Thereafter, we normatively justify this expansive interpretation of untouchability by situating it within Nussbaum's theory of disgust (C).

A. The traditional interpretation

Article 17 abolishes "untouchability" and prohibits its practice "in any form". Within the text of this Article, two questions immediately arise: first, *who is an untouchable?* second, *what are the various forms in which it may be practiced?* Proponents of the traditional view point out that the term "untouchability" has been placed within inverted commas – this indicates that it has a concrete, historically contextualised meaning, which is located in systemic caste-based oppression and exclusion which is widely prevalent in Hindu society.[85] In other words, the Drafters of the Constitution used the term "untouchability" as a technical term referring exclusively to caste untouchability, which cannot be interpreted to include all forms of group exclusion. This understanding was echoed by numerous members during the Constituent Assembly Debates. For example, Professor KT Shah highlighted the absence of a definition of untouchability, without which Article

[83] *Indian Young Lawyers Association* (n 14) [523].

[84] ibid [357].

[85] Constituent Assembly Debates, November 29, 1947, speech by K.M. Munshi <https://www.constitutionofindia.net/constitution_assembly_debates/volume/3/1947-04-29> ("The word 'untouchability' is put purposely within inverted commas in order to indicate that the Union legislature when it defines 'untouchability' will be able to deal with it in the sense in which it is normally understood."); *Devarajiah v B. Padmanna* 1957 SCCOnline Kar 16.

17 could potentially include other forms of group exclusion.[86] This could range from treatment of menstruating women as impure to exclusion on sanitary and hygiene grounds, such as those who are suffering from diseases such as leprosy. In furtherance of this claim, Naziruddin Ahmed moved an amendment that proposed to define untouchability in terms of caste and religion, to give "better shape" to the scope of Article 17.[87] Similarly, other members such as Manohar Das almost exclusively referred to the treatment of Harijans while discussing the radical significance of Article 17.[88]

This interpretation has also been upheld by numerous Courts. In *Devarajiah* v. *B. Padmanna*, the Mysore High Court observed that "comprehensive as the word 'untouchables' in the Act is intended to be, it can only refer to those regarded as untouchables in the course of historical development".[89] Similarly, in *State of Karnataka* v. *Appu Balu Ingale*, the Court held that "Article 17 of the Constitution strikes at caste-based practices built on superstitions and beliefs that have no rationale or logic".[90] However, the most significant exposition of this view was delivered by a five-judge bench of the Supreme Court in *Sri Venkataramana Devaru* v. *State of Mysore*.[91] This case pertained to a temple in Karnataka, which was only open to a specific sect of Hindus known as Gowda Brahmins. On being challenged, the Supreme Court upheld the right of religious groups to exclude the general population under Article 25(2)(b). In doing so, Dasgupta CJ held that the only restriction on religious administration under Article 26 was stipulated in Article 17, which prohibited practice of caste-based untouchability. In defining the scope of this restriction, the Court reasoned that Article 17 was a culmination of attempts to outlaw "a custom which denied to large sections of Hindus the right to use

[86] Constituent Assembly Debates, November 29, 1948, speech by K.T. Shah <https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-29> ("[...] I would like to point out that the term 'untouchability' is nowhere defined… What about those diseases, and people who suffer from, which are communicable, and so necessarily to be excluded and made untouchables while they suffer?").

[87] Constituent Assembly Debates, November 29, 1948, speech by Naziruddin Ahmed <https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-29> The amendment that was introduced read as "No one shall on account of his religion or caste be treated or regarded as an 'untouchable'; and its observance in any form may be made punishable by law".

[88] Constituent Assembly Debates, November 29, 1948, speech by Manohar Das <https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-29>

[89] *Devarajiah* (n 85) [18].

[90] (1995) Supp (4) SCC 469.

[91] AIR 1958 SC 255.

public roads and institutions to which all the other Hindus had a right of access, purely on grounds of birth".[92]

In *Sabarimala*, Malhotra J held that not all forms of exclusion amount to untouchability under the Constitution. Rather, Article 17 only "pertains to untouchability based on caste prejudice […]. The right asserted by the Petitioners is different from the right asserted by Dalits in the temple entry movement".[93] On these grounds, she held that Article 17 was inapplicable to the case of menstruating women.

