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A Critical Analysis of the Court of Appeal Judgment in Bebb v Law Society [1913] EWHC 1

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The Court of Appeal in Chancery ('Court of Appeal') on 10th December 1913 issued their judgement for the case *Bebb v Law Society ('Bebb').*[1] This well-renowned landmark case was one of many 'persons' cases. It concerned whether or not permission should be granted for women to be admitted as solicitors of the Supreme Court. The 7-pages long judgement has often been criticised and used as an example to highlight the prejudice and inequality that women of the early 20th century faced when trying to join the male-dominated legal profession.

This case commentary aims to critically evaluate, examine and analyse the Court of Appeal judgement in *Bebb.* In order to do so, various facets comprising the logic behind the judgement, the use of rhetoric and narrative skills in the judgement, the effect of having judges different from those of this case and the context of *Bebb* will be explored. The case commentary will assert and signify that *Bebb* reflected society's attitudes to women during that time.

Case Summary

Miss Gwyneth Marjorie Bebb, the figurehead of the movement for women to enter the legal profession, along with three other women Karin Costelloe, Maud Ingram and Lucy Frances (Nancy) Nettlefold, applied to the Law Society (respondent) to take the preliminary examinations in December 1912.[2] These four women were 'carefully' chosen to apply to the Law Society to bring a test case before the courts (as agreed by the Law Society) after other branches of the legal profession (the Law Society and Parliament) resisted admitting

[1][1914] 1 Ch. 286. Due to the nature of the report, paragraph numbers are absent in the judgement. Hence, page numbers will be used to reference the part that is being addressed.
[2]Dr Judith Bourne, 'Gwyneth Bebb: the past explaining the present' (The Law Society Gazette, 29 April 2019)<https://www.lawgazette.co.uk/gwyneth-bebb-the-past-explaining-the-present/5070047.article> Accessed 2 May 2021.

women.[3] The women aimed to receive articles of clerkship and then be admitted as solicitors. However, the Law Society notified them that if they chose to appear for the examination, they would be denied admission as solicitors due to them being 'women'. The women decided to challenge the Law Society and eventually appealed to the Court of Appeal. The reason behind why Miss Bebb was chosen as the plaintiff is unknown. It is open to a wide range of speculations – ranging from being the most qualified candidate to her last name being the first one alphabetically.[4] According to s. 2 of the Solicitors Act 1843, *"No person shall act as an Attorney or Solicitor […] unless such Person shall after the passing of this Act be admitted and enrolled and otherwise duly qualified as an Attorney or Solicitor, pursuant to the Directions and Regulations of this Act"*[5]. The appellant asserted that the word 'persons' could be interpreted to include women in the absence of any 'repugnant'.[6] She sought a declaration that she could be included in 'person'. The Law Society expostulated the appellant's claim and contended that their decision to not admit women complied with the law and as a result, no cause of action had to be provided for the appellant's claim.[7] The central legal issue was regarding statutory interpretation - Whether or not s. 48 of the Solicitors Act 1843 paved the way for women to be encompassed within the word 'persons' of s. 2 of the same Act. The Court of Appeal gave a unanimous decision. They agreed with the respondent and consequently dismissed the appeal.[8]

The logic behind the judgement

Courts are responsible for serving justice and maintaining equality; It is appalling to see courts being reluctant to implement anti-discriminatory regulations.[9] Such was the case with *Bebb*. The logic behind the Court of Appeal decision has often been criticised. Lord Cozens-Hardy MR gave the

[3]Rosemary Auchmuty, 'Whatever happened to Miss Bebb? Bebb v The Law Society and women's legal history' (2011) 31 Legal Studies 199 212.
[4] ibid 213.
[5]Solicitors Act 1843 s 2.
[6]Ibid s 48.
[7]*Bebb* (n1) 286.
[8]Ibid 299.
[9] Alexandrine Guyard-Nedelec, 'Discrimination Against Women Lawyers in England and Wales: An Overview' (2007) 17 Gender Forum <http://genderforum.org/wp-content/uploads/2017/05/200717_WorkingOutGender.pdf> accessed 5 May 2021.

leading judgement. He stated that women were under a *'common law disability',* which prohibited them from becoming solicitors and nothing in the Solicitors Act 1843 which indicates the destruction or removal of this existing disability.[10] He referred to three different factors that suggested the existence of a disability. This consisted of the 300-year-old reference of the Mirror of Justice by Lord Edward Coke - wherein it was expressed *'that women cannot be attorneys'*[11]- *'Fems ne poient estre attorneys'*[12]. Astonishingly, his Lordship decided to determine a case of such high importance by citing a 300-year-old passage, despite claiming that the Mirror cannot be considered as a *'work of the highest possible authority'*[13]. A lot can change within the span of three centuries. By simply referring to a tricentennial text, Lord Cozens-Hardy MR depicted his traditional beliefs and unwillingness to bring in a change in the legal profession. This opinion was voiced by the feminist press when they mentioned that despite being educated in modern schools under modern requirements, they are being judged about sex disability as '*expressed by a judge [Coke] who has been in his grave for three centuries'*.[14]

Lord Cozens-Hardy MR further explains that the foundation of the common law of the country lies on the *'long uniform and uninterrupted usage'* of only men being able to become solicitors.[15] Consequently, as women previously neither applied to become attorneys of law nor were they admitted as attorneys of law, the court could not permit the admission of women as solicitors.[16] For this reason, the disability still existed among women, preventing them from becoming solicitors. This indeed signifies the inflexibility of the legal system in the early 20th century. Swinfen Eady LJ in concurred with the above judgement. He rejected the appellant's argument based on *'the inveterate practice of the centuries'*.[17] Therefore, he stated that since there were no cases of a woman ever taking the role of a solicitor, women cannot become solicitors in

[10] *Bebb*(n1) 294.
[11] Ibid 293.
[12] *Ibid* 296.
[13] *Ibid* 293.
[14] Auchmuty,'Whatever happened to Miss Bebb?'(n3) 216.
[15] *Bebb*(n1) 294.
[16] Ibid.
[17] *Bebb*(n1) 297.

accordance with the law. Furthermore, Phillimore LJ agreed with the 'inveterate' theory. He mentioned that statutes had to be understood and interpreted according to the common law and not with their literal meaning.[18] According to him, the legislators did not intend for women to be admitted as solicitors in public office.[19] Thereby rejecting the literal meaning interpretation of the Act and deciding the case on the basis of its statutory interpretation. This hindered s. 48 of the Solicitors Act 1843 from being applied to women in order to declare them as 'person'. However, this makes it challenging to comprehend the reason behind the creation of s. 48 of the Act. It makes one question why s. 48 section of the 'Solictors' Act referred to 'females' when women could never become solicitors, to begin with.

The judges claimed that due to the lack of precedent (regarding women in such roles), a change in the usual practice of law could only be initiated by the Parliament and not by the court.[20] It is pretty ironic that the test case, as previously mentioned, was initiated by the Parliament. The Parliament relied on the Court to make the amendments in the legal profession. At the same time, the Court deferred reformations and declared that it could be done only through modifications in legislation. This signifies that both the branches of the legal profession were reluctant and lacked interest in introducing a change and moving away from the traditional practice of not allowing women to join the profession.[21]

The rhetoric and use of narrative skills in the judgement

The Court of Appeal judgement suggests that Lord Cozens-Hardy MR wisely used rhetoric and narrative structures to persuade others that his decision was not influenced by the pre-conception that women were incapable of being lawyers due to their personality and inabilities. This is evident when he acknowledged Miss Bebb's capability and intellectual ability[22]. His Lordship used short phrases to make it very clear that he viewed Miss Bebb as a

[18]Ibid.
[19]Ibid 299.
[20]Ibid 294.
[21]Auchmuty, 'Whatever happened to Miss Bebb?'(n3) 216.
[22]*Bebb* (n1) 294.

competent young woman who had the potential to surpass her peers. He never mentioned that he thought less of her on account of her sex. This tactic incorporated by the Master of the Rolls in the leading judgement makes the judgement seem like it was free from prejudice towards women. The fact that he chose to praise Miss Bebb at the end indicates that he tried to reinforce the idea that he held no prejudice against Miss Bebb.

In contrast, the other two judges. Swinfen Eady LJ and Phillimore LJ did not mention anything about the appellant in decisions.[23] It can be inferred that despite Miss Bebb being very well educated and having high potential characteristics, the Lord Justices looked down upon her. They did not deem it necessary to mention her in their respective decisions. Likewise, towards the end of his decision, Phillimore LJ *'incidentally mentions'* that if women were admitted as solicitors, they would not be able to enter a binding contract after marriage and, as a result, would be unable to do so for their clients.[24] This highlights that the Lord Justice was steadfast and very much against the notion of permitting women to qualify as practising professional lawyers despite him claiming that statutory interpretation was the sole reason for his decision.

During the Edwardian era, courts started applying the omission technique according to which '*irrelevant or superfluous facts'* were omitted from judgements.[25] This approach was used in *Bebb as* well. The way the court decides is very much dependent on the facts of the case. However, when courts take the scientific route, i.e. when the judge decides to merely apply the relevant 'rules', it very likely for some facts to be left unrevealed.[26] Miss Bebb worked in the public sector as the Investigating Officer for the Board of Trade.[27] This crucial fact is not mentioned anywhere among the facts of the case. One of the key arguments restricting women was that since women were not allowed to undertake roles in the public office, they could not be admitted to the legal

[23]Rosemary Auchmuty, 'Recovering lost lives: researching women in legal history' (2015) 42 Journal of Law and Society 34, 36.
[24]*Bebb* (n1) 299.
[25]Auchmuty,'Recovering Lost lives' (n21) 38.
[26] ibid.
[27]Auchmuty,'Recovering Lost Lives' (n21) 39.

profession. The defendant asserted that lawyers were employees of the public sector.[28] However, her profession as an Investigating Officer in the public office demanded similar responsibilities to that of a qualified solicitor.[29] Omitting this paradoxical key point is quite preposterous. This would have certainly helped bolster the argument that if being a solicitor was a public function, then Miss Bebb was capable and qualified to become a solicitor, as she was already working in the public sector. The judges chose to leave out this fact from the judgement.

The application of this narrative is used for two reasons. The first one is to avoid feeling empathy so that the judge faces no difficulty when it comes to giving hostile judgements.[30] While the second reason for the usage of the tactic is to prevent any doubts about the judgement being just that could have formed due to the gap between the rule applied and the omitted fact.[31] By implementing the omission technique, the judges showed that since they were not in favour of admitting women, they decided to simply take off a vital fact that would have raised more questions regarding the Court of Appeal judgement.

In different parts of the judgement, the judges have mentioned that the Parliament will have to decide whether or not to admit women.[32] They explained that this is because courts do not have the power to do so as they have to follow the common law of the country (inveterate usage), whereas an amendment in the legislation would open the profession to women as well.[33] The repeated use of this idea within the narrative of the judgement makes it appear as if the Court of Appeal was powerless and so was forced to reject the appeal. On the contrary, the court could certainly have opened the doors for women to become solicitors by giving importance to the appellant's interpretation of s. 48 of the Solicitors Act 1843. Nevertheless, they decided not to do so by choosing the

[28] *Bebb* (n1) 291.
[29] ibid.
[30] Auchmuty,'Recovering Lost Lives' (n21) 38.
[31] Ibid.
[32] *Bebb* (n1) 294; 297.
[33] Ibid 299.

lack of doctrine of precedent and their statutory interpretation of the Act over reform in the legal profession.

The effect of having a different judge

It is very likely that if the case were heard before a different judge at a different time, then the verdict delivered would have been different.[34] Lord Denning was one of the most influential judges of the 20th century. He actively reformed the law, especially for women and delivered judgements that were different from the usual traditional judgements. This was evident in *Williams & Glyn's Bank v Boland used a different approach from the High Court Judge.*[35] He was known for having a unique judgement writing style. Unlike most other judges, Lord Denning gave great importance to context and background. He began his judgement by understanding the parties and their acts with regard to the context.[36] This indeed invoked sympathy for the party that was being wronged and also portrayed the difference between the legal principle that had to be applied and the circumstances that the people faced.[37] Had the judges *of Bebb* adopted a similar approach, they would have got a better understanding of Miss Bebb's situation and the campaign rather than just adhering to the traditional method of simply applying the relevant principles.

It can be contended that if *Bebb* was heard before a female judge today, a different result could have been expected. 'Males' operated as the monopoly sex within the judiciary in the Edwardian society.[38] This is evident in *Bebb* as it was heard before three white men. They could have had discriminatory views about women, although they never explicitly stated it in their judgement.[39] Today, a feminist judge would be able to relate to her own experiences, which would undoubtedly impact her judgment. This would have been very beneficial to Miss Bebb as her case involved one explicit gender angle – women. By providing valid legal reasoning, the female judge could change the fate of *Bebb*.

[34]Auchmuty,'Recovering Lost Lives' (n21) 39.
[35] [1979] CH 312.
[36]Auchmuty,'Recovering Lost Lives' (n21) 39.
[37] ibid.
[38]*Guyard-Nedelec* (n7).
[39]Auchmuty,'Recovering Lost Lives' (n21) 37.

Based on this, there is a high tendency that a feminist judge would have either dissented or would have agreed and provided legal reasoning different from that of the three white male judges of *Bebb*.[40]

The context of *Bebb v Law Society*

While the judgement of *Bebb* comes as a shock to many today, this was not the case in the early 1900s. The case was not an outlier. This is because society had a misogynist attitude towards women. Despite the judgement being hugely disappointing, it was scarcely unpredictable. The case was one of many cases wherein women fought for their rights and equality. Thirty years before *Bebb,* Bertha Cave was rejected from being admitted in the legal profession - The House of Lords unanimously dismissed her appeal due to the absence of precedent (just like the *Bebb*).[41] This indeed signifies the stagnant progression of the law when it came to opening the profession for women. *Bebb* was a part of the first wave of the feminist movement, which included the suffrage movement. Women were kept away from the legal profession for the same reason as the national suffrage – lack of precedent. This clearly emphasises the role of women in the 20th century and the fight that they had to put across. Despite the case failing, the judgement received a lot of backlash from the media; they began questioning if men were *'afraid of woman's brains'*[42]*,* marking a shift in the societal views about women.

Bebb can be used to compare and understand the position of women around the world when trying to enter the legal profession. The discussion regarding the admission of women in the legal career began in France around the same time as it did in England. However, women were admitted as lawyers in France 20 years before England.[43] This because of the Chauvin case, which made the

[40] Rosemary Hunter, 'The Feminists Judgements Project' (UKSC Blog, 17 January 2010) <http://ukscblog.com/the-feminist-judgments-project/#:~:text=The%20Feminist%20Judgments%20Project%20is,significant%20cases%20in%20English%20law> accessed 07 May 2021.
[41] Ericka Rackley and Rosemary Auchmuty (eds), *Women's Legal Landmarks: Celebrating the history of women and law in the UK and Ireland*. (Bloomsbury Publishing 2018) <https://www.perlego.com/book/859168> 26.
[42]Auchmuty, 'Whatever happened to Miss Bebb?'(n3) 217.
[43]Christine Alice Corcos, 'Portia Goes to Parliament: Women and Their Admission to Membership in the English Legal Profession' (1998) 775 Denv. U. L. Rev. 307, 327.

new government want to amend the legislation for women.[44] Moreover, in Canada, *Edwards v Attorney General of Canada*[45] marked the conclusion of the 'persons' cases after women were recognised as 'persons' under the British North America Act 1867.[46] Similarly, women in South Africa could not be admitted as lawyers.[47] *Incorporated Law Society v Wookey*[48] reformed the law, and it was declared that 'person' included women as well. These examples clearly illustrate the reluctance that different parts of the world when it came to allowing female lawyers. Contrastingly, New Zealand was the only member of the Commonwealth that never disapproved women of becoming lawyers. The first female attorney was Ellen Melville in 1909. [49]

Conclusion

To summarise, *Bebb* helps understand the progression of the role of women in England over the past centuries. While the case failed, it did have a significant role in the feminist campaign, which advocated for women's rights and paved the way for women to qualify as lawyers in less than a decade. This resulted in major amendments in the legislation. The judges demonstrated some prejudice towards women through their traditional reasonings and use of rhetoric and narrative features. Nevertheless, *Bebb* being heard before the Court of Appeal shows the beginning of the change in women's position.[50]

[44] ibid 326.
[45] [1930] AC 124, [1929] UKPC 86.
[46] Rackley and Auchmuty (n39) 36.
[47] *Corcos* (n41) 326.
[48] 1912 AD 623.
[49] *Corcos* (n41) 326.
[50] Auchmuty, 'Recovering Lost Lives' (n21) 37.