B. The radical thesis

The radical thesis does not challenge the basic premise of the traditional approach – Article 17 undoubtedly sought to prohibit caste-based untouchability, which had led to some of the worst atrocities and structural oppression in Indian history. However, this view argues that Article 17 is not restricted to caste-based untouchability, but also prohibits various other forms of group exclusion. At its core, Article 17 embodies a larger principle of the transformative constitution – the anti-exclusion principle.[94] As Bhatia observes, the anti-exclusion principle seeks to limit "the power of groups and communities to exclude their constituents in a manner that would interfere with their freedom to participate in normal economic, social and cultural life".[95] Therefore, Article 17 does not only prohibit untouchability against the lower castes, but seeks to emancipate all groups "who have been victims of discrimination, prejudice and social exclusion".[96]

This interpretation can be justified as a matter of a textual construction, constitutional history and judicial precedent. The text of Article 17 prohibits untouchability "in any form" – a deliberately broad phrase that was added to the initial draft prepared by the Fundamental Rights Sub-Committee.[97] This seems to suggest "untouchability" can manifest in various avatars, such as prejudice against menstruating women, all of which would be outlawed under the Constitution. However, what is of greater significance is that the Drafters of the Constitution refrained from defining "untouchability". This is in direct contrast to the Government of India Act 1935, which was laid down a specific list of

92 ibid [23].

93 *Indian Young Lawyers Association* (n 14) [523].

94 Gautam Bhatia, 'Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom Under the Indian Constitution' (2016) 5 Global Constitutionalism 351, 373.

95 ibid.

96 *Indian Young Lawyers Association v State of Kerala* (n 14) [341].

97 B. Shiva Rao, *The Framing of India's Constitution: A Study* (Universal Law Publishing 1968) 202 (The first draft of the provision read "Untouchability is abolished and the practice thereof is punishable by the Law of the Union").

communities that were treated as "untouchables".[98] Moreover, Dr. B.R. Ambedkar expressly rejected the Amendment propounded by Nazaruddin Ahmed, which was ultimately rejected by the Assembly as well. Despite repeated objections that Article 17 was vague, and could potentially include exclusion of multiple other forms of group exclusion, the Constituent Assembly voted against narrowing down this definition.[99]

While most cases have predominantly favoured the traditional interpretation, the exception to this can be found in Sinha CJ's dissenting judgement in *Sardar Sayedna Taher Saifuddin* v. *The State of Bombay*.[100] This case involved a challenge to the Bombay Prohibition of Excommunication Act, 1949, which prohibited the practice of excommunication by the leaders of religious administrations. This legislation was challenged by the Head Priest of the Dawoodi Borah community. By a 4-1 majority, the Supreme Court struck down this Act as unconstitutional as it deprived the Head Priest of the right to manage its own religious affairs. The lone dissenter, Sinha CJ, linked religious excommunication with the prohibition on untouchability under Article 17. He argued that the social practice of excommunication had the effect such that "*the position of an excommunicated person becomes that of an untouchable in his community*".[101] Accordingly, Article 17 was not merely a direct proscription against caste-untouchability, but also encompassed groups that were 'effectively' being treated as untouchables.

On reviewing the text and constitutional history, it is plausible to argue in favour of a broad interpretation of Article 17. However, one question remains: how do different forms of social untouchability interact with another? It is here that Chandrachud J's holding in *Sabarimala* is truly transformative. He argues that caste untouchability is not an independent structure of social exclusion - it is rather one of many manifestations of a "hierarchical order of purity and pollution enforced by social compulsion. Purity and pollution constitute the core of caste".[102] This order may manifest in various other forms. In the realm of sexuality and gender, it manifests in the exclusionary treatment of menstruating women. In the realm of religion, it manifests in the practice of excommunicating certain groups. However, all of these practices emanate from a discriminatory social hierarchy

[98] For an analysis of this argument, see Bhatia (n 94) 368.