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The COVID-19 Crisis, Domestic Violence and Indian Legal Shortcomings: An Examination of How the Pandemic Helped Reveal Structural Deficiencies in the Indian Legal Framework

Hazel Lincy Ebenezer

Introduction

Since the beginning of 2020, the COVID-19 crisis affected the lives and livelihood of millions, if not billions, around the world. This extremely public global pandemic was closely followed by a relatively private and less obvious 'shadow pandemic'.[1] The terminology of a 'shadow pandemic,' coined by the United Nations, refers to the sharp increase in gender-based crimes and violence against women since early 2020. Such an increase is especially seen in reference to cases of domestic violence, with many families forced to stay home together for most of 2020 and 2021. In fact, in April 2020, UN Secretary General Antonio Guterres requested for the declaration of a worldwide domestic violence 'ceasefire'.[2] While doing so, Guterres urged governments to 'put women's safety first as they respond to the crisis.' [3] Despite the international community petitioning for such action relatively early, many governments still failed to account for gender-based violence in their COVID action plans, and the rates of domestic violence in countries all over the world continued to rise.

In 2020, India saw a 100% rise in emergency calls related to domestic violence.[4] Recorded cases of sexual and gender-based violence doubled during the first nation-wide lockdown, from 24 March to 3 May.[5] More specifically, the National Commission of Women faced a 94% increase in reported cases of violence against women in less than a month since the start

[1]'COVID-19 Worsening Gender-Based Violence, Trafficking Risk, For Women And Girls' *UN News*, 2020)<https://news.un.org/en/story/2020/11/1078812>Accessed 8 February 2025
[2] ibid.
[3] ibid.
[4]Payal Seth, 'As COVID-19 Raged, The Shadow Pandemic Of Domestic Violence Swept Across The Globe' (*The Wire*, 2021) <https://thewire.in/women/covid-19-domestic-violence-hdr-2020>Accessed 8 February 2025. Similarly, there was a 30% rise in Cyprus, 40-50% rise in Brazil and 60% rise in the European Union.
[5]Mysore Narasimha Vranda and Moorkath Febna, 'Response To Sexual And Gender-Based Violence Against Women During COVID-19' (2020) 42 Indian Journal of Psychological Medicine 582.

of the first lockdown (24 March 2020 to 16 April 2020).[6] When it comes to domestic violence, the issue was not simply an increase in this form of abuse, but also the decrease in accessibility to services and support systems that previously curtailed or dealt with this ever-prevalent form of violence in India. Therefore, the above percentages are only in reference to the cases that do come to light, where the woman is able to access help.[7] Sadly, many other women were forced to suffer in silence. Exacerbating factors, such as restricted mobility or limited services, resulted in the fact that 'the rise in violence is often hidden.'[8]

Despite the specific characteristics of the COVID lockdown, increased violence faced by women is 'a pattern repeated in many emergencies, whether conflict, economic crisis or during disease outbreaks,'. [9] In countries like India, by not sufficiently protecting women from domestic violence and providing justice for this crime, the law failed to ensure a sustainable and equitable response to the COVID-19 pandemic. Moreover, despite the 94% increase in reported gender-based violence during the first month of the lockdown, Shalu Nigam shares that 'no political leader made any statement regarding stopping violence or providing support to women in need.'[10] In learning lessons from the pandemic, it is as pertinent as ever for the government of this large and diverse country to make sure that women and girls are sufficiently protected from the increased threat to violence that they face during times of crisis. It is equally important that the structural legal inequalities highlighted during the pandemic are sufficiently addressed in order to provide substantive equality beyond the crisis.

This research seeks to understand how cases of domestic violence in India continued to skyrocket during the COVID-19 crisis, despite existing domestic

[6]Shalu Nigam, 'COVID-19: India's Response To Domestic Violence Needs Rethinking' [2020] SSRN Electronic Journal.
[7]Many women who share their living space with their abusers are unable to make a phone call for help without the knowledge of the perpetrator.
[8]'UNSDG | Shadow Pandemic: UN India Responds To Uptick In Violence Against Women And Girls During COVID-19' (*UN Sustainable Development Group*, 2020) <https://unsdg.un.org/latest/stories/shadow-pandemic-un-india-responds-uptick-violence-against-women-and-girls-during> Accessed 8 February 2025.
[9]Ibid.
[10]Nigam,'COVID-19: India's Response To Domestic Violence' (n6).

violence laws criminalising this offense, as well as campaigns tailored to respond to the increase in violence. Along with revealing weaknesses in the government's COVID response, this incongruity also reveals a larger structural deficiency and lack of equity in the Indian legal framework surrounding domestic violence. As Maji, Bansod and Singh highlight, the increase in domestic violence during lockdown 'is a clear indication of the trend that the domestic space is still unsafe for a majority of women.'[11] Beginning with a discussion on domestic violence in India during COVID-19, this paper seeks to understand the reason behind a high rate of cases – both before and during the pandemic – by looking at scripts and perceptions prevalent in India's private, social sphere, which influence the public, social and legal sphere as well.[12]

Although these scripts and perceptions are not indicative of every individual Indian experience, they are largely predominant in Indian society as a whole. The research argues that social perceptions on marriage and gender roles help explain the weaknesses in India's laws surrounding domestic violence. These weaknesses, in turn, are highlighted and exacerbated by the increase in domestic violence during COVID-19. Finally, the paper concludes with a brief discussion of actions that the government can take in order to begin a conversation on creating equitable and long-lasting protection for victims of domestic violence.

COVID 19 and Domestic Violence in India

Existing Laws and Efforts Made during COVID

In order to understand the ways in which domestic violence laws and campaigns have been ineffective, it is important to begin by looking at what these provisions aimed to address. Even prior to the pandemic, the Indian legal

[11]Sucharita Maji, Saurabh Bansod and Tushar Singh, 'Domestic Violence During COVID-19 Pandemic: The Case For Indian Women' [2021] Journal of Community & Applied Social Psychology 6.

[12]The public-private divide is a social divide where certain relationships and offences are placed in the public sphere and therefore under more protection and scrutiny while others are left in the private where the state has minimal intervention. Legally, this is most obviously seen in the division between the predominantly public sphere of criminal law and the private sphere of civil law.

system included domestic violence laws that were tailored to specific forms of abuses,[13] as well as laws that covered domestic violence as a whole. The two most prominent provisions under the latter category included the Protection of Women from Domestic Violence Act (PWDVA),[14] within India's civil law, and Section 498A of the Indian Penal Code (IPC),[15] within India's criminal law. India is often congratulated for its ground-breaking creation of IPC Section 498A in 1983, making it one of the few countries to criminalise domestic violence at the time. However, this definition of domestic violence – under the heading of cruelty by the husband or his family – has a high threshold to cross, as the violence should be 'likely to drive the women to commit suicide', 'cause grave injury or danger to life, limb or health (whether mental or physical)' or be related to a dowry demand.[16] Promisingly, the PWDVA also provides a definition for domestic violence – with a more realistic threshold – which includes emotional and economic, as well as sexual and verbal abuse.[17] However, violation of PWDVA does not hold any criminal consequences.

In addition to these existing laws, the onset of COVID-19 restrictions and the public outcry for protection from domestic violence led to the creation of a few public campaigns and action by states. In April 2020, soon after the first lockdown began, the National Commission for Women (NCW) launched their WhatsApp-based helpline in order to provide a covert method for reporting domestic violence.[18] Similarly, governmental provisions for victims of domestic violence that already existed[19] continued to operate.[20] However, during the same time, the national government had still not made domestic violence services essential – despite the lockdown.[21] Where the national government fell short, a few individual states created their own initiatives in order to try and fill the gap.

[13]Such as dowry-related death.
[14]Protection of Women from Domestic Violence Act 2005
[15]Indian Penal Code 1860, Chapter XXA, Section 498A
[16]ibid.
[17]Protection of Women from Domestic Violence Act 2005, Chapter II, Article 3
[18]Mitali Nikore, 'With Covid-19, Comes The "Shadow Pandemic": How The Surge Of Domestic Violence Gripped India's Women In 2020' (*Times of India Blog*, 2020)
[19]Such as the One Stop Centres and the Emergency Response Support System.
[20]Nikore(n18)
[21]Nigam,'COVID-19: India's Response To Domestic Violence'(n6)

Perhaps most famously, the state of Uttar Pradesh created a 'Suppress corona, not your voice' campaign, which included awareness spreading, a new domestic violence helpline and the assurance that a female officer would address each complaint.[22] Similarly, Kerala's State Commission for Women introduced a tele-counselling facility and a WhatsApp number, [23] while the Maharashtra government's initiatives included a #LockdownOnDomesticViolence campaign.[24] [25]

Increase in complaints

Despite existing laws and individual state efforts, domestic violence complaints remained at an almost steady increase throughout 2020, following its sharp rise during April and May 2020.[26] Regarding the domestic violence cases registered in 2020, Chandra et. al. mention how, 'such a spurt in complaints has never been documented by the NCW in the last decade.'[27]Similarly, the first half of 2021 maintained these high rates of reported domestic violence.[28] Overall, in the first six months of 2021, the NCW had already received 13,337 complaints of crimes against women as a whole, which was more than half of the 23,722 crimes reported during all of 2020 – and certainly higher than the 19,730 crimes reported prior to the pandemic in 2019.[29] Many speculate that 'the increased number of complaints may not be due to new incidents but are rather from repeatedly abused victims.' [30] This theory is corroborated by an online survey on the 'prevalence and characteristics of spousal violence experienced by Indian

[22]Nikore(n18);Nigam,'COVID-19:India's Response To Domestic Violence'(n6); Emma Graham-Harrison and others, 'Lockdowns Around The World Bring Rise In Domestic Violence' (*The Guardian*, 2020)<https://www.theguardian.com/society/2020/mar/28/lockdowns-world-rise-domestic-violence> Accessed 8 February 2025.
[23] Rukmini Sen, 'Stay Home, Stay Safe: Interrogating Violence In The Domestic Sphere' (*Economic and Political Weekly Engage*, 2020);Nikore(n18).
[24]Nikore(n18).
[25]Other researched state efforts include a police phone-up programme in Odisha (Nikore(n18)) and allowing movement of PWDVA protection officers in Tamil Nadu (see Nigam,'COVID-19: India's Response To Domestic Violence'(n6))
[26] 'NCW: Report' (*ncwapps.nic.in*, 2020) <http://ncwapps.nic.in/frmReportNature.aspx?Year=2020>
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[28] 'NCW: Report' (*ncwapps.nic.in*, 2021) <http://ncwapps.nic.in/frmReportNature.aspx?Year=2021>
[29] *id.* for 2021, 2020 and 2019. Within these crimes, the category of domestic violence held the most complaints.
[30]Chandra et. Al(n27)

women during the lockdown.' [31] In the results, 77.6% of respondents who had previously faced spousal violence shared that the violence had increased since the COVID lockdown.[32] This shows us two things. First, it reveals that there were certain unique characteristics of this pandemic, and the lockdown it requires, which 'helped' perpetrators create, maintain and exaggerate an environment of domestic violence.

Second, it supported the fact that domestic violence was a widespread problem with insufficient solutions – and limited reporting – prior to the lockdown as well. Nigam explains; 'it is not that women are not being abused in homes earlier, but during the lockdown, the virus is mirroring and magnifying the discrimination, inequalities, oppressions, privileges and patriarchal violence, all of which already existing in the male-dominated hierarchical and layered society.'[33] Relatedly, Phumzile Mlambo-Ngcuka, the Executive Director of UN Women, describes the global pandemic as 'a perfect storm for controlling, violent behaviour behind closed doors.'[34] This apt analogy showcases how certain characteristics and consequences of COVID-19 'contribute to an environment that triggers violence on women.' [35] Most prominently, these factors included the loss of an income and the particularities of lockdown, such as isolation and proximity to the perpetrator, as well as limitations in seeking support or help.[36] The following section dissects the factors that exacerbated domestic violence during the lockdown, before examining the ways in which domestic violence was maintained and sanctioned even outside of the pandemic.

COVID 19 Factors and Domestic Violence

Loss of Income

[31]Amrit Pattojoshi et. al., 'Staying Home Is NOT 'Staying Safe': A Rapid 8-Day Online Survey On Spousal Violence Against Women During The COVID -19 Lockdown In India' (2020) 75 Psychiatry and Clinical Neurosciences 64.
[32]Ibid.
[33]Nigam,'COVID-19: India's Response To Domestic Violence'(n6).
[34]'UN Chief Calls For Domestic Violence 'Ceasefire' Amid 'Horrifying Global Surge'' (*UN News*, 2020) <https://news.un.org/en/story/2020/04/1061052>
[35]Vranda and Febna(n5) 582.
[36]These factors, among others, are mentioned by Vranda and Febna(n35) 582; Akshaya Krishnakumar and Shankey Verma, 'Understanding Domestic Violence In India During COVID-19: A Routine Activity Approach' (2021) 16 Asian Journal of Criminology 25.

The COVID-19 pandemic resulted in the loss of numerous jobs and incomes around the world. In India, more than 90% of working Indians – and 94% of working women – are employed in the informal sector.[37] This menat that many Indians faced a high probability of losing their jobs during the lockdown, and that many women bore 'the brunt of going incomeless.'[38] Both within and outside the pandemic, such a lack of income can lead to distress and depravation of basic needs, as well as constant dependency on the earning spouse – usually the man – which, in turn, can increase vulnerability and exacerbate domestic violence.[39] A husband's loss of income can also be interpreted as a loss of security or control, and can lead to an increased exertion of control over the wife – including her finances or savings.[40] This form of economic abuse is especially damaging for women who have been saving money to leave a violent domestic situation.[41]

Lockdown Restrictions

Due to the particular nature of domestic violence as well as the particular nature of the lockdown, the abuser and victim were in constant, isolated contact. Such social isolation resulted in an increased risk of victimization.[42] In this context, victimization can entail, 'increased rates and intensity of threats, physical, sexual, and psychological abuse, humiliation, intimidation, and controlling behaviour.'[43] Interestingly, the rise in domestic violence complaints, recorded by organisations such as the NCW, was also accompanied by a decrease in

[37]Anusua Singh Roy, Nandini Sen and Subrata Sankar Bagchi, 'Gender-Based Violence In India In Covid-19 Lockdown' (2021) 44 Journal of Comparative Literature and Aesthetics 52.
[38]Ibid.
[39]Maji,Bansod and Singh(n11) 6; World Health Organization, 'What The Health Sector/System Can Do' (World Health Organization 2020);Mansi Vora et. al., 'Letter To The Editor: COVID-19 And Domestic Violence Against Women' (2020) 53 Asian Journal of Psychiatry.
[40]Vora(n39);World Health Organization, 'What The Health Sector/System Can Do' (World Health Organization 2020), Akshaya Krishnakumar and Shankey Verma, 'Understanding Domestic Violence In India During COVID-19: A Routine Activity Approach' (2021) 16 Asian Journal of Criminology 25.
[41]India Development Review, 'How Is Domestic Violence Linked To The COVID-19 Lockdown?' (*Feminism In India*, 2020)<https://feminisminindia.com/2020/04/23/covid-19-lockdown-domestic-violence-linked/> Accessed 2023.
[42]Somayyeh Naghizadeh, Mojgan Mirghafourvand and Roghaye Mohammadirad, 'Domestic Violence And Its Relationship With Quality Of Life In Pregnant Women During The Outbreak Of COVID-19 Disease' (2021) 21 BMC Pregnancy and Childbirth 12, also mentioned in World Health Organization, 'What The Health Sector/System Can Do' (World Health Organization 2020).
[43]India Development Review(n41).

complaint calls to some non-governmental organisations, such as Shakti Shalini and Jagori.[44] Krishnakumar and Verma speculate how such a discrepancy could be attributed to the particularities of the lockdown, including: 'confinement at home, constant monitoring and controlling decision-making by the abuser, social isolation of victims from friends and family members, and reduced options for support.'[45] [46] Most of these factors can be attributed back to the proximity of the abuser, which acts as a barrier for the victim to seek help.[47]

During the lockdowns in India, many women facing domestic violence were no longer able to access their support systems, even as the risk of violence at home continued to increase. When domestic violence did occur, the lockdown prevented women from leaving the house to find safety, and it often prevented her family members and friends from supporting or intervening for the victim.[48] Research also found that the police, who were tasked with enforcing the lockdown, held an increasing apathy towards victims of domestic violence.[49] Relatedly, women hesitated to file a complaint as, if and when their husbands were released, they were still isolated with him – which could lead to an increase in violence.[50] After considering these realities, it is clear to see that the absolutes within the instructions of the lockdown did not take the plights of many Indian women into consideration. Within the parameters of the lockdown, perpetrators further reduced a victim's 'access to services, help and

[44]Krishnakumar and Verma(n40) 21.
[45]Ibid. Also shared in India Development Review(n41).
[46]Particularly pertinent to health and safety during the pandemic, forms of victimisation also include restricting access to soap or hand sanitizer and/or spreading incorrect information about COVID-19, as mentioned in World Health Organization, 'What The Health Sector/System Can Do' (World Health Organization 2020).
[47]Krishnakumar and Verma(n40).
[48]World Health Organization, 'What The Health Sector/System Can Do'(n40); Aviva Parvez Damamia, 'Lockdown And Rise In Domestic Violence: How To Tackle Situation If Locked With An Abuser' (*The Indian Express*, 2020)<https://indianexpress.com/article/lifestyle/life-style/lockdown-rise-of-domestic-violence-how-to-tackle-situation-if-locked-with-abuser-national-commission-for-women-6406268/> Accessed 8 February 2025; Krishnakumar and Verma(n44).
[49]Krishnakumar and Verma(n44).
[50]India Development Review(n41);Esha Roy, 'Domestic Violence, Abuse Complaints Rise In Coronavirus Lockdown: NCW' (*The Indian Express*, 2020) <https://indianexpress.com/article/india/domestic-violence-abuse-complaints-rise-in-coronavirus-lockdown-ncw-6344641/> Accessed 8 February 2025; Or those living in joint families may face abuse from their in-laws in the meantime.

psychosocial support from both formal and informal networks,' as a way to exert control over their spouses.[51] As a double-edged sword – even as extreme isolation was used as a form of domestic violence – a victim's separation from support networks and formal institutions also increased her chances of facing domestic violence during the lockdown. [52]

Examining the particularities of domestic violence during the pandemic reveal something beyond an inefficiency in the government's COVID response. The constant increase in domestic violence, despite established laws and local campaigns, pointed towards a structural shortcoming in the existence and execution of the laws addressing forms of violence against women in India's private social sphere. As the government's lack of acknowledgement of a woman's particular struggles within her home is made more clear, it creates a need to 'rethink and restructure patriarchal assumptions and the notions relating to stereotypical gender norms.'[53] The following section aims to expose some of the social scripts and perceptions that underly the acceptance and apathy towards private forms of violence against women, before examining the broad consequences of these perceptions on the Indian legal system.

Social Scripts, Perceptions and Domestic Violence

Although the nationwide lockdown was mostly a novel concept, women in India's patriarchal society 'have been contesting the boundary of `public' and `private' or ghar and bahar since ages.'[54] With the pandemic in particular, the existing gender roles of some communities – which only allow women to leave the private, domestic sphere for work or school –meant that women were entirely unable to leave during the lockdown.[55] However, men, who are able to travel between public and private social spheres with greater ease, were still allowed – by the state and by the society – to leave the house for essential

[51]World Health Organization, 'What The Health Sector/System Can Do'(n40).
[52]Damamia(n48).
[53]Shalu Nigam, 'COVID-19, Lockdown And Violence Against Women In Homes' [2020] SSRN Electronic Journal.
[54]Nigam'COVID-19: India's Response To Domestic Violence'(n6).
[55]Maji, Bansod and Singh(n11) 6.

purposes.[56] This shows the importance of understanding and reacting to social perceptions and practices when creating equitable laws – both in the short term and for longer lasting change. In order to learn the necessary lessons from the government's lack of a gendered approach to this pandemic, Nigam says that,

> The situation calls for a need to rethink and restructure the class inequalities widened due to impact of globalization and to reconsider the stereotypical patriarchal assumptions and the notions relating to gender norms. A crisis situation provides a platform to rekindle the collective imagination to alter the pre-existing ideas about the gender discourse.[57]

In India, given that a woman was subjected to domestic violence every 4.4 minutes even before the pandemic,[58] there is also a need to reconsider the connections between the 'stereotypical patriarchal assumptions' [59] in much of Indian society and the existing legal mechanisms on domestic violence laws.

Stressing this connection between India's patriarchal system and domestic violence, Maji. Bansod and Singh share how, 'feminist scholars contend that the patriarchal system's gender-power dynamics is at the core of domestic violence.' [60] Social elements, such as patrilineal descent and strongly prescribed gender roles, play a prominent part in enforcing both the patriarchal system and domestic violence.[61] These elements, in turn, are often reinforced and validated through scripts and perceptions, which are passed down across generations within India's private social sphere. These patriarchal scripts and perceptions are also reproduced and strengthened during times of crisis, such as the COVID-19 pandemic. Taking all this into consideration, this research explains much of the systemic deficiencies and lack of equity in the Indian legal framework surrounding domestic violence through the fact that the legal system fails to take the effects of social scripts and perceptions into consideration. This, in turn, affects the creation of a law, the execution of justice and the outcome

[56]Ibid.
[57]Nigam,'COVID-19: India's Response To Domestic Violence'(n6).
[58]Data from National Crime Research Bureau,'Crime In India 2018' (National Crime Research Bureau 2018).
[59]Nigam,'COVID-19: India's Response To Domestic Violence'(n6).
[60]Maji, Bansod and Singh(n11) 2.
[61]Ibid; Linda Stone and Caroline James,'Dowry, bride-burning, and female power in India' (1995) 18 Women's Studies International Forum 2, 129.

of a case. This section briefly examines two sets of social scripts and perceptions relating to marriage which, both separately and together, contribute towards a social and legal acceptance of domestic violence in India.

Marriage as Necessary and Permanent

The first social perception examined, which cites marriage as necessary and permanent, provides context on Indian society's conceptions of marriage in general. In much of the country, a woman's marriage is inevitable and, 'traditionally, an unmarried daughter is considered not only a financial and social burden but a source of damnation for her family and ancestors.'[62] Such pressure on the natal family to get their daughter married also gives the potential groom and his family a social pedestal from the very start of the marriage negotiations. Additionally, the burden placed on a woman's family to get her married – for fear of social or religious dishonour – often removes, or at the very least limits, a bride's own say in her marriage discussions. The combination of such strong societal pressure regarding the necessity of marriage, along with the limited role a woman often plays in this life decision, results in further undermining the agency of women within the marital relationship.

With marriage presented as 'the ultimate goal for women,'[63] many women face pressure from their family, relatives and society at large to get married – and get married fast. Once wedded, and in response to their 'accomplishment' of getting married, women are finally welcomed into society as full and participative members. Additionally, marriage in India is not only about the bride and groom but is instead considered to be 'an alliance between two families'[64] – with some women only meeting their future husbands at the proverbial alter. The combination of the importance of marriage in a woman's life and her lack

[62]Priya R. Banerjee, 'Dowry in 21st Century India: The Sociocultural Face of Exploitation' (2014) 15 Trauma, Violence and Abuse 1 34.
[63]Anshu Nangia, 'The Tragedy of Bride Burning in India: How Should the Law Address It' (1997) 22 Brooklyn Journal of International Law 3, 650.
[64]Sonia Dalmia and Pareena Lawrence, 'The Institution of Dowry in India: Why It Continues to Prevail' (2005) 38 The Journal of Developing Areas 2, 77.

of agency in the decisions associated with marriage work together to hinder the rights of women and undermine their role in society.

Scripts that deem marriage as necessary go hand in hand with scripts stating the permanence of marriage – even with the presence of domestic violence. Despite existing civil provisions for divorce, the dissolution of marriage is discouraged socially and religiously – and often strips women of any social status that they may have gained through marriage. This perceived permanence of marriage in Indian society has strong connections with ancient scripts[65] along with the Hindu belief of marriage as an insoluble sacrament.[66] B.R Sharma et al. discuss how, 'the tendency among most Indian women, even though they may suffer and die, is to stay with the husband and in-laws, since they have been trained to be part of their newly acquired family.'[67] Similarly, Laurel Remers Pardee writes that 'society's mandate of obedience extends so far that often Indian wives will refuse to implicate their husbands in their murders even on their death beds, blaming their in-laws instead.' [68] This accompanies the permanence of marriage with an expectation of suffering as well as the keeping family affairs – including affairs of violence – private.[69]

A Husband Can and Should Discipline His Wife

Adjacent to the permanence of a marriage, other social scripts from ancient authorities encourage and expect a husband to 'discipline' his wife – some even claim that a wife is a slave to her husband.[70] Portraying that a woman can only be controlled when a man is in charge, these perceptions are used as a

[65] Such as in the later mentioned Code of Manu.
[66]Mudita Rastogi and Paul Therly, 'Dowry and its Link to Violence against Women in India' (2006) 7 Trauma, Violence and Abuse 1, 70.
[67]B.R. Sharma et al, 'Dowry – A Deep-Rooted Cause of Violence Against Women in India' (2005) 45 Medicine, Science and the Law 2, 167. They go on to say that, 'The woman is brought up to sacrifice her existence for her husband and her children and to keep them happy. These traditional barriers compel her to suffer in silence even though she has a good cause to complain.'
[68]Laurel Remers Pardee, 'The Dilemma of Dowry Deaths: Domestic Disgrace or International Human Rights Catastrophe' (1996) 13 Ariz. J. Int'l & Comp. L. 495.
[69]Rastogi and Therly(n66) 1, 69 and 70.
[70]Judith Greenberg, 'Criminalizing Dowry Deaths: The Indian Experience.' (2003) 11 American University Journal of Gender, Social Policy & the Law 2 822.

justification for the inferiority that women often face within the domestic space.[71] Therefore, a husband is socially sanctioned to dole out discipline for any real or perceived slights. Although originating in ancient times, this social perception – which renders domestic violence as sanctioned and acceptable – is also widely present in society today. In fact, India's 2015-2016 National Family Health Survey found that 49% of women considered violence to be an acceptable 'wear and tear' of marriage.[72] This shows the extent to which patriarchal scripts and perceptions are internalised by members of society.

Pardee observes how 'Indian society conditions females from childhood to be subservient to their husbands. Men, on the other hand, are taught that they may beat or even kill their wives.'[73] Nigam also mentions how, 'she is obliged to obey and serve selflessly, and he gets the right to chastise her. This authority is not questioned even if the husband is a drunkard, gambler or criminal.'[74] This is further supported by Melissa Spatz's elaboration of 'a widespread belief in Indian society that women must serve their husbands and not cause them any harm, whereas men, as their protectors, may beat or even kill their wives if they choose.'[75] Affecting the lives of women both before and after marriage, such expectations particularly translate into the marital relationship by making it 'hierarchical and inegalitarian.'[76] Additionally, as 'Indian culture is characterized by patrilineal descent, patrilocality, the joint family, and strongly prescribed subservience of wives to husbands and in-laws'[77], a new bride is given the lowest position within family as soon as she enters. On this point, Shalu Nigam write that, 'being a new entry in the marital home, a woman is powerless and vulnerable. She occupies the lowest rung in the hierarchy of relationships; therefore, the prerogative of chastisement rests with those who hold seniority

[71]A similar concept is discussed in Jane Rudd, 'Dowry-murder: An example of violence against women' (2001) 24 Women's Studies International Forum 5, 517.
[72]National Family Health Survey 2015-2016. Also cited in Nigam, *Women and Domestic Violence Law in India: A Quest for Justice* (Taylor and Francis 2020) 31.
[73]Laurel Remers Pardee(n69).
[74]Shalu Nigam, *Women and Domestic Violence*(n72) 25.
[75]Melissa Spatz, 'A Lesser Crime: A Comparative Study of Legal Defenses for Men Who Kill Their Wives' (1991) 24 Columbia Journal of Law and Social Problems 4, 614
[76]Nigam, *Women and Domestic Violence*(n72) 245.
[77]RG Menezes et al, 'Deaths: Dowry Deaths' in *Encyclopaedia of Forensic and Legal Medicine* (Elsevier 2016) 69.

in a graded arrangement.'[78] The joint family household also prioritises a husband's loyalty to his parents over loyalty to his wife.[79] With such socio-cultural norms in play, women in Indian society face many spoken and unspoken barriers as they enter a marital relationship.

The Results of Social Scripts and Perceptions

Though such scripts are not representative of Indian society as a whole, the prevalence of domestic and gender-based violence in particular, as well as its increase in times of crisis, clearly shows the importance of addressing these perceptions as something affecting the nation at large. Additionally, the National Family Health Survey also found that 76% of women did not seek help after having experienced domestic violence – which further showcases the entrenched nature of such social scripts and perceptions. [80] Therefore, conditioned to expect and endure abuse, combined with the permanence and necessity of a marriage, women often do not reach out for help. On this point, B.R Sharma et. al. share that, 'the tendency among most Indian women, even though they may suffer and die, is to stay with the husband and in-laws, since they have been trained to be part of their newly acquired family.'[81] It does not help that all of the aforementioned scripts are also attached to an overall perception that the occurrences within the private, familial sphere should be kept as just that – private. A discrepancy in the laws on marriage and marital violence between the public, criminal sphere and the private, civil sphere also reinforce the idea that issues within the family are private matters and should

[78]Nigam, *Women and Domestic Violence*(n72) 24; Purna Manchandia, 'Practical Steps towards Eliminating Dowry and Bride-Burning in India' (2005) 13 Tulane Journal of International and Comparative Law 315.

[79]Greenberg(n70) 810. Interestingly, there lies an argument to the contrary which shares that it is the break-up of joint families and the creation of nuclear families in the 1980s that resulted in husbands losing 'sight of the rights and well-being of their wives.' This is shared in Vineeta Palkar, 'Failing Gender Justice in Anti-Dowry Law' (2003) 23 South Asia Research 2 185. Regardless, it is the wife who finds herself at a disadvantage.

[80]The same National Family Health Survey found that 76% of women did not seek help after having experienced domestic violence

[81]B.R. Sharma et al, 'Dowry – A Deep-Rooted Cause of Violence Against Women in India' (2005) 45 Medicine, Science and the Law 2, 167. They go on to say that, 'The woman is brought up to sacrifice her existence for her husband and her children and to keep them happy. These traditional barriers compel her to suffer in silence even though she has a good cause to complain.'

be dealt with by the family themselves, rather than any outside party.[82] This 'culture of silence' surrounding domestic or marital violence often results in 'an apathetic insensitive criminal justice system response to victims.'[83] Many cases remain unreported as married women reside in the midst of social expectation to both suffer in their marriage and keep the family secrets – including instances of violence – contained. [84] The combination of these expectations highlights the detrimental nature of India's division between the public sphere and the private sphere for victims of domestic violence; women must expect to face cruelty in the private social realm, but they are not socially allowed to address or discuss their suffering in the public social or legal realm either. This secrecy also allows for scripts and perceptions to be continually reinforced and minimally challenged.

This research addresses two main ways in which the effect of social perceptions can be seen in the legal process. First, scripts often prevent many cases from being reported or reaching the police to begin with, as women may choose not to look for help or are pressured not to. Many women who do try to invoke legal provisions face a difficult time of it as they are, directly or indirectly, accused of bringing the public (the state) into the private, family realm. Despite domestic violence laws, 'it is not easy for the judicial system to break into the stranglehold of the patriarchal family.[85]

Second, cruelty or violence that does get reported is often tainted through multiple, intersecting perceptions and behaviours propagated by society. The classifications and judgements on cases of domestic violence are made by police or judicial officers, who themselves are members of society and, pertinently, members of family units within society as well. This allows them to influence, but also be influenced by, social perceptions themselves. For example, the aforementioned scripts regarding a wife's duty to obey and a

[82] Meghna Bhat and Sarah Ullman, 'Examining Marital Violence in India: Review and Recommendations for Future Research and Practice' (2014) 15 Trauma, Violence & Abuse 1
[83] ibid.
[84] Rastogi and Therly(n66) 1, 69 and 70.
[85] 'COVID-19, Domestic Abuse And Violence: Where Do Indian Women Stand?' (*Economic and Political Weekly Engage*, 2020)<https://www.epw.in/engage/article/covid-19-domestic-abuse-and-violence-where-do> Accessed 8 February 2025.

husband's right to discipline, can often results in a misunderstanding of domestic violence as maladjustment to the marriage.[86] This not only turns the victim into the accused, but it also creates a push for reconciliation when women approach a police station or a courtroom with claims of domestic violence.[87] In fact, 'when a battered wife complains under 498A, the violent husband is called upon and the counsellor or the police negotiate on behalf of the woman.'[88] Courts, too, often refer cases under IPC Section 498A to mediation, in hopes of achieving a 'settlement' and 'compromise' between the parties.[89]

In failing to consider social dynamics, Indian criminal law expands the aforementioned scripts operating in the private sphere into action in public spaces as well. This becomes problematic when the influenced public spaces were designated as spaces for the protection of women – such as police stations and courtrooms. In this example, the patriarchal influence of scripts and perceptions is clear to see given that, 'courts and police often fear that intervention will exacerbate adjustment difficulties. They put the continuation of the marriage above the safety of the victim.[90] This shows how the intent and implementation of the law is affected by the reality of domestic violence being social categorised as a private matter. Such a categorisation gives the crime of domestic violence a high level of immunity from interference by the state – despite existing legal provisions. Although the aforementioned scripts and perceptions require an understanding and unpacking in much further detail, the rundown provided in this section can already reveal necessary policy and legal changes on domestic violence, discussed in the section below.