[99] Constituent Assembly Debates, November 29, 1948 https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-29.

[100] AIR 1962 SC 853.

[101] ibid [24].

[102] *Indian Young Lawyers Association* (n 14) [343].

that is rooted in ideas of purity and pollution.[103] Rather than targeting one specific form of untouchability, Article 17 sought to break down the institution from which it emanates.

C. Deconstructing purity and pollution

The radical view identifies '*purity*' and '*pollution*' as the defining feature of social untouchability under Article 17. Irrespective of the interpretative issues surrounding the Constituent Assembly Debates, can this approach be normatively justified within a broader theoretical framework of discrimination law? We argue that the construction of '*purity*' and '*pollution*' are manifestations of disgust stigma, which posits that discrimination against certain marginalised groups is based on stigmatising them as '*dirty*' or '*impure*'.

The theory of disgust was propounded by the legal philosopher Martha Nussbaum, who argued that prejudice and social exclusion against certain marginalised groups is based on disgust.[104] According to this theory, human beings often harbour disgust towards certain substances, such as their own bodily fluids and excreta. Some scholars, such as Rozin, argue that the reason behind this disgust is because it forces human beings to confront their own animality.[105] Irrespective, Nussbaum labels this phenomenon as "primary disgust", which she considers an inherent aspect of human existence. However, she further argues that human beings have a tendency to distance themselves from their animality by projecting this disgust onto others - this cognitive response manifests in the attribution of quasi-animal characteristics to a subaltern group, such as homosexuals, Jews or African Americans. These groups are then stigmatised in various ways, such as being identified as hyper-sexual, smelly, less intelligent and so on.[106] On a fundamental level, "projectile disgust" challenges the humanity of the minority group, who are portrayed as uncivilised or barbaric. Nussbaum identifies

[103] See Gautam Bhatia, 'I send my soul through time and space/ to greet you. You will understand […]: On Sabarimala and the Civil Rights Cases' (*Indian Constitutional Law and Philosophy*, October 29, 2018) <https://indconlawphil.wordpress.com/2018/10/29/i-send-my-soul-through-time-and-space-to-greet-you-you-will-understand-on-sabarimala-and-the-civil-rights-cases/> accessed 8 August 2020 ("In other words, like slavery was the most horrific and most tangible manifestation of racial hierarchy, untouchability was the most horrific and most tangible manifestation of an exclusionary social order that was grounded in ideas of purity and pollution. There were, however, other manifestations of that order as well.").

[104] Martha Nussbaum, *From Disgust to Humanity: Sexual Orientation and Constitutional Law* (OUP 2010).

[105] Paul Rozin, 'Disgust' in M. Lewis and J. M. Haviland-Jones (eds.), *Handbook of Emotions* (Guilford Press 2000) 637-53.

[106] Martha Nussbaum, 'Disgust or Equality? Sexual Orientation and Indian Law' (2010) 6 JILS 1, 5 ("The so-called thinking seems to be: if those quasi-animal humans stand between us and our own animal stench and decay, we are that much further from being animal and mortal ourselves").

various groups that have been treated in this manner – homosexuals, Jews, African-Americans and menstruating women. That is not to discount a variety of other factors that may lead to prejudice, such as religious beliefs and other psychological causes. However, it cannot be denied that disgust stigma is one of the central pillars of discrimination against different marginalised groups, which eventually gives rise to various tropes and stigmas.[107] In conceptualising queer discrimination, disgust stigma cannot be ignored.