Learnings from COVID 19

With a plethora of social scripts and perceptions, as well as the particularities of COVID-19 to consider, the legal provisions and social campaigns against

[86]Greenberg(n79) 812.
[87] *id.* at 811. This push for reconciliation is also seen in the government established counselling cells as well as the few government shelters that exist for women.
[88]Shalu Nigam, *Women and Domestic Violence*(n72) 57.
[89]Human Rights Law Network, 'Leading Cases on Dowry' (New Delhi 2011) 295
[90]Greenberg(n70) 812.

domestic violence during the pandemic fell short of the mark. In this final section, the research will briefly consider some learnings and future actions to help pave the way for an effective and long-lasting addressal of this form of violence. To begin with, the increase in cases during the pandemic clearly showed that having scattered, local campaigns against domestic violence is not enough. Instead, there is a need for nationwide, 'accessible, diversified and proactive systems to alert authorities and protect victims.'[91] This includes declaring all domestic violence related services as essential,[92] providing easy and immediate access to temporary women's shelters,[93] and training all current essential services to recognise and assist victims of domestic violence[94] - both during and outside national emergencies. Similarly, it is also important to train police and judicial officers to make sure that 'the perpetrators are not just sent off with a warning and that women's domestic violence complaints are treated with high priority.[95] The presence of strong nationwide action also symbolises a resistance against social scripts and perceptions and hopes to counter their widespread and entrenched nature with its own widespread and entrenched campaigns.

Another promising development would be the extensive and robust utilisation of media platforms in order to spread awareness about domestic violence throughout the nation.[96] Roy, Sen and Bagchi share how, 'the COVID-19 pandemic has clearly demonstrated the information-dissemination power of the state machinery.'[97] Employing similar methods, various forms of media can also be used for nationwide campaigns that would correct and fight harmful scripts and perceptions while encouraging public discussions about domestic violence and providing information on filing reports. After understanding the

[91]United Nations Human Rights Office of the High Commisioner, 'COVID-19 and Women's Human Rights: Guidance' (United Nations Human Rights Office of the High Commisioner 2020).
[92]Anusua Singh Roy, Nandini Sen and Subrata Sankar Bagchi, 'Gender-Based Violence In India In Covid-19 Lockdown' (2021) 44 Journal of Comparative Literature and Aesthetics 50.
[93]Vranda and Febna(n5) 583.
[94] India Development Review(n41);Many other recommendations are also provided within Aman, 'Urgent Recommendations On Addressing Domestic Violence During The COVID-19 Pandemic' (Aman - Global Voices for Peace in the Home 2020).
[95]Seth(n4).
[96]India Development Review(n41).
[97]Roy, Sen and Bagchi(n92).

influence of the domestic scripts on domestic violence, both within and outside COVID-19, these simple yet powerful strategies can pave the way towards a safer future for women all over the nation as we continue to emerge on the other side of the pandemic.

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The Monitoring of Fundamental Rights: Implications of the Proposed Screening Regulation of the New Pact on Migration and Asylum

Jessica Kearney-Touhey

Editorial Note

This 2022 paper critiques the Proposed Screening Regulation, [1] noting significant revisions to the proposal since the writing of this piece. On 8 February 2024, the Council's Permanent Representatives Committee finalized a compromise text, introducing key amendments. Approved in April 2024 by the European Parliament and adopted in May 2024 by the Council, the New Pact on Migration and Asylum includes 10 legislative measures, including the finalized Screening Regulation. The Pact will take effect in mid-2026, marking a significant shift in EU migration governance.

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Introduction

The New Pact on Migration and Asylum (New Pact) introduces several new policy instruments to strengthen Europe's approach to migration management. This essay will focus on the Proposed Screening Regulation (Screening Regulation), in particular, Articles 3, 7, and 9. The adoption of the Screening Regulation would impact the fundamental rights of irregular migrants and potential asylum-seekers who reach the European Union (EU). The duration, location, applicability, and possible outcomes of the screening process may result in *de facto* detention and refusal of entry for those seeking international

[1]Commission 'Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817' [Proposed Screening Regulation] COM (2020) 612 final, 23 September 2020

protection. The independent monitoring mechanism could be strengthened by establishing an individual complaint mechanism and requiring the participation of an EU-body, such as the EU Agency for Fundamental Rights (FRA), or civil society, such as human rights or equality bodies, in the monitoring of the screening process. This could increase impartiality and safeguard the right to effective remedy. Additionally, the Screening Regulation would introduce a more exhaustive list of vulnerable groups of irregular migrants who enter the EU, which may lead to the provision of adequate support and considerations for special procedural or reception needs during the screening process.

Background on the New Pact on Migration and Asylum

The New Pact was proposed by the European Commission in September 2020 with the purpose of creating a robust and reliable migration management system.[2] The New Pact intends to provide a comprehensive approach to migration and asylum policy, border management, and strengthen governance by introducing a package of ten new instruments, guidelines, proposed regulations, and amendments to improve the current system.[3] The approach intendeds to improve procedures, create a common framework for migration practices, and foster solidarity amongst EU Member States.[4] The New Pact aims to create a more effective legal framework, enhance strategic planning, and improve operational support. This would be done by streamlining procedures on asylum and return, creating stronger crisis preparedness and response practices, improving screening checks, and introducing new mechanisms for search and rescue operations.[5] Additionally, the New Pact aims to improve external border guard capabilities, adopt a new integration and inclusion action plan, and introduce new sustainable pathways with non-EU countries to match EU labour demands.[6] The New Pact advocates for a whole-of-government approach by promoting the integration of policy-making in the

[2]Commission 'Communication on a New Pact on Migration and Asylum' COM (2020) 609 final, 23 September 2020
[3]Commission 'Migration and Asylum Package: New Pact on Migration and Asylum documents adopted on 23 September 2020' (2020) <https://ec.europa.eu/info/publications/migration-and-asylum-package-new-pact-migration-and-asylum-documents-adopted-23-september-2020_en> Accessed 8 February 2025
[4] Commission (n 1) 1. Introduction: A New Pact on Migration and Asylum
[5]Ibid
[6]Ibid

areas of migration, external border control, asylum, return, the combat against human smuggling, and sustaining partnerships with key third-countries.[7]

Overview of the Proposed Screening Regulation

The Screening Regulation[8] of the New Pact introduces a new pre-entry screening system applicable to all third-country nationals[9] seeking entry into the EU who do not fulfil entry requirements.[10] This is applicable at the external border, after disembarkation following a search and rescue mission, after internal apprehension, and at airports.[11] This proposed regulation introduces uniform procedures of pre-entry assessments to evaluate the individual needs of entrants including the screening of health and vulnerability checks,[12] identity checks,[13] security checks,[14] and biometric data registration.[15] The Screening Regulation additionally sets out rules on the duration of screening,[16] collection of relevant information,[17] and monitoring of the screening process.[18] The Screening Regulation proposes a uniform process for the EU to ensure the prompt identification of those needing international protection, who would be channelled into the asylum procedure, and those who are not in need of protection, who would be channelled into the return procedure.[19] The intention

[7]Commission (n 1) 1. Introduction: A New Pact on Migration and Asylum
[8]Commission 'Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817' [Proposed Screening Regulation] COM (2020) 612 final, 23 September 2020, Explanatory Memorandum, 1. Context of The Proposal
[9]A third-country national is 'Any person who is not a citizen of the European Union within the meaning of Art. 20(1) of TFEU and who is not a person enjoying the European Union right to free movement' as defined in Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders [Schengen Borders Code] (2016) OJ L 77/1, art 2(5)(b)
[10]Entry conditions include a valid travel document issued within the last ten years that is valid for at least six months, an entry visa, a justification of the purpose and conditions of the intended stay and means of subsistence, no prior issuance of a Schengen Information System alert, and be considered a non-threat to public policy, internal security, public health, or the international relations of Member States, as defined in the Schengen Borders Code art 6(1)
[11]Proposed Screening Regulation, art 3
[12]Ibid, art 9
[13]Ibid, art 10
[14]Ibid, art 11
[15]Ibid, art 14(6)
[16]Ibid, art 6
[17]Ibid, art 8
[18]Ibid, art 7
[19]Proposed Screening Regulation, Explanatory Memorandum, 1. Context of the Proposal

is to create a pre-entry stage to improve the use of the relevant policy instruments.[20] By doing so, it aims to strengthen 'synergies between external border controls, asylum, and return procedures'.[21] Thus, the aim is to manage the increase of mixed migration flows[22] and create a tool to identify, at the earliest possible period, persons who are unlikely to qualify for international protection.[23]

Applicability

The Screening Regulation introduces a mandatory screening procedure that Member States must conduct on all third-country nationals in the following scenarios. Those who: 1) are apprehended at the external land, air, or sea border in connection with an unauthorized crossing;[24] 2) disembark in a Member State following a search and rescue mission;[25] and 3) apply for international protection at the external border on in transit zones[26] and who do not fulfill the entry conditions set out in Regulation 2016/399/EU (Schengen Borders Code).[27] The above-mentioned categories tend to cover all irregular migrants presented or apprehended at the border who do not fulfill entry requirements.[28]

Screening Duration and Location

Article 6 *Requirements concerning the screening* indicates that screening should take place at an appropriate location in the territory of the Member State within proximity of the external border.[29] The procedure is to be completed without delay and take a maximum of five days upon presentation or apprehension at the external border or sea disembarkation. In case of

[20]Ibid, 1.4.4. Compatibility and possible synergy with other appropriate instruments
[21]Ibid, Explanatory Memorandum, 1. Context of the Proposal
[22]The proportion of migrants arriving from countries with less than a 25% recognition rate has risen from 14% in 2015 to 57% in 2018 as cited in the Commission 'Amended Proposal for the establishment of Eurodac' COM (2020) 614 final, 23 September 2020, Explanatory Memorandum, 1. Context of the Proposal
[23]Proposed Screening Regulation, Explanatory Memorandum, 1. Context of the Proposal
[24]Ibid, art 3(1)(a)
[25]Ibid, art 3(1)(b)
[26]Proposed Screening Regulation, art 3(2)
[27]Schengen Borders Code, art 6
[28]European Council on Refugees and Exiles (ECRE), 'Reception, detention and restriction of movement at EU external borders' (2021) <https://ecre.org/wp-content/uploads/2021/07/ECRE-Heinrich-Boll-StiftungReception-Detention-and-Restriction-of-Movement-at-EU-External-Borders-July-2021.pdf> Accessed 8 February 2025, 39
[29]Proposed Screening Regulation, art 6(1) and (2)

exceptional circumstances, such as a disproportionately high number of entrants who are subject to screening, the timeline may be extended by an additional five days.[30] Those apprehended within a Member State's territory must be screened without delay within 3 days, and no mention of an extension is indicated.[31] The Screening Regulation does not specify which authority is to conduct the screening.[32] Thus, it may be managed by various state bodies. For example, in the airport procedure of the German border procedure, the initial interview is carried out by the Federal Police, not the asylum authorities.[33] Staff must be competent and possess the appropriate skills to conduct health and vulnerability checks. The EU Agency for Asylum (EUAA) should add a specific module on screening to its training catalogue in order to ensure the responsible authorities possess the skills to conduct these checks.[34]

Those undergoing screening at the external border are not authorised entry into the Member State's territory.[35] This implies that almost all persons seeking international protection would be detained at centres by the external border, presumably without the possibility to leave their accommodation.[36] The European Council on Refugees and Exiles (ECRE) argues that this leads to '*de facto* detention in degrading conditions', further questioning how the Screening Regulation will avoid ongoing failures of current operations in hotspots,[37] such as Italy and Greece, in order to 'operationalise the Commission's promise of "no more Morias"'. [38] Amendments proposed by the European Parliament

[30]Ibid, art 6(3)
[31]Ibid, art 5 and 6(5)
[32]Ibid, art 6(7)
[33]Wiebke Judith, 'Der »New Pact on Migration and Asylum« Übersicht zur geplanten Reform des Gemeinsamen Europäischen Asylsystems' (2021) Asylmagazin 1-2/2021, 7, 8
[34]European Union Agency for Asylum (formerly the European Asylum Support Office), 'Training Catalogue: Training and Professional Development Centre' (2021) <https://euaa.europa.eu/sites/default/files/2021-11/EASO_Training_Curriculum_Catalogue_2021.pdf> Accessed 8 February 2025
[35]Proposed Screening Regulation, art 3(1) and (2) in conjunction with art 4(1)
[36]Judith (n 31) 8
[37]For information on hotspots see Asylum in Europe's report on Italy <https://asylumineurope.org/reports/country/italy/asylum-procedure/access-procedure-and-registration/hotspots/> and Greece <https://asylumineurope.org/reports/country/greece/overview-main-changes-previous-report-update/> Accessed 8 February 2025
[38]ECRE (n 26) 39

suggest that vulnerable applicants should not be subject to detention[39] and should be channelled directly into the regular asylum or return procedure.[40] This is especially relevant to ending the practice of detaining children for the purpose of determining their immigration status, as upholding the best interests of the child should always be primary consideration.[41]

Possible Outcomes

ECRE indicates that '[a]lthough the [Screening] Regulation frequently refers to there being two possible outcomes of the screening – asylum or return procedure – there are in fact four possible outcomes: 1) refusal of entry, 2) return, 3) asylum, or 4) relocation'.[42] The proposed regulation does not mention detention.[43] Directive 2011/95/EU (Recast Qualification Directive)[44] outlines the asylum procedure and Directive 2008/115/EC (Return Directive)[45] outlines the return procedure. Relocation may occur if families separated in different EU countries apply for family reunification during the processing of their asylum claims, as per Regulation 604/2013/EU (Dublin III).[46]

[39]Committee on Civil Liberties, Justice and Home Affairs, 'Draft Report Introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817: Amendments 445-807' (2022) 2020/0278 (COD) <https://www.europarl.europa.eu/doceo/document/LIBE-AM-703277_EN.pdf> Accessed 8 February 2025, Amendment 645
[40]Ibid, Amendment 648
[41]United Nations General Assembly (UNGA), 'New York Declaration for Refugees and Migrants' (3 October 2016) UN Doc A/RES/71/1, para 33
[42]ECRE, 'Screening out rights? Delays, detention, data concerns and the EU's proposal for a pre-entry screening process' (2020) <https://ecre.org/wp-content/uploads/2020/12/Policy-Note-30.pdf> Accessed 8 February 2025, 3
[43]ECRE (n 40)
[44]Commission 'Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)' (2011) OJ L 337/9
[45]Commission 'Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals' [Return Directive] (2008) OJ L 348/98
[46]Commission 'Regulation EU 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)' (2013) OJ L 180/31, art 10

Though refusal of entry is outlined in the Schengen Border Code, it is intended to be without prejudice concerning the right to seek international protection.[47] Case law has proven that this has been violated. This can be seen from the cases dealing with the refusal of entry at the land border,[48] push-backs at sea,[49] and forced removals from Member States to third countries[50] of potential international protection applicants. Within these procedures, some Member States also use the 'so-called legal fiction of non-entry', stating that a person did not formally enter the territory due to their unauthorized entry. These entrants will likely be subject to restrictions of movement or detention.[51] Thus, it is important to ensure a robust monitoring mechanism in the screening procedure in order to ensure fundamental rights are being respected, and the right to claim international protection can be exercised. This will be further explored in section 4.