In India, the construction of "purity" and "pollution" is the most prominent manifestation of disgust stigma. Within the caste system, Dalits have historically been forced to work as manual scavengers, which has strengthened the stigma of the lower castes being "unhygienic", and "polluting".[108] However, the purity-pollution dichotomy is not restricted to the lower castes. Various subaltern groups in India are stigmatised on the basis of disgust, such as Muslims, Dalits, menstruating women, aged people, and, as argued in greater detail later, homosexuals and transgenders.[109] In the case of Muslims, the role of disgust stigma during the 2002 Gujarat riots is well documented, where Muslims were often portrayed as "hyper-fertile" and "animalistic".[110]

Therefore, the radical thesis advances our understanding of discrimination in India in two ways. First, it may be argued that this interpretation dilutes the significance of caste discrimination in India. On the contrary, the radical thesis recognises the intersections between gender, sexuality and caste in India, which sheds light on how different groups are stigmatised in the name of purity.[111] That does not mean that all groups are stigmatised equally – rather, it shows how notions of purity are a common element in discrimination against various social groups. Second, it provides constitutional protection to minority groups who remain stigmatised in contemporary society, which may pave the way for substantive equality in the future.

V. Impurity as Disgust: Reading Queerness into Article 17

This brings us back to the central question that this article poses: how do we protect queer sexual minorities from private discrimination under the Constitution

[107] Zoya Hasan *et al*, 'Introduction' in Zoya Hasan et al. (eds.) *The Empire of Disgust: Prejudice, Discrimination and Policy in India and the US* (OUP 2019).

[108] See Marc Galanter, 'Untouchability and the Law' (1969) 4 Economic and Political Weekly 131, 137 ("In its broadest sense 'untouchability' might include all instances in which one person treated another as ritually unclean and as a source of pollution.").

[109] ibid.

[110] See Martha Nussbaum, *The Clash Within: Democracy, Religious Violence and India's Future* (HUP 2007).

[111] On the intersection between caste and gender, see B.R. Ambedkar, 'Castes in India: Their Mechanism, Genesis and Development' in Dr. Babasaheb Ambedkar (ed.), *Writings and Speeches* (Dr. Ambedkar Foundation 1979).

of India? We argue the answer lies in Article 17 of the Constitution, which is horizontally applicable against all private actors.[112] Needless to say, this argument is firmly grounded in the radical tradition, which interprets Article 17 as an expansive prohibition on all forms of group untouchability.

During the hearings in *Naz*, the Delhi High Court briefly observed that there may be an analogy between untouchability and sexual orientation.[113] Unfortunately, the Court did not elaborate on this argument, which finds no mention in the final judgement.[114] We develop this claim further by arguing that discrimination suffered by queer individuals is a structural form of "untouchability". To prove this, we begin by demonstrating the role of "purity" in discrimination against non-hetero sexuality (A). In particular, we deconstruct the discourse surrounding public health, HIV and queerness in India. Thereafter, we analyse the continuities between caste hierarchies and sexual orientation. Through this, we show that the impurity of the lower castes is historically intertwined with the stigmatisation of sexual minorities in India (B). Therefore, we conclude that queer prejudice and discrimination is rooted in disgust, which is a manifestation of the purity-pollution hierarchy that is intrinsic to the caste system. Accordingly, it is a form of "untouchability", which brings it within the purview of Article 17.

A. Purity and pollution in queer prejudice

The role of disgust stigma in discrimination against queer sexualities is well documented. In many ways, it can be said to be the core tension behind the struggle to strike down sodomy laws across the world. It was a central feature of the famous debate between Lord Devlin and HLA Hart, with the former arguing that collective social disgust towards homosexuals was sufficient to criminalise same-sex intercourse.[115] In *Evans* v. *Romer*, a case before the US Supreme Court, a witness claimed that homosexuals routinely ate each other's faces, consumed raw blood and

[112] Madhav Khosla, *The Indian Constitution* (OUP 2012) 89.

[113] Edited Transcript of the Final Arguments Before the Delhi High Court, in Arvind Narrain and Marcus Eldridge (eds.), *The Right that Dares to Speak its Name: Naz Foundation v. Union of India and Others* (Alternative Law Forum 2009) 48.

[114] A brief explanation is provided in Sujit Chaudhary, 'Living Originalism in India? "Our Law" and Comparative Constitutional Law' (2013) 25 Yale J. of Law and the Humanities 1, 15 ("But what is the link between sexual orientation and untouchability? The treatment which homosexuals experience today is similar in kind to that which "untouchables" experienced and which prompted the adoption of Article 17, in that the treatment of homosexuals likewise flows from their social status.").