Extension of Vulnerabilities

High importance is placed on the protection of human rights of persons who have been rendered vulnerable, including eliminating discrimination against them.[52] The Screening Regulation outlines instances in which vulnerability and health checks must be performed. This regulation complements the rules of external border control in the Schengen Borders Code, particularly the responsibility to prevent unauthorized admission and to carry out border control measures without prejudice to the rights of those seeking international protection.[53] The Schengen Borders Code, which regulates the entry of third-country nationals and potential asylum-seekers, provides a non-exhaustive list of vulnerable persons: unaccompanied minors and victims of trafficking.[54] The Screening Regulation expands the concept of vulnerability by linking it to Article

[47]Schengen Borders Code, art 14(1)
[48]*R.A. and Others v. Poland* App no 42120/21 (ECHR, 28 September 2021); *D.A. and Others v. Poland* App no 51246/17 (ECHR, 8 July 2021)
[49]*Hirsi Jamaa and Others v. Italy* App no 27765/09 (ECHR, 23 February 2012)
[50]*N.D. and N.T. v. Spain [GC]* App no 8675/15 and 8697/15 (ECHR, 13 February 2020)
[51]ECRE (n 26) 22. Austria, Belgium, France, Germany, Greece, Hungary, Italy, Netherlands, Portugal, Romania, and Spain rely on this construct
[52] World Conference on Human Rights 'Vienna Declaration and Programme of Action' (25 June 1993) I. art 24
[53]Proposed Screening Regulation, Explanatory Memorandum, 1. Context of the Proposal
[54]Schengen Borders Code, art 16(1)

21 of Directive 2013/33/EU (Recast Reception Conditions Directive), which includes:

> minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of trafficking in human beings, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation.[55]

Suggestions include to add those who have suffered inhuman or degrading treatment, are stateless, at risk of statelessness, or have special procedural or reception needs.[56] Additional EU legislation, such as in the Return Directive, use a narrower definition of a vulnerable group.[57] The Recast Reception Conditions Directive is the most comprehensive definition of vulnerability found in EU law; thus, the adoption of the Screening Regulation would recognize more vulnerable groups of irregular migrants who enter the EU. When there are signs of vulnerabilities or special procedural or reception needs during the screening process, concerned persons should receive adequate support.[58] These support mechanisms address the specific needs and promote the effective protection of the fundamental freedoms and human rights of migrants in vulnerable situations.[59] However, there are concerns as to whether this can be carried out sufficiently within the allocated time period for vulnerabilities that are unapparent or associated with shame. It is often necessary to build up trust with the concerned person in order to identify said vulnerabilities.[60]

Independent Monitoring

The Screening Regulation proposes the implementation of an independent monitoring mechanism established by the Member State in which the screening

[55]Commission 'Directive 2013/33/EU laying down standards for the reception of applicants for international protection (recast)' [Recast Reception Conditions Directive] (2013) OJ L 180/96, art 21
[56]Committee on Civil Liberties, Justice and Home Affairs (n 37) Amendment 639 and 640; Recast Reception Conditions Directive, art 22
[57]Return Directive, art 3(9) defines vulnerable persons as 'minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence'
[58]Proposed Screening Regulation, art 9(3)
[59]UNGA (n 39) Annex II, III. Content, para 8(i)
[60]Judith (n 31) 8

is being completed. Article 7 *Monitoring of fundamental rights* sets out the requirement to ensure fundamental rights are respected during the screening process.[61] It shall ensure compliance with EU and international law.[62] This should be further extended to ensure compliance with national law. The establishment of an independent monitoring mechanism is necessary to ensure fundamental rights are safeguarded throughout the screening procedure.

EU-Level Mechanism

The establishment of an independent monitoring mechanism for the screening process is welcomed, however, Article 7 provides the monitoring body discretionary powers to 'invite relevant national, international, and non-governmental organisations and bodies to participate in the monitoring'.[63] The lack of participation of external organizations in the monitoring process may result in impunity or a lack of impartiality and objectivity. Although the monitoring mechanism is intended to be independent, Member States are in charge of creating and implementing the mechanism within their territories, and have complete freedom to determine what this body will be. For example, the case *Rahimi v. Greece* brought to the European Court of Human Rights involved an unaccompanied Afghan minor seeking asylum who was placed in an adult detention facility without adequate care. He was arrested for irregular entry and put into detention prior to the registration of his asylum application. The asylee was given an information pamphlet outlining available remedies, including the possibility of submitting a complaint to the chief of police, however, it did not outline the process or if they were obligated to respond. The case summary indicates that '[t]he Court further questioned whether the chief of police represented an authority satisfying the requirements of impartiality and objectivity necessary to make the remedy effective'.[64] Furthermore, the Court determined that 'the Applicant undoubtedly came within the category of highly vulnerable members of society, and it had been incumbent on the Greek State to protect and care for him' resulting in violations of Articles 3, 13, 5 § 1(f) and

[61]Proposed Screening Regulation, Explanatory Memorandum, 5. Other Elements
[62]Ibid, art 7(2)
[63]Ibid
[64]*Rahimi v. Greece* App no 8687/08 Summary (ECHR 5 July 2011), para 4

5 § 4 of the European Convention on Human Rights.[65] This case demonstrates the importance of having a monitoring mechanism for the period prior to the asylum or return procedure.

It is essential that the monitoring body is independent from the screening body. In discussing the Forced Return Monitoring Systems, the FRA indicates that,

> [a]ll EU Member States have some form of return monitoring by law. But in practice, gaps remain. For example, in Germany and in Sweden the main monitoring entity is closely connected to the authority responsible for returns. Without sufficient separation between the two, a monitoring system cannot be entirely effective.[66]

This is applicable to the screening procedure as well. The proposal indicates that the European Border and Coast Guard Agency (Frontex) and the EUAA may support authorities in the screening process.[67] It further indicates that the independent monitoring mechanism should be without prejudice to the monitoring of fundamental rights by Frontex.[68] Regulation 2019/1896/EU indicates that Frontex must 'monitor compliance with fundamental rights in all of its activities'.[69] However, there is no mention of an independent entity to monitor that these rights are being safeguarded, and merely states that it is a task Frontex shall perform. Thus, it is unclear which entity would be monitoring the screening process if Frontex is involved in the screening.

Any authority completing the screening procedure must be subject to an independent monitoring mechanism. The European Parliament has called on the European Commission to establish an independent and transparent monitoring mechanism for all operations conducted by Frontex, 'in addition to the internal complaint mechanism in place', in order to comply with human

[65]Ibid para 6
[66]European Union Agency for Fundamental Rights 'Forced return monitoring systems 2021 update' (13 December 2021) <https://fra.europa.eu/en/publication/2021/forced-return-monitoring-systems-2021-update> Accessed 8 February 2025.
[67]Proposed Screening Regulation, art 6(7)
[68]Ibid, Recital (23)
[69]Commission 'Regulation (EU) 2019/1896 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624)' (2019) OJ L 295/1, art 10(1)(e)

rights while implementing external migration policies.[70] Therefore, the Screening Regulation should outline that the monitoring must be performed by a body which is functionally separate from the authority completing the screening process. Additionally, complaints against EU bodies can be heard by the European Ombudsman, adding an additional layer of legal remedy.

Article 7 outlines the supporting role the FRA has in the monitoring mechanism. The FRA is to provide general guidance on the establishment and functioning of the independent monitoring mechanism, including advisory assistance to Member States upon request.[71] The FRA does not play a large enough role to ensure the system operates fairly and in accordance with human rights law as it is only tasked to provide guidance and support to the functioning of the monitoring system, and not participate in the monitoring process directly. The New Pact intends to foster solidarity and responsibility-sharing amongst EU Member States; thus, it would be logical to create an EU-body to safeguard the monitoring process or enhance the FRA's role. The FRA's involvement could be strengthened by tasking it with regular reporting on national monitoring and presenting annual reports on its finding to the EU institutions, European Ombudsman, EUAA, and Frontex.

The creation of a national monitoring body ultimately adds additional pressure on external EU states who are facing delays in the registration of asylum claims,[72] have difficulties maintaining adequate reception conditions,[73] and have deficiencies in the appeals procedure.[74] The possibility of bias or partiality in the independent monitoring system creates further opportunities for potential unlawful actions to occur and risks insufficient oversight throughout the monitoring process. Establishing an EU entity, or enhancing the FRA's role, could safeguard the system's operational integrity.

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[70]European Parliament 'Resolution of 19 May 2021 on human rights protection and the EU external migration policy' (2021) 2020/2116(INI), para 14

[71]Proposed Screening Regulation, art 7(2)

[72]ECRE, 'The length of asylum procedures in Europe' (October 2016) <https://www.ecre.org/wp-content/uploads/2016/10/AIDA-Brief-DurationProcedures.pdf> accessed 1 March 2022, 4

[73]*M.S.S. v. Belgium and Greece [GC]* App no 30696/09 (ECHR 21 January 2011); *R.R. and others v. Hungary* App no 36037/17 (ECHR 2 March 2021)

[74]Council of Europe 'H46-9 M.S.S. and Rahimi groups v. Greece (Application No. 30696/09) Supervision of the execution of the European Court's judgments' (2019) CM/Del/Dec(2019)1348/H46-9

Civil Society and Human Rights Defenders

States, in cooperation with international organizations and NGOs, must create favourable conditions to ensure the full enjoyment of human rights and eliminate any obstacles that prevent the enjoyment of these rights.[75] In the absence of an EU-level mechanism to assist in the monitoring process, an alternative, and perhaps even stronger solution, would be to engage with civil society and human rights defenders. The importance of civil society and governmental bodies in the participation of monitoring is invaluable to safeguarding the procedure. Non-governmental organizations play a fundamental role in supporting national institutions in protecting and promoting human rights of all, and particularly of vulnerable persons.[76] In order to ensure the integrity and independence of the monitoring mechanism, human rights organizations, equality bodies, ombudspersons, NGOs, and international organizations should work in collaboration with the monitoring mechanism and the FRA.[77] Their participation may involve collaboration in the monitoring process, but additionally, in the creation and implementation of the mechanism and its responsibilities.[78] Moreover, the monitoring mechanism should be granted unhindered access to all the potential screening and detention areas such as police stations, detention centres, and reception facilities, as well as access to all documents and recordings of relevance.[79] Full access to detention and holding centres housing irregular migrants undergoing screening can ensure the protection against torture and other cruel, inhuman, or degrading treatment or punishment by public authorities.[80]

Safeguards guaranteeing the independence of the monitoring mechanism must also comply with the *Paris Principles* on 'composition and guarantees of

[75]World Conference on Human Rights (n 50) I. art 13
[76]UNGA 'National institutions for the promotion and protection of human rights' [Paris Principles] (20 December 1993) UN Doc A/RES/48/134, Annex: Methods of operation (g)
[77]Committee on Civil Liberties, Justice and Home Affairs (n 37) Amendment 551
[78]Ibid, Amendment 562
[79]Committee on Civil Liberties, Justice and Home Affairs (n 37) Amendment 550
[80]Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) 2375 UNTS 237, art 4(1) and (2)

independence and pluralism',[81] particularly that there is pluralist representation in the mechanism[82] and that there are sufficient resources to carry out the mandate so it is not subject to government financial control, which can impact its independence.[83] Moreover, the incorporation of the national Ombudsman in the monitoring mechanism, in accordance with the *Venice Principles*,[84] can promote independence, fairness, transparency, and impartiality.[85] The incorporation of an ombudsperson and other relevant institutions can result in the promotion and protection of fundamental freedoms and human rights, promote good governance, bolster respect for the rule of law, and address the power imbalance between public service providers and individuals.[86] Thus, incorporating civil society and human rights institutions in the monitoring mechanism would strengthen the protection of fundamental rights and assist in an efficient and independent exercise of the monitoring mandate.

Individual Complaints

The Screening Regulation does not establish the possible legal remedies if fundamental rights have been violated. An effective framework of remedies to redress rights violations should be provided by States in conformity with applicable human rights instruments.[87] The establishment of an individual complaint mechanism[88] could ensure that those undergoing the screening process can bring forward any allegations of misconduct and rights violations in order to access effective legal remedies.[89] The *Paris Principles* recommend that within the institution's operational framework, it shall '[h]ear any person and obtain any information and any documents necessary for assessing situations falling within its competence'.[90] A system in which complaints and petitions may

[81]Paris Principles, Annex: Composition and guarantees of independence and pluralism, art 2
[82]Ibid, art 1
[83]Paris Principles, Annex: Composition and guarantees of independence and pluralism, art 2
[84]European Commission for Democracy through Law 'Principles on the protection and promotion of the ombudsman institution' [Venice Principles] (3 May 2019) CDL-AD(2019)005
[85]Ibid
[86]UNGA 'The role of Ombudsman and mediator institutions in the promotion and protection of human rights, good governance and the rule of law' (28 December 2020) UN Doc A/RES/75/186, para 8
[87]World Conference on Human Rights (n 50) I. art 27
[88]Committee on Civil Liberties, Justice and Home Affairs (n 37) Amendment 550
[89]European Parliament (n 68), para 11
[90]Paris Principles, Annex: Methods of operation (b)

be brought by individuals, their representatives, and civil society can ensure the institutional promotion and protection of human rights.[91]

By establishing a comprehensive procedure in which individual complaints can be launched, the right to effective remedy[92] can be safeguarded. The institutional process to enable individual complaints to achieve redress for their grievances can improve governance and provide incentives for accountability and transparency in the public institution. This can have particular benefits for vulnerable groups.[93] It is essential that the complaint system has sufficient institutional capacity, clarity, and efficient processes. This includes the government commitment of creating an enabling environment to access the mechanism, receive a timely response, and have no fear of reprisal.[94] This would also require the opportunity to engage with free legal services to ensure comprehension of their rights, explore possible avenues to submit a complaint, and have access to the appeal procedure.[95] In discussing human rights compliance during the implementation of external migration policies, the European Parliament notes with,

> great concern the absence of operational, reporting, monitoring, evaluation and accountability mechanisms for individual cases which track and respond to potential violations, as well as the lack of effective judicial remedies for persons whose rights are allegedly violated as a consequence of informal EU agreements and financial cooperation.[96]

The possibility for individuals or third parties to submit complaints can reaffirm a high quality of standards in the monitoring process. The Screening Regulation mentions that Member States must ensure that their national law ensures the proper investigation of allegations breaching fundamental rights and that

[91]Paris Principles, Annex: Composition and guarantees of independence and pluralism, art 2
[92]European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) ETS 5, art 13; Charter of Fundamental Rights of the European Union (declared 18 December 2000, entered into force 1 December 2009) 2012/C 326/02, art 47
[93]Suchi Pande, 'Towards effective and inclusive grievance redress mechanisms in education' (2022) <https://etico.iiep.unesco.org/en/towards-effective-and-inclusive-grievance-redress-mechanisms-education> Accessed 23 February 2022
[94]Ibid, para 4
[95]Committee on Civil Liberties, Justice and Home Affairs (n 37) Amendment 448
[96]European Parliament (n 68), para 6

complaints will be dealt with promptly and in an appropriate manner.[97] However, it does not indicate the procedure to investigate allegations and the punitive measures taken in the event of violations occurring during the screening process. An important amendment suggestion is to include clear and proportionate disciplinary measures under national law for violations of fundamental rights.[98]

Conclusion

The New Pact on Migration and Asylum intends to strengthen Europe's approach to migration management, however, there are shortcomings to this achievement. The Screening Regulation warrants amendments to the proposed text in order to better safeguard unauthorized third-country nationals entering the EU. The independence of the monitoring mechanism is crucial to protect the fundamental rights of irregular migrants and seekers of international protection. An impartial mechanism that operates in collaboration with EU agencies and civil society can ensure the objectivity and transparency required by institutions that promote and protect fundamental rights. The opportunity for individuals to submit complaints would allow for the investigation of allegations and secure the right to legal remedy. The recognition of additional vulnerable groups can ensure adequate support is granted to persons of concern. It is pertinent that authorities undertaking the screening process are competent in identifying vulnerabilities and provide support to those that have special procedural and reception needs. With necessary improvements to the proposed migration framework, the EU can strengthen its efforts in protecting the most vulnerable.

[97]Proposed Screening Regulation, Explanatory Memorandum, 3. Results of Ex-Post Evaluations, Stakeholder Consultations and Impact Assessments, Fundamental Rights
[98]Committee on Civil Liberties, Justice and Home Affairs (n 37) Amendment 508

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Homelessness and the citizen-consumer

Tereza Koshi

According to Shelter, there are at least 271,000 people judged as homeless in England alone.[1] Homelessness has become an urgent social and political issue which is reflected in the numerous legislation and policy responses towards it in England. However, despite the growth of legislation homelessness in England continues to grow.[2] As will be discussed, this is due to their neoliberal nature in focusing on privatization and individualism.

Neoliberalism is defined as an economic and political ideology that favours the private sector and argues state intervention should be kept at a minimum.[3] For Rose, liberalism reconceptualises 'all aspects of social behaviour […] along economic lines – as calculative actions undertaken through' human choice.[4]

Thus, neoliberalism seeks to alter the relationship between the state and its citizens, with the state's role changing from welfare provider to facilitator, so that citizens take responsibility for their own well-being and success.[5]

This essay will discuss how Turner's argument on the erosion of social citizenship and the growth of the 'citizen-consumer' as a result of neoliberal policies, is highly relevant to homelessness in England today. It will argue that the neoliberal homelessness laws and responses in England have outcast the homeless and do not enable them to be treated equally as citizens because they cannot adhere to the notion of consumerism and the consumer-citizen.