[115] Patrick Devlin, *The Enforcement of Morals* (OUP 1965); *c.f.* H.L.A. Hart, *Law, Liberty and Morals* (OUP 1963). See, generally, Peter Cane, 'Taking Law Seriously: Starting Points of the Hart-Devlin Debate' (2006) 12 J. of Ethics 21 (2006).

brought back diseases from their travels in foreign countries.[116] In particular, these descriptions were aimed at eliciting revulsion towards sexual practices that are not peno-vaginal, referencing purportedly "filthy" acts, such as anal sex. In the case of transgenders, disgust is often motivated by revulsion towards the trans body, which challenges heterosexual norms by rejecting the sex assigned at birth. As Miller *et al* point out, disgust towards trans bodies is particularly strong in response to a change of sex through hormone therapy or surgery.[117]

The role of disgust in perpetuating social prejudice against sexual minorities can be seen in various avatars in India during the struggle for decriminalisation. This can be seen in Lord Macaulay's refusal to even explicitly mention same-sex intercourse while drafting Section 377, out of the fear that it "could give rise to public discussion on this revolting subject".[118] Similarly, in *Mihir* v. *State of Orissa*, Pasayat J observed that "carnal intercourse is abhorred by civilised society", and offences under Section 377 implied "sexual perversity" in some form.[119] Lastly, in *Koushal*, the Supreme Court rebuked the Delhi High Court for relying on foreign precedents "in its anxiety to protect the *so-called* rights of LGBT persons".[120] The implication of using the phrase 'so-called' is fairly clear – the rights of homosexuals are somehow inferior to those held by the heterosexual majority.

One of the primary arguments used to defend Section 377 was that decriminalisation would lead to a spike in HIV-AIDS cases and public health risks.[121] In the United States of America, HIV-AIDS was popularly referred to

[116] *Evans v Romer* 517 U.S. 620 (1996).

[117] P.R. Miller et al., 'Transgender politics as body politics: Effects of disgust sensitivity and authoritarianism on transgender rights attitudes' (2017) 5 Politics, Groups and Identities 4, 5 ("Individuals with stronger disgust dispositions may have more adverse reactions to transgender people who challenge body norms by displaying gender on their bodies – dress, makeup, or hair, for example – in ways that do not match their sex assigned at birth. Likewise, those strongly oriented toward disgust may react negatively to perceived body norm challenges from those who alter their bodies via hormone therapy or surgery. And given the literature on disgust and outgroup attitudes, disgust may be especially potent in this context given that transgender people are a relatively stigmatized minority group.").

[118] Alok Gupta, 'Section 377 and the Dignity of Indian Homosexuals' (2006) 41(46) Economic and Political Weekly 4815.

[119] *Mihir Alias Bhikari Charan Sahu v State* 1991 SCCOnline Ori 438, [7]; *Chitranjan Dass v State of UP* (1974) 4 SCC 454 ("a highly educated and cultured individual, was suffering from mental aberration when he committed the offence of sodomy").

[120] *Suresh Kumar Koushal* [n 66].

[121] AIDS Bhedbav Virodhi Andolan, *less Than Gay*: *A Citizens Report on the status of Homosexuality in India* (1991) <https://s3.amazonaws.com/s3.documentcloud.org/documents/1585664/less-than-gay-a-citizens-report-on-the-status-of.pdf> accessed 24 August 2020.

as the "gay plague" on being associated with same-sex intercourse.[122] This is a unique manifestation of the theory of disgust – it attributes the spread of HIV-AIDS to the alleged "promiscuity" of the gay man, who is portrayed as engaging in unsafe and unsanitary sexual practices. A review of the transcripts in both *Naz* and *Koushal* shows that the State considered same-sex intercourse as a public safety risk.[123] Accordingly, the State argued that Section 377 was a deterrent measure against unsafe sexual practices that resulted in greater HIV-AIDS infection. This was despite an affidavit from the National AIDS Control Organisation which effectively said that Section 377 impeded the fight against HIV-AIDS. Historically, the weaponization of HIV-AIDS discourse to regulate marginalised communities is not a new phenomenon. For example, in the United States of America, HIV-AIDS has been used as a pretext to persecute communities on the fringes of civilised society, such as poor African-American intravenous drug users.[124]