[1] Shelter, At least 271,000 people are homeless in England today' (Shelter, 11 January 2023) <https://england.shelter.org.uk/media/press_release/at_least_271000_people_are_homeless_in_england_today#:~:text=Posted%2011%20Jan%202023&text=New%20research%20from%20Shelter%20shows,England%20are%20without%20a%20home> accessed 8 February 2025.

[2] Kevin Brown, 'The Banishment of the Poor from Public Space: Promoting and Contesting Neo-Liberalisation at the Municipal Level' (2019) 29 Social & Legal Studies 1, 2.

[3] Liz Manning, 'Neoliberalism: What It Is, With Examples and Pros and Cons' (*Investopedia*, 29 July 2022) <https://www.investopedia.com/terms/n/neoliberalism.asp> accessed 11/04/2023.

[4] Nikolas Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge University Press 1999), 141.

[5] Martin Whiteford, 'Street homelessness and the architecture of citizenship' (2008) 2 People, Place & Policy Online 88, 90.

Instead, the homeless are considered as a barrier 'to the smooth flow of consumption'.[6]

The first section of the essay will elaborate on the meanings of social citizenship and citizen-consumer. It will then provide a discussion on how homelessness laws and responses have led to the move from social citizenship to the citizen-consumer notion. Amongst the multiple legislation and responses employed focus will be placed on the Localism Act 2011, the Homelessness Reduction Act 2017 (with its amendments to the Housing Act 1996) and on the responses towards the visible homeless (rough sleepers).

Meanings:

It is necessary here to clarify exactly what is meant by social citizenship. The notion was first introduced by T.H. Marshall in his essay *Citizenship and Social Class* and broadly refers to his idea that the provision of welfare by the state, composes a set of rights associated with citizenship.[7] In other words, Marshall believes there is an expectation that the state will provide its citizens with basic needs to be able to participate as citizens in the community legally, politically, and culturally.[8] This essay takes this notion further to encompass the citizen being better able to participate in their community, because of the basic welfare support. Yet, it can be argued that this is a form of passive citizenship whereby a culture of dependency is created by citizens relying on the state for their welfare.

So, on the other hand, a citizen-consumer is defined in this essay to refer to the active citizen. This citizen is self-regarding, accepts responsibility and makes his own choices according to his circumstances. Thus, the 'patterns of choice and power found in the private economy'[9] are imitated, particularly, by treating citizens as 'consumers of services.' [10] This notion is compatible with

[6] Brown (n 2), 12.
[7] T.H. Marshall, *Citizenship and Social Class* (Cambridge University Press, 1950).
[8] Bryan Turner, 'We Are All Denizens Now: On the Erosion of Citizenship' (2016) 20 Citizenship Studies 679, 681-682.
[9] Catherine Needham, 'Citizen-consumers' (2003) Catalyst Forum <https://www.catalystforum.org.uk/pdf/needham.pdf> accessed 14/004/2023.
[10] Elizabeth Vidler and John Clarke, 'Creating Citizen-Consumers: New Labour and the Remaking of Public Services' (2005) 20 Public Policy Adm. 19, 19.

neoliberalism which promotes the market and focuses on individualism and ultimately promotes privatization.

The following section will discuss how the growth of the citizen-consumer has been promoted through neoliberal homelessness laws and responses recently enacted.

From social to consumer citizens:

Localism Act 2011:

The first signs of the erosion of social citizenship came with the enaction of the Localism Act 2011 which intended to disperse power away from central government to local communities.[11] In the essay focus will be placed on the changes it made to the homelessness duties under the Housing Act (HA) 1996. Specifically, section 148 of the 2011 Act allowed local authorities to discharge their housing duty by offering privately rented accommodation, notwithstanding whether the applicant accepted or declined.[12] Thus, the section set in motion the involvement of the private sector in the housing system and reflects the neoliberalist ideology and focus on privatisation.[13]

Justification for the change has been that it empowers the applicant as a consumer and promotes their choice within the market framework, giving them autonomy.[14] Yet, the homeless due to their vulnerable position in society, do not have a choice and are obliged to accept the offer from the local authority (LA), because declining it would mean they are left with no housing.[15] Moreover, the Act disregards the main cause of homelessness which is the loss of an assured shorthold tenancy.[16] Placing the homeless back into the private sector increases the possibility of their homelessness recurring. Also ignored, are the vulnerabilities homeless people may have such as poverty and health issues which will only increase when placed into a system focused on self-

[11] Chris Bevan, 'The Localism Act 2011: The Hollow Housing Law Revolution' (2014) 77 MLR 964, 964.
[12] Localism Act (LA) 2011, S.148.
[13] Bevan (n 11), 971.
[14] Hal Pawson, 'Local Authority Homelessness Prevention in England: Empowering Consumers or Denying Rights?' (2007) 22 Housing Studies 867, 868.
[15] Bevan (n 11), 973.
[16] Dave Cowan, 'Reducing Homelessness or Re-ordering the Deckchairs?' (2019) 82 MLR 71, 114.

reliance without necessary monitoring systems in place.[17] This leads to a bureaucratic system which excludes the homeless and disempowers them as social citizens because they are not able to self-govern themselves in the instability of the private sector as citizen-consumers.

The boundaries between the public and private sectors have become blurred whilst increasing the possibility of public services turning private.[18] This has also been furthered through the enaction of the Homelessness Reduction Act (HRA) 2017 in amending the HA 1996 which increased the use of the private sector in fulfilling local authorities' duties under the HA 1996.

Homelessness Reduction Act 2017:

The HRA 2017's main change was its focus from providing applicants with a service to helping them prevent their homelessness through new duties placed on local authorities, the prevention and relief duties.[19] Through the amendments the HRA produces a different approach towards the homeless applicants by involving further human engagement and moving away from pure decision-making choice.[20] As such, there is a change in attitude towards resolving homeless applicants' predicaments by engaging with not only their housing but their broader issues such as what caused their homelessness and helping them retain their accommodation.[21] However, this approach has not been reflected in practice.

Under the new prevention and relief duties, the LA must 'take reasonable steps' to prevent an applicant's homelessness and help them secure accommodation.[22] In theory this presents a shift towards social citizenship in wanting to engage with applicants and help them retain their position in society.[23] However, it will be discussed that in practice they reflect a form of neoliberal governance of the homeless which promotes the growth of the

[17] Bevan (n 11), 974.
[18] Vidler and Clarke (n 10), 33.
[19] HA 1996, s.189B + 195.
[20] Andrew Arden, 'Reflections on reduction' (2018) 21 JHL 83, 86-87.
[21] HA 1996, s.189B.
[22] Ibid.
[23] Arden (n 20).

citizen-consumer by virtue of the applicant taking active steps in relieving their homelessness with the help of the LA.[24] An analysis of the relief duty will follow. As mentioned, once a LA is satisfied that an applicant is homeless, it must help the applicant to secure suitable accommodation. If within, 56 days the applicant is not housed and is still homeless, the main housing duty under s.193 will apply.[25] Nonetheless, the duty requires action by both the LA and the applicant. The duty can be discharged where the applicant has refused a 'final accommodation order' or a social house.[26] Specifically, a final accommodation order is an offer of a six-month AST (and nothing longer than 12 months) from the privately rented sector.[27] Yet, if the applicant refuses, he will no longer be owed the main housing duty.[28] As noted by Cowan, LAs will likely offer final accommodation offers because it will relieve their duties whether the applicant accepts or declines (as with the Localism Act).[29] It can be argued that this presents a new form of gate-keeping towards preventing the homeless from receiving the main housing duty and being given short-term solutions through the privately rented sector instead; its use now established in legislation.[30]

An additional way in which the duty can be absolved is if the LA believes 'that the applicant has deliberately and unreasonably refused to take any step' in his personalised plan created by the LA, to secure accommodation.[31] This is troublesome as homeless applicants are most likely to struggle with managing their communications, especially if they are living on the streets.

As such, we can see a move towards the neoliberalist idea of the individual taking responsibility for their circumstances and not relying on the state for support. Thus, it promotes the active citizen-consumer, as opposed to the passive applicant, because they must now take steps to resolve their homelessness.[32] The HRA 2017 treats the homeless as free, autonomous

[24] Chris Bevan, 'Governing "The Homeless" in English Homelessness Legislation: Foucauldian Governmentality and the Homelessness Reduction Act 2017' (2021) 38 Housing, Theory and Society 259, 265-266.
[25] HA, s.193.
[26] Ibid, s 193A(1)-(2).
[27] Ibid, s 193A(4).
[28] Ibid, s.193A(3).
[29] Cowan (n 16), 121.
[30] Arden (n 20), 84.
[31] HA 1996, s 193B(2).
[32] Cowan (n 16), 123.

individuals who can manage their own housing precarity, with the help of the state.[33] Moreover, through the exercise of the duties imposed on LAs, the new relationship between the state, citizen-consumer and the private market becomes apparent.[34] However, this view ignores the structural problems that lead to homelessness such as the shortage of affordable housing, created by past neoliberal policies including the 'right to buy' scheme and the council housing stock transfers to private housing associations.[35]

Responses:

The move towards neoliberalism and the citizen-consumer is also reflected in general responses towards homelessness which have involved removing the homeless from visible society and criminalising them. The ideology behind the responses can be based on viewing the homeless as passive citizens who live in opposition to the active citizen-consumer.[36] This has ultimately resulted in the outcast of homeless people from society who for one reason or another are unable to comply with the citizen-consumer ideology.

This is not a new approach but has been around since the early 19th century evident by the enaction of the Vagrancy Act 1824 with section 4 criminalising rough sleepers.[37] Its enaction was driven by economic justifications whereby idleness was thought bad for the economy hence punishable.[38] These do not differ from neoliberal ideologies with their focus on the economy. Almost a hundred years later the section is still in force, despite efforts to repeal it through the Police, Crime, Sentencing Courts Act (PCSC) 2022.[39] The section has merely been amended with no enforcement date appointed thus, rough sleepers are still being criminalised.[40]

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[33] (n 24), 271.
[34] Cowan (n 16), 127.
[35] Tom Slater, 'The housing crisis in neoliberal Britainfree market think tanks and the production of ignorance' in Simon Springer, Kean Birch, Julie MacLeavy (ed) *Handbook of Neoliberalism* (Routledge 2016).
[36] Whiteford (n 5), 89.
[37] Vagrancy Act 1824, s.4.
[38] William Blackstone, *Commentaries on the laws of England* (Oxford, 1765-1769).
[39] PCSC 2022, s.81.
[40] Martine Martin, 'Is it scrapped yet? An update on our campaign to repeal the Vagrancy Act' (*Crisis,* 13 December 2022) <https://www.crisis.org.uk/about-us/the-crisis-blog/is-it-scrapped-yet-an-update-on-our-campaign-to-repeal-the-vagrancy-act/#:~:text=The%20Government's%20amendment%20made%20repeal,the%20Vagrancy%20Act%20is%20repealed%E2%80%A6> accessed 8 February 2025.

Government publications when considering the repeal of the Vagrancy Act, refer to 'ending rough sleeping' whilst 'keeping people safe' and 'protecting communities.'[41] Yet, evidently, when speaking of 'people' they do not refer to the homeless rough sleepers, but the citizen-consumer, thereby, treating the former as lesser citizens. There is a polarity in seeing rough sleepers as vulnerable individuals on the one hand, and as lazy undeserving people who should work harder for themselves to get out of their situation. Yet, because of prevailing neoliberal ideologies, the latter stance has prevailed over the former. Whether the Vagrancy Act is repealed or not, the mechanism of Public Space Protection Orders (PSPOs) goes further than the Act in criminalising and excluding the homeless from society.

PSPOs provide LAs with the authority to tackle anti-social behaviour, namely activities that 'have a detrimental effect on the quality of life of those in the locality'.[42] In other words, it may be argued that PSPOs address behaviours that affect the consumerism of public spaces.[43] The citizen-consumer in seeing the rough sleepers and the poor in the streets, is discouraged from pursuing, and entering public spaces that aid consumption.[44] Hence, the Orders promote consumer-friendly activities from which rough sleepers are excluded due to their circumstances. PSPOs treat the citizen-consumer as the 'ideal autonomous user of public space' and disregard anyone that does not fit in that group which includes rough sleepers.[45] Their approach echoes the Vagrancy Act in treating 'the homeless as outsiders invading the local community'.[46]

Conclusion:

To conclude, it has been argued that neoliberal ideologies have been applied in homelessness laws and responses, leading to the erosion of social

[41] GOV.UK, 'Repeal of the Vagrancy Act 1824: Police, Crime, Sentencing and Courts Act 2022 factsheet' (Home Office, 20 August 2022) <https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-factsheets/repeal-of-the-vagrancy-act-1824-police-crime-sentencing-and-courts-act-2022-factsheet> accessed 8 February 2025.
[42] Anti-social Behaviour, Crime and Policing Act 2014, S.59.
[43] (n 2) 12-13.
[44] Ibid.
[45] Ibid.
[46] Ibid.

citizenship and the growth of the citizen consumer. Such ideologies, despite being universally applied to all citizens, leave the homeless to fend for themselves as they cannot live up to the expectations of the citizen-consumer. The reduction in welfare provision and move towards individualism and privatisation has led to the separation between the active citizen-consumer and the undeserving passive homeless people.[47]

Both the Localism Act 2011 and the HRA 2017 have neoliberal foundations as seen through their promotion of the citizen-consumer and involvement of the private market. They assume homeless applicants have the autonomy and freedom to make choices that will enable them to evade their homelessness predicament, however in practice, this does not work. Because of these assumptions, the homeless are seen as the undeserving poor who did not work hard enough to relieve their homelessness. As such, they are treated as outsiders of the community because they cannot abide by the ideology of the citizen-consumer. Responses to homelessness such as the Vagrancy Act 1824 and PSPOs also reflect the above notion. Yet, they go further in excluding the homeless by criminalising rough sleeping and thus, the visibly poor. Ultimately, the laws and responses discussed protect conspicuous consumption and the economy over the needs of citizens.

[47] Ibid, 4.

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The extent to which law can be used by social movements in order to effect social change: A critical examination of Sarah Levinsky's argument that the effectiveness of legal mobilisation depends on the context and way it is deployed

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Levitsky argues that successfully mobilising the law as a tool for social change is only a productive means largely dependent on the context in which it is used and how it is used. In light of this, the title questions to what extent can the law be used as an effective means for social change by social movements. In order to explore this, I use the social movement of the Campaign Against Racial Injustice ('CARD') and specifically their work around the Race Relations Act 1965 and its amendments in 1968. Through this and the use of legal theory I will illustrate my argument that, in line with Levitsky, the law's role as a tool for social change is a necessary but limited one, as if relied on too heavily, particularly in the context of racial injustice, it can become counterproductive. CARD, which I address in more depth in the following section, is one of the limited examples in the UK of a social movement that focuses on racial injustice that uses the law as their predominant tool to bring about their desired change. This is largely indicative of the distrust of the law amongst such communities which is derived and encapsulated through the understanding that "the master's tools will never dismantle the master's house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change".[1] I argue that such a mindset is a completely justified one with sufficient standing, that is explicitly illustrated by my case study, which is why I chose to address the mobilisation of law in such a context, to exemplify the

[1] Audre Lorde, 'The Personal and the Political Panel' (Second Sex Conference, 29th October 1979) < https://monoskop.org/images/2/2b/Lorde_Audre_1983_The_Masters_Tools_Will_Never_Dismantle_the_Masters_House.pdf> accessed 25th March.

point that the effectiveness of legal mobilisation is dependent on its user and the context.

Case Study

CARD was a social movement active between 1965 to 1967. Their formation came about after the visit of Martin Luther King Jr. in 1964, who called for 'the coloured population in Great Britain to organize and fight against the perils of racism.'[2] Inspired by such remarks a number of immigrant organisations came together to create an 'organization of organizations' [3] to address the discrimination and inequality they experienced. This umbrella organisation aimed 'to struggle for the elimination of all racial discrimination against coloured people in the United Kingdom'.[4] CARD's formation took place in a context of heightened tensions in race relations across Britain as a result of mass emigration from commonwealth countries, following the end of World War 2 and the calls for aid to help 'rebuild' Britain.