This argument should not be taken to mean that untouchability in caste and sexual orientation are identical. While the caste system constructs purity on the basis of birth, queer untouchability operates through the medium of disgust – it associates the queer with promiscuity, unsafe sexual practices and disease to justify social exclusion and prejudice. However, there are many similarities in the way both groups are stigmatised as impure. For example, both communities are perceived to be "unsanitary" and associated with faecal matter. While the lower castes are perceived as "unsanitary" due to the practice of manual scavenging, queer groups are treated the same way due to non-hetero sexual practices. The practice of untouchability and prejudice towards both groups is heavily linked with disgust stigma.

B. Caste and sexual orientation

In the previous section, we established that queer discrimination takes place along the axis of "purity" and "pollution", much like caste discrimination. In this Section, we take this claim one step further – we argue that queer discrimination is not only similar to caste discrimination in its *modus operandi*, but is historically linked with the development of the caste system. Much like gender and caste intersect in

[122] John Paul Brammer, 'Three decades later, men who survived the 'gay plague' speak out' (*NBC News*, 2 December, 2017) <https://www.nbcnews.com/feature/nbc-out/three-decades-later-men-who-survived-gay-plague-speak-out-n825621> accessed 24 August 2020.

[123] Notes of Proceedings in *Suresh Kumar Kaushal v. Naz Foundation* 32 <http://orinam.net/content/wp-content/uploads/2012/04/Naz_SC_Transcript_2012_final.pdf> ("[...] read out figures for various States in India of HIV prevalence among MSM community. He said that unprotected anal sex was the most important risk factor for the spread of HIV.").

[124] ABVA Report (n 121) 3.

the treatment of menstruating women, sexual orientation and caste intersect in the exclusion and prejudice towards queer sexualities in India.

Throughout the prolonged struggle against Section 377, we repeatedly see references being made to "Indian values and morals", both within the courtroom as well as in broader public discourse. Defenders of Section 377 argued that Indian culture represents a puritanical regime of sexual morality, where only heterosexual intercourse within the realms of marriage was permitted.[125] However, this argument ignores the influence of colonialism on the development of sexual morality in India. As Menon argues, the culture and tradition that led to the enactment of Section 377 was not "Indian", but rather "a concoction of patriarchal British prudery and minority Indian practices".[126]

In the context of India, the rise of disgust towards queer sexualities roughly corresponds to the advent of colonial rule. Prior to the arrival of the British, sexuality was widely celebrated in Hindu culture. This can be seen through various texts, most prominently in the sexually explicit kama-sutra. As Menon shows, Indian history is rife with examples of sexual freedom and desire that extend far beyond the heteronormative ideal.[127] To name a few, Hijras were treated as auspicious and not stigmatised, the rulers of Awadh dressed as women during feast days and women had multiple sexual partners. This is not to say that this description is without exception – for example, the Manusmriti promotes the notion of sexual purity in many ways. However, the evidence overwhelmingly indicates that Indian culture recognised a wide and permissive range of sexual practices prior to the arrival of the British.

However, the advent of British colonialism brought with it a gradual decline of sexual freedom in India. The British were shocked by Hindu sexual practices, which they regarded as "dirty" and "filthy".[128] Accordingly, they sought to legislate and regulate the exercise of desire in India. It was during this time that the infamous Criminal Tribes Act, 1861 was enacted, in which hijras were treated as a

[125] Aniruddha Dutta, 'Retroactive Consolidation of 'Homophobia' in Arvind Narrain and Alok Gupta (eds), *Law Like Love: Queer Perspectives on Law* (Yoda Press 2011) 163 ("The Hindu right and more conservative factions of the government have set the fray in proclamations of homosexuality as 'western', corruptive or inhospitable to 'Indian' values and society).