In light of such conditions CARD's main aims were to ensure equal opportunity in key areas and pressure for policies that promote social equality.[5] The way in which CARD would enact such aims was largely inspired by the methods used by the Civil Rights Movement in the US, particularly that of the NAACP. Therefore, lobbying for legislative change, particularly in the form of rights was CARD's focal tool for bringing about their desired social change, hence their involvement with the Race Relations Act that sought the prohibition of racial discrimination, was an attractive avenue for CARD.

CARD's mobilisation for the Race Relations Act can be separated into two attempts using two different forms of lobbying. CARD's initial involvement with the Race Relations Act was largely an example of inside lobbying, which is a form of lobbying where individuals seek to influence legislation through direct

[2] Peace News, 11 December 1964.
[3] Benjamin Heineman, *The Politics of the Powerless: A Study of the Campaign Against Racial Discrimination* (OUP, 1972) 1.
[4] ibid.
[5] ibid.

exchanges with policy makers.[6] The specific way in which CARD exercised this form of lobbying followed sight of the Bill drafted by Frank Soskice MP at the first reading and recognised its limited scope. In light of this, CARD's legal subcommittee drew up a 'green document' recommending several draft amendments to the Bill. CARD then sent these proposals to every MP, Cabinet Member and the Attorney-General with the hope of gaining Government support for their proposals.[7]

CARD's second lobbying attempt can be characterised as 'outside lobbying', 'which comprises tactics that indirectly address policymakers through mobilizing and raising the awareness of a broader audience.'[8] This includes the use of public communication channels, through methods such as contacting journalists and the media.[9] The way CARD enacted this was through the launch of their 'summer project' that was a central catalyst to the final amendments of the Act,[10] which will be addressed in the following section. I will use such forms of legal mobilisation throughout the rest of my essay to illustrate the necessity but also limitations of such a mechanism.

The Law's Utility

Legal mobilisation is a means by which the law can be utilised to challenge inequalities in society, particularly those sustained by law. Through an expansive Mccann like understanding of the law, [11] its mobilisation can therefore take on many forms, including, cause lawyering, the demand for legislative change, electoral advocacy and the demand for rights.[12] With regard to the forms of legal mobilisation used by CARD with their work on the Race Relations Act, as mentioned, a mixture of tactics were used,[13], but particularly

[6] De Bruycker I and Beyers J, "Lobbying Strategies and Success: Inside and Outside Lobbying in European Union Legislative Politics" (2019) 11 European Political Science Review 57.
[7] Benjamin (n 3).
[8] Beyers (n 6).
[9] ibid.
[10] Benjamin (n 3).
[11] Michael Mccann, *Law and Social Movments* (Routledge, 2017) 21.
[12] Calvin Morrill, *Stephen Rushin, and Mayra Feddersen, Mobilizing the* Law (International Encyclopedia of Social & Behavioral Sciences, 2014) 590.
[13] An indication of the law's limited capabilities.

the inside and outside forms of lobbying for legislative change was central to their work.

However, in order to establish as to whether such forms of legal mobilisation are an effective means to bring about social change, it is important to first understand that there are two consequences of legal mobilisation that can be categorised as 'direct' and 'indirect' effects.

Direct effects refer to when the result achieved was the aim intended, for example reaching a definitive legal ruling that alters the law in the desired way.[14] We can see such an effect when we look at CARD's work on the final amendments of the Race Relations Act, in their achievement of the Race Relations Act's amendment in 1968. After the Race Relations Act was enacted in 1965, CARD was particularly disappointed in its scope despite their initial lobbying in that 'there [was] disappointment that housing and employment [were] not only not in the Act, but [could] not be accepted as amendments[15]' as these were crucial areas that Black British people faced severe racism. Therefore, they sought ways in which they could lobby to bring about legislative change to broaden the scope of the Act.

The two main ways in which they enacted outside lobbying was firstly what they deemed as 'braintrusting'[16] tasks which included the submitting of evidence, drafting legislation and writing articles. The second avenue of lobbying was to influence as many organisations as possible and to encourage them to state that there is need for legislative change.

With these two avenues of lobbying in mind, inspired by the 1964 'Freedom Summer' in Mississippi and The Student Nonviolent Coordinating Committee's success in testing the effectiveness of anti-discrimination legislation, CARD

[14] ibid 593.
[15] Letter from CARD Organizing Secretary, 38 April 1965, Communist Party Records, Manchester Labour History Archives and Study Centre Manchester.
[16] Benjamin (n 3) 130.

initiated the 1966 'Summer Project', which tested the effectiveness of the 1965 Act.[17]

CARD initiated the project through distributing over 10,000 leaflets to black British individuals on 'How to Expose Discrimination'. They also gathered and paired white and non-white students to complete a set of tasks, including applying for the same housing or job opportunities. Through this they were firstly able to evidence with empirical data that black individuals were facing discrimination based purely on race. Secondly, they were also able to demonstrate that the original 1965 Act did not have a wide enough scope to allow for meaningful change. They were able to do so, as by March 1967 CARD was able to send 150 complaints as a result of the 'Summer Project' to the Race Relations Board set up by the 1964 Act. 90% of these claims were found to be out of remit of the 1965 Act, the majority of which being in housing and employment[18] thus demonstrating the need for further legislation.

This coupled with the major media attention the Summer Project received, was a major driving factor for the final amendments in 1968 that expanded the scope to incorporate issues such as housing and employment. This is therefore a clear example of how legal mobilisation can lead to direct legal and consequently social change.

In addition to the direct effects of legal mobilisation, there are also the indirect effects. The indirect effects of legal mobilisation can be understood as the effects that the process of mobilising and engaging with the law can have and the social change that this can bring, regardless of whether or not the overarching aims sought out have been successful. As Handler notes, such effects can be the raising awareness through media attention and the generation of hope and solidarity,[19] the latter of which can be particularly important in social contexts such as racial injustice where the power dynamics

[17] ibid 131.
[18] Campaign Against Racial Discrimination, 'How to Expose Discrimination,' 1966, Black History Collection, Institute of Race Relations.
[19] Joel Handler, *Social Movements and the Legal System: A Theory of Law Reform and Social Change* (New York: Academic Press 1979).

present makes solidarity a highly advantageous result. This can therefore lead to legitimate social change, which is indicative as to why CARD's initial attempts, through inside lobbying without sufficient allyship, had little impact of the 1965 Act.[20]

We can see the strength of generating solidarity and allyship in CARD's lobbying on the final amendments of the Race Relations Act. While mobilising the law in the form of demands for legislative change through outside lobbying, their 'Summer Project' received mounting media attention, including the mainstream press who produced multiple reports on the realities of racial discrimination. This included The Times, the Observer, the Sunday Times, and The Economist who published articles supporting the expansion of the Race Relations Act. Moreover, the Sunday Telegraph published an article entitled 'It's No Fun Being a Brown Briton'[21] with the Guardian describing the 'Summer Project' as 'the most cogent case for extending the Race Relations Act'.[22]

Such publications are indicative of the fact that 'CARD's testing work contributed both to the body of evidence and, through the press report of its efforts, to a more general public awareness of the problem'.[23] The importance of such solidarity cannot be underestimated as I argue, outside lobbying that allows for social change through indirect effects are distinct from the effect of direct mobilisation as they are not plagued by the issues present in the direct effects of legal mobilisation that will be addressed in the second section. I argue that not only does such solidarity in the context of racial injustice help legitimise the demands of ethnic minorities due to the power that the white voice holds politically, but there is also power in creating a shift in social attitudes and societal opinions, regardless of whether the law reflects this or not. Additionally, such a shift can almost force legal reform as legislators, whether for legitimate or political reasons, want to see and ensure that the law reflects the wider attitudes and opinions of society.

[20] Benjamin (n 3) 134.
[21] Ibid.
[22] ibid.
[23] ibid 129.

Rights Discourse

As Heineman notes, CARD were not just seeking legislative change, they were doing so in the form of wanting reform through the demand for civil rights.[24] Through the demand for the expansion of scope beyond just public places, CARD was ultimately asking to have a right to access housing, employment, and public services without facing discrimination.[25] This was encapsulated by Uzo Iwobi stating that 'The Race Relations Acts were introduced to provide clear laws that said that everyone in Britain had a legal right to be treated fairly and equally, and that everyone had a responsibility to make sure that people abided by these rules.'[26]

This therefore opens up the discussion of whether mobilising the law for the demands of rights and its discourse is a productive tool for social movements to effect social change. Although through my second section I will be exploring the critiques of such mobilisation, which I largely agree with, in the context of racial injustice I argue that the demand for rights still provides an integral though limited tool for advancing social change.

Rights discourse, I argue is similar to other forms of legal mobilisation in that it can have both direct and indirect effects. Furthermore, I would also suggest that similarly it is its direct effects that hold greater criticism, which will be addressed in the second section, and that its indirect effects, particularly in such a social context, is a clear illustration of how the law can be mobilised, in the form of rights discourse, to allow for social change.

Therefore, in light of this I argue that the two main reasons as to why legal mobilisation in the form of rights demands can be used as a legitimate tool for social movement to advance social change through indirect effects, is the ability of rights discourses to empower and legitimise.

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[24] Newsround, 'What was the Race Relations Act?' (*Newsround*, 26 November 2018) <https://www.bbc.co.uk/newsround/46310188#:~:text=%22The%20Race%20Relations%20Acts%20were,Race%20CCounci%20Cymru%20in%20Wales> accessed 10th April.
[25] ibid.
[26] ibid.

In terms of empowerment, such an effect, particularly in the context of racial injustice, should not be underestimated, as Wilson and Cordero notes there is power in, 'political minorities to realize their rights'.[27]

The reason I would argue that the use of such language, particularly in the context of racial injustice can be so empowering and thus advantageous is that, as Williams notes, the rhetoric of rights is an effective discourse to fight racial injustice as such vocabulary is compatible and desirable with the 'establishment' 'from whom social change for the better must come'. [28] Furthermore, as Williams notes, such rhetoric is 'deliciously empowering to say. It is the magic wand of visibility and invisibility, of inclusion and exclusion, of power and no power. The concept of rights, both positive and negative, is the marker of our citizenship, our relation to others'.[29] Therefore, I argue that the use of rights rhetoric is a useful tool for social movements, particularly those concerning racial injustice, as they allow marginalised communities to be self-empowered and access spaces and conversations that can effect social change, that they otherwise would struggle or feel disempowered to contribute to.

Along with empowerment, rights discourse can also indirectly bring about social change through its ability to translate a social movement's demands into a language that legitimises their concerns, thus allowing them to be seen, heard, and addressed by those that have the power to effect social change.

In Kimberli Crenshaw's exploration of the civil rights movement in the US, which CARD drew great inspiration from methodology-wise, she highlights how demands made without using such rhetoric would be limited in its accomplishments due to the fact that black people were seen as the subordinate 'other' and therefore to allow for their inclusion into such necessary

[27] Emilio Lehoucq, Whitney K. Taylor, 'Conceptualizing Legal Mobilization: How Should We Understand the Deployment of Legal Strategies?' [2020] Law & Social Inquiry 166, 183.
[28] Patricia Williams, *The Alchemy of Race and* Rights (HUP 1991) 149.
[29] ibid 164.

spaces, the use of the dominant's rhetoric was necessary. Through this such communities would then be able to 'manipulate elements of the dominant ideology to transform the experience of domination. It is a struggle to create a new status quo through the ideological and political tools that are available.'[30]

Furthermore, I argue it to be important that to evaluate the usefulness of rights discourse, it is important to contextualise its use. As Crenshaw notes, although there are legitimate concerns with the direct effects of using rights, one must evaluate its usefulness with the knowledge that for marginalised groups wanting to alleviate racial injustice, due to power dynamics, there are limited options presented to such groups due to their marginalisation. As Crenshaw states, there is 'the unlikelihood that specific demands for inclusion and equality would be heard if articulated in other terms'.[31] Therefore, any attempts by such a community to 'appropriate rhetorical/legal incantations should be appreciated'.[32]

This is a major critique of Critical Legal Theory's ('CLT') own critique on rights in which Christopher McCrudden justifiably questions as to what other means would provide minorities with comparable protection and therefore perhaps the critique on rights is coming from white critical legal theorists who are unable to recognise that rights discourse can be 'invigorating cloaks of safety[33]'. Through the ability of rights discourses to empower and legitimise social movements and their demands, 'Rights do at times, give pause to those who would otherwise oppress us'.[34]

Furthermore, though a critic of rights discourse, Tushnet highlights how rights discourse is a way of declaring what a society is or what commitments it should be living up to, as

[30] Kimberli Crenshaw 'Race, Reform, And Retrenchment: Transformation And Legitimation In Antidiscrimination Law' [1988] 101 HLR 1331, 1386.
[31] ibid 1385.
[32] ibid 1382.
[33] Christopher McCrudden, *Anti-discrimination law* (NYUP 1991) 360-361.
[34] Richard Delgado, 'The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?', (2016) <https://scholarship.law.ua.edu/fac_working_papers/446> 305.

> ‘the sort of rights-talk that makes sense and turn defines what the society is. When someone objects to an act as a violation of a right, the ensuing dialogue either involves a claim that the challenged act is inconsistent with some "deeper" commitments that the actor has . . . or deals with what kind of society we ought to have”.[35]

This is a clear illustration of how powerful and beneficial the indirect effects of empowerment and legitimisation can be. Therefore, I argue that the indirect effects of legal mobilisation, including the use of rights discourse, can be beneficial to social movements to effect social change, particularly for those like CARD who deal with racial injustice.

Therefore, legal mobilisation for groups such as CARD, I argue, can be relied upon to a limited extent to effect such social change, specifically when outside lobbying is used and relied on for its indirect effects. However, as the following section will address, how legal mobilisation should not necessarily be relied upon for its direct effects.

The Law’s Limitations

As Levitsky states, the law is not an inherently empowering tool for social movements to mobilise, and its success depends on the context and ways in which it is used. This point is exemplified when we look to contexts of racial injustice and social movements such as CARD.

CARD was ultimately concerned with the social change that would bring about the advancement of experiences for ethnic minorities in Britain. However, at the same time as advocating for such social change, the Government had just initiated the 1962 Commonwealth Immigrants Act.

The Act ultimately was a restriction on the migration of Commonwealth citizens. The Act streamlined the ability of migrating by only permitting entry to those who had work permits. Though seemingly neutral, such a requirement had a

[35] Crenshaw (n 28) 1366.

clear disproportionate effect on non-white individuals wishing to migrate. The Act was initiated and passed by the Conservative Government then ratified by the succeeding Labour Government in 1964. It has been justifiably argued that the Conservative Party's decision to introduce such legislation and the Labour Party's decision to keep such immigration controls operative was motivated by their want to appeal and appease to the white working-class voter that were threatened by and in clear contention with the growing presence of black and other ethnic minority immigrants in the country.[36]

Such an Act clearly sets a tone for of a hostile environment, in which non-white individuals are made to feel unwelcomed and as second-class citizens, and thus almost validating and enshrining racial discrimination into law, in the way that it encourages the questioning of the statuses and positions of 'un-deserving immigrants'. Furthermore, such legislation creates a xenophobic precedent of thought of allowing and encouraging the questioning of non-white individual's presence in Britain generally, behind the façade of neutrality. As Andrew Geddes noted, 'the coupling of immigration controls with race relation legislation suggested that the authorities assumed that a numerical limit on immigration would improve race relations. Thus, such a connection characterised immigration as a problem and, by extension, also the immigrant's themselves'.[37]

Such strict and discriminatory immigration legislation is in clear juxtaposition with the ethos behind the Race Relations Act, which almost presents a counterintuitive stance that the law takes on race relations. Through this we can see how although law can be a tool that when mobilised can produce social change, the legal landscape that it sits in can itself ultimately be a hindrance to the effectiveness of the change brought about by that mobilisation.

Furthermore, although one could argue that such legislation sought to and achieves the appeasement of two juxtaposed sectors of society and thus, they

[36] Benjamin (n 3).
[37] Simon Peplow, 'The 'Linchpin for Success'? The problematic establishment of the 1965 Race Relations Act and its Conciliation Board' [2017] Contemporary British History 430.

balance each other out, the weakness to such argument is found through the political agenda of the legislation.

Soskice who introduced the Bill into Parliament himself termed the Act to be part of a 'package deal',[38] which insinuated that the instruction of this Act would therefore allow the Government to pass harsher immigration legislation without coming across as overly hostile. Furthermore, it has been argued that legislation, such as the Race Relations Act, that appears to attempt to tackle and denounce racial discrimination would make increased immigration restrictions more widely accepted, whilst also projecting the image that such restrictions are not to do with race.[39] Furthermore, Geddes also suggested that there was an arranged bipartisan agreement necessitating the need for immigration to be controlled, initiated by Labour 'in order to diminish its electoral significance and 'depoliticise race issues".[40] Ira Katznelson similarly stated how the enactment of the Act marked 'the third phase of this two-party consensus on race,' [41] which Douglas Ashford claimed to represent the bipartisan agreement 'to do little or nothing' with racial discrimination.[42]

Such a political agenda undermines the sincerity and authenticity of the social change, which in turn weakens its reliability when there is more genuine state backing for the counteractive immigration legislation. Therefore, it is arguable that CARD was advocating for reform in something that even when such reform took place, it would not be able to overcome the explicitly discriminatory and prioritised laws already in place and to come. Such a context clearly stunts the ability for CARD's mobilisation for the Act and its modification to bring about sufficient and significant social change.

Such an observation links to the issues of using rights discourse, in that in reality rights are hard to rely on. After lobbying for the initial amendments of the

[38] ibid.
[39] ibid.
[40] ibid.
[41] ibid.
[42] ibid.

Act, CARD criticised it for its narrow scope of civil rights that it protected, namely on the protection in 'public spheres'.[43] However, I argue further in saying that the effectiveness of such an Act both in its substance and form, were also limited due to the fact that it relies on rights. To argue this, I will be exploring Critical Legal Theory's ('CLT') critique on the use of rights, particularly in a context such as racial injustice, in order to establish that mobilising the law by lobbying for legislative change in the form of rights is arguably largely un-advantageous, which is evidenced in its overriding direct effects.

Rights Discourse

CLT has established that although mobilising to extend legal rights might have beneficial indirect effects, ultimately, they have overriding direct effects of legitimising the inequality and oppression that the rights were attempting to ameliorate. CLT put this down to a multitude of reasons, but particularly as they understand rights as 'inherently unstable, contingent, and manipulable'.[44] By this they ultimately argue that rights are conceptualised as whatever those with power say they are, therefore when individuals seek to rely on and create them for protection, they are ultimately re-creating and reinforcing the conditions oppressing them.[45]

CLT notes how the 'use of legal rights impedes advances by progressive social forces by allowing the state to define a movement's goals'.[46] The reason why this is problematic is that the state is never going to craft and extend rights in a way that could radically disrupt the structure and order of society, which ultimately would be necessary to see substantial and meaningful change and advancement.[47] This, I argue is based on an almost Hobbesian understanding of humans, who are only concerned with protecting their security and property, and therefore rights reinforce such alienating characteristics. CLT argue that rights encourage and validate such characteristics as they force individuals to

[43] Benjamin (n 3).
[44] S. R. Levitsky, 'Law and Social Movements: Old Debates and New Directions', in Sarat and Ewick, *The Handbook of Law and Society*, 2015 383-384.
[45] ibid.
[46] ibid.
[47] ibid.

look at themselves and others as 'isolated rights-bearers'.[48] as opposed to members of a community, thus making 'it impossible for us even to imagine what a non-hierarchical society founded on cooperation and love would look like'.[49]

Therefore, CLT is particularly driven for the 'demystification'[50] of rights to break away social movement's dependency on them, which Richard Delgado notes is already apparent for minority groups who have a foundational distrust in law due to the way, "society has provided us with more than adequate tutelage". Delgado argues, minorities know the weakness of using rights as a shield, particularly as they are generally dictated by those in power wanting to maintain their power.[51] In light of this Alan Freeman argues that the legal reforms born out of the civil rights movement, which CARD drew much inspiration from, were severely limited by the constraints embedded in relying on the law due to it being dictated by "needs basic to the preservation of the class structure",[52] which Freeman argues were 'simultaneously repositories of racial domination and obstacles to the fundamental reordering of society'[53] which is indicative of why CARD's initial lobbying attempts to widen the proposed scope of the Act, purely based on inside lobbying, were overlooked.

This argument can explicitly be seen in the application of the legislation that CARD was lobbying for. Gavin Schaffer noted that Section 6 of the Race Relations Act, which established the right to not be subjected to racial hatred, saw a number of examples of attempted prosecutions asserting Section 6 against black activities, and in fact the pursuance of Section 6 was used against such activists more readily than their white counterparts[54] For example, Michael Abdul Malik (Michael X), the Black Power leader and four members of the Universal Coloured People's Association were tried under Section 6 for

[48] McCrudden (n 31) 358.
[49] ibid.
[50] Levitsky (n 42).
[51] ibid.
[52] Crenshaw (n 28) 1352.
[53] ibid.
[54] Gavin Schaffer, 'Legislating against Hatred: Meaning and Motive in Section Six of the Race Relations Act of 1965' [2014] 25 Twentieth Century British History, 251.

allegedly 'stirring up racial hatred against white people'.[55] The ultimate effects of such usage was the prosecution of black Britons, thus ultimately allowed racism to continue through a 'new language of racism'[56] as opposed to ensuring their protection which was the motivating factor for CARD lobbying such legislation. Such an example not only demonstrates the un-genuine motivation behind such legislation as already mentioned, but it also goes to highlight that those with power will formulate rights in a way that does not threaten their power or threaten to disrupt the hierarchies and power structures in society generally, which is indicative of the fact that such legislation was proposed and therefore lobbied by movements such as CARD with the aim of eradicating racial discrimination in Britain, yet in practice it is being used for the complete opposite and arguably ultimately allowed the enshrining of the maintenance of racial oppression into law.

Furthermore, as Joel Handler notes, another issue with the reliance on rights is that 'in practice, their rights are not fulfilled because enforcement relies too much on the complaining client' [57] and on complaints in areas such as employment, what Handler notes as the 'bureaucratic contingency' 'would present an insuperable obstacle in battling employment discrimination. It would be impossible for the victims of discrimination to challenge a significant number of employment decisions'.[58] Handler notes this in recognition of the fact that although the rights might be there, particularly when it is a civil right against racial discrimination, in order for one to rely on them, one must prove the racial discrimination, which is a difficult task particularly when the perpetrator has not explicitly but implicitly discriminated, which can often have a façade of neutrality despite being racially charged,[59] which again highlights the law's limitations to effect sufficient social change in such a context.

[55] ibid.
[56] ibid.
[57] Joel F. Handler, *Social Movements and the Legal System: Theory of Law Reform and Social Change* (AP 1978) 10.
[58] Ibid 145.
[59] Crenshaw (n 28) 1352.

Ultimately, as Kimberli Williams Crenshaw states, in line with CLT's argument, 'If law functions to reinforce a world view that things should be the way they are, then law cannot provide an effective means to challenge the present order'. Therefore, I argue that law is a tool for maintenance and reinforcement and cannot be relied on for radical change, particularly in contexts of civil rights that require the dismantling of the very avenues that largely go against the interests of the legislators and those in power, hence why law is a tool of maintenance.

Therefore, as Domingo and O'Neil note, to effectively use law and, in particular, rights requires the mindset of what he notes as a 'practitioner of rights'[60] namely someone who is 'something of a game-player, particularly skilled in the law, but keenly aware of its limitations and the social conditions necessary for its effective deployment'.[61]

Habermas

Furthermore, as Habermas notes, there is something paradoxical with the use of law, as the law both protects and restricts individual autonomy and rights. Before exploring such an argument, it is important to briefly establish the framework and context in which Habermas establishes this augment. Habermas builds on Luhmann's systems theory, which I will be discussing later, and makes a distinction between what he calls the 'lifeworld' and systems. The lifeworld refers to the spheres of communication affecting all areas of life, it incorporates all aspects of everyday life, including family life, culture, and informal social interactions.[62] Whereas the systems simply refer to the systems/operations of sectors such as the economic and political sectors.

The law relates to this as it operates as a medium between the systems as well as the life world. Habermas states that through the use of law there has been the colonisation of the lifeworld.[63] When Habermas argues this, he refers to the

[60] Pilar Domingo and Tam O'Neil. "The politics of legal empowerment Legal mobilisation strategies and implications for development." (2014) 53.
[61] ibid.
[62] S. L. Roach Anleu, 'Contemporary Social Theory and Law' *Law and Social Change*, (SAGE 2010).
[63] ibid.

concept of 'Juridification', namely the process in which there are tendencies towards increasing regulation of the lifeworld through law.[64] Habermas then deems this as the colonisation of the lifeworld due to the codification in law of the insurance of protection and rights as well as the offer of 'protection to citizens against the inhumane effects of the capitalist market and provide such rights and freedoms'.[65]

Habermas is critical of this as he sees the involvement of the law and state as paradoxical. Although he notes the benefits and a sense of security that having state and law there to protect you, thus making you and your position stronger, but as mentioned at the same time Habermas argues that with this comes a restriction of individual autonomy due to a reliance on the state of protection. This is problematic as the more this 'colonisation' interferes with the lifeworld, individuals become more dependent for having to go to the state for protection. Therefore, ultimately this protection and interference comes with a cost, namely autonomy.[66]

The reason this is so problematic in contexts when one is increasingly relying on the state to protect their civil rights, is that firstly, as already established, such legislation is almost always not drafted to sincerely be in their favour, which is also backed by a state that is not going to interpret and apply such legislation in a way that could threaten their position in society, and such ways are usually necessary to bring around sufficient social change. Therefore, in this sense I argue that for groups such as CARD, the want for legislative change and protection in the form of rights is almost a 'trap' as they are looking to rely on arguably baseless rights that at the same time restrict them from acting on alternative methods.

Luhmann

[64] J. Habermas, *The Theory of Communicative Action, Vol. 2* (Boston: Beacon Press, 1987) 359.
[65] ibid.
[66] ibid.

The final way that I address the limitations of mobilising the law to effect social change is through looking at an aspect of Luhmann's qualms with the use of the law and thus its limitations, specifically through looking at the systems theory.

The systems theory, amongst other things, notes an almost incompatibility of languages between the systems and the lifeworld, and therefore the laws interjection as a mediator between these systems, which ultimately keeps society together.[67] This is where Luhmnan notes an important issue that is particularly relevant for establishing the law's limited ability to be mobilised to facilitate change.

Luhmann notes that the legal system itself has an even more distinct logic from the other systems, and therefore during its roles as a mediator it has to translate other systems into legal terms, ideas and logic to be able to comprehend them, which as Luhmann argues, turn them into entirely something else. The issue with this is that with all the systems it interacts with, the law makes an incorrect alternative reality based on its own logic, and therefore fails to facilitate the improvement, advancement and change of society.[68] Ultimately 'Law cannot deal directly with economic policy, medical dilemmas, moral values, political philosophy or family life, but it produces parallel legal communications on all these issues and through this production nonlegal issues are transposed into legal questions and communicated as lawful/unlawful or legal/illegal'.[69]

This is also a point raised by Mark Tushnet who notes that, specifically with rights, 'the language of rights undermines efforts to change things by absorbing real demands, experiences, and concerns into a vacuous and indeterminate real confrontations and real circumstances'.[70] He argues that through the use of rights discourse, the integral objectives change and are then constrained to

[67] ibid.
[68] Niklas Luhmann , "Systemtheorie, Evolutionstheorie und Kommunikationstheorie", in: *Soziologische Gids* (1975) 154–168.
[69] Anleu (n 60).
[70] Crenshaw (n 28) 1353.

the ideological limitations of the law.[71] Therefore, he argues that '"[i]f we treated experiences of solidarity and individuality as directly relevant to our political discussions, instead of passing them through the filter of the language of rights, we would be in a better position to address the political issues on the appropriate level".[72]

The reason I argue the relevance of can be seen when we look to CARD's mobilisation of law. Through this it is clear that the original aims of CARD, namely for the eradication of racial discrimination, were somewhat lost through their mobilisation which ultimately did not necessarily reflect nor achieve their original aim, highlighted by the tight scope and unintended application. Therefore, in light of Luhmann's observations I argue that simply because legislation has been enacted to outlaw discrimination through rights, does not equate to the eradication of racism, particularly as the law is unable to grasp and reflect the moral, political and economic intersecting factors that need addressing to do so. This is a sentiment also held by Angela Davis, who notes that:

> 'The civil rights movement was successful in achieving the legal eradication of racism and dismantling segregation, but the eradication of the legal apparatus is not equivalent to the abolition of racism. Racism persists in a framework more expansive than the legal framework'.[73]

Therefore, ultimately to rely on rights, as CARD did through lobbying for legislative change in the form of civil rights, is clearly not the most advantageous avenue to effect social change for social movements, particularly when concerned with matters of racial discrimination that inhibit moral questions that the law is unable to grasp and thus unable to attend to appropriately nor adequately. Clear evidence to support this failure on the law's inability to enact the radical social change needed on such matters can be seen

[71] ibid.
[72] ibid.
[73] A. Davis and F. Barat 'Ferguson Reminds Us of the Importance of a Global Context', *Freedom is a Constant Struggle: Ferguson, Palestine and the Foundations of a Movement*, (Haymarket Books 2016) 16.

in the fact that although the Act was repealed and covered by the Equality Act 2010 which aims to deal with the discrimination addressed in Race Relations Act and more, contrary to the UK Government's findings, the Runnymede Trust confirmed that the UK is still systemically racist, if not more so in comparison to when the Race Relations Act was enacted , particularly in the areas that the Race Relations and now Equality Act claim to deal with, such as employment and housing.[74] This therefore indicates that the law is not the best place to deal with such issues due to the incompatibilities of what the 'lifeworld' needs and what the law can offer.

Overall, I argue that the efficiency to mobilise law to effect social change centrally depends on who is enacting such mobilisation and what it is for. Furthermore, I argue that the extent of its effectiveness is also dependent on what it is being depended on for and if their efficacy is being judged based on the direct or indirect effects of legal mobilisation. As the case study of CARD has demonstrated, that for social movements advocating for legislative change on issues such as racial injustice, the use of the law is arguably a 'necessary evil' in that such groups have limited alternatives other than dependence on the law, however what they should limit their dependency to is the advantageous indirect effects of legal mobilisation to bring about social change.

Therefore, as Domingo and O'Neil note in line with Levinsky, the law's 'usefulness',

> 'Depends not just on their normative content – which is in any case indeterminate at best – but also on the position of the actor deploying them, his linkages with other individuals and groups in the social system in which he is embedded and his capacity to form alliances across a range of social groups and institutions'.[75]

[74] Bridget Byrne, Claire E. Alexander, *Ethnicity and Race in the UK: State of the Nation* (Policy Press 2020).
[75] Domingo (n 58).

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Imperial Patterns of Sanctioned Economic Dominance in International Investment Law: From The East India Company to the Coalition Provisional Authority

Kyriakos Trigonis

'A socio-legal approach to IEL [International Economic Law] enables us appreciate the significance of two key related trends. First, the existence of emergent sites of normative authority for international economic rules and regulations outside the traditional interstate system. And second, the shifting modalities of power in global economic governance that enable dominant actors to embed and globalize their models of economic organization."[1]

Introduction

Akinkugbe's socio-legal approach to international economic law ('IEL') strives to not only embolden our understanding of how global state-investor relationships operate in practice, but to form a credible narrative that the rules of IEL have been hardwired to accommodate the interests of dominant economic actors. An arguably audacious, but not wholly untenable premise, which may be legitimized through the principles and operation of international investment law ('IIL'). Thus, to challenge the legitimacy of this thesis, this analysis will strive to establish that the rules of IIL have been structurally drafted to perpetuate a degree of economic domination by affording foreign investors favourable protections at the expense of trading-off the ability of sovereign states to regulate on their own accord. A context-dependent exercise which traces this form of sanctioned exploitation from a period of imperialism, allowing economically powerful aliens to employ a combination of diplomacy and force in imposing their preferred legal regimes under the sanction of the modern principles of IEL. Positing the Coalition Provisional Authority's occupation of Iraq as modern evidence of this phenomenon, it will be established that IIL, rather than emerging on a blank legal canvas, has been formulated as a product of economic *leverage*. A historical pattern of imperially constructed

[1] Olabisi Akingumbe, 'Reflections on the Value of Socio-Legal Approaches to International Economic Law in Africa' [2021] CJIL 24.

leverage which has helped facilitate the imposition of asymmetrically balanced systems of protection by dominant foreign investors often at the detriment of vulnerable, capital-poor, developing host countries.

SECTION 1: BALANCING COMMERCIAL IMPERATIVES AND STATE ECONOMIC SELF-DETERMINATION

The Weaponized Value of Foreign Direct Capital

Before delving into the legality of economic rule, a central bargaining chip at the disposal of these parties may be explored in the often-extortionate value of foreign direct capital ('FDC'). This instrument has been defined by the World Bank as the net inflows of investment to acquire a lasting management interest (10 percent or more of a voting