[126] Madhavi Menon, *Infinite Variety: A History of Desire in India* (Speaking Tiger Publishing 2018) 7.

[127] ibid; see generally Giti Thadani, *Sakhiyani: Lesbian Desire in Ancient and Modern India* (Bloomsbury 2016).

[128] Nussbaum (n 110) 8.

"criminal caste".[129] Similarly, Section 377 of the Indian Penal Code was a version of a similar provision of the British Penal Code, which declared that buggery was an offence against the Creator.[130] Over time, this critique of Indian sexuality was internalised by upper-caste Hindus, who sought to mimic the practices and morals of Victorian England.[131] Therefore, the caste-order that crystallised during the later years of colonialism attributed hyper-sexuality and sexual perversity to the lower castes, while the upper castes prided themselves on sexual purity.[132] This took various forms. For example, the purity of the upper castes was ensured by preventing upper caste women from engaging in sexual intercourse with men from the lower castes.

Historically, this shows that the oppression of queer sexuality was an integral element of the caste hierarchy that emerged during colonial India. The emergence of disgust towards non-hetero sexual practices was heavily associated with the impurity of the lower castes. Prejudice towards queer sexualities is a form of the purity-pollution hierarchy identified by Chandrachud J in *Sabarimala*, akin to the treatment of menstruating women. Therefore, we conclude that queer discrimination and prejudice is a form of social untouchability, which falls within the purview of Article 17. Accordingly, this provides an independent basis through which private actions can be subjected to the anvil of constitutional review.

VI. Conclusion: Civic Equality Beyond Decriminalisation

The decriminalisation of same-sex intercourse has been hailed as a ground-breaking moment in Indian history for various reasons. After all, it was a victory that was achieved after three decades of litigation and activism. For some, it marked the end of treating homosexuals as criminals and "unapprehended felons". For others, it represented an unequivocal rejection of Victorian morality

[129] *See* Dilip D'Souza, *Branded by Law: India's Denotified Tribes* (Penguin 2001) 57 (quoting Jawaharlal Nehru as saying "I am aware of the monstrous provisions of the Criminal Tribes Act which constitute a negation of civil liberty […]. An attempt should be made to have the Act removed from the statute book. No tribe can be classed as criminal as such and the whole principle is out of consonance with all civilized principles of criminal justice and treatment of offenders.").

[130] British Penal Code 1797, §377 ("Buggery is a detestable and abominable sin among Christians not to be named, committed by carnal knowledge against the ordinance of the creator and order of nature by mankind with mankind, or with brute beast, or by womankind with beast.").

[131] Nussbaum (n 110) 9.

[132] Uma Chakravarthi, 'Conceptualising Brahmanical Patriarchy in Early India: Gender, Caste, Class and State' (1993) 28(14) Economic and Political Weekly 579, 579 ("The need for effective sexual control over such women to maintain not only patrilineal succession [a requirement of all patriarchal societies] but also caste purity, the institution unique to Hindu society. The purity of women has a centrality in Brahmanical patriarchy, as we shall see, because the purity of caste is contingent upon it.").

in a democratic society. Nonetheless, it is clear decriminalisation is only the first step in a longer journey towards achieving substantive political and social equality in India. There are many directions that the queer rights movement can go from this point onwards. This includes petitioning for the right to marry, civil unions, full property and inheritance rights.[1]

While the significance of decriminalisation cannot be understated, equally the continued existence of private discrimination and oppression cannot be ignored. In a rigidly hierarchical society, the persecution of queer minorities continues despite the reading down of Section 377. As the ICJ Report highlighted, it takes place in a variety of different forms, across public and private spaces. In other words, more is required to substantively give effect to constitutional guarantees of equality and human dignity. This may take the form of anti-discrimination legislation, as has been enacted in the United States. Our argument suggests that this conundrum can be unanswered by unlocking the radical potential within the Constitution of India, through an interpretation of Article 17.

[1] See Satchit Bhogle, 'The Momentum of History – Realising Marriage Equality in India' (2019) 12(3-4) NUJS LR. 1-22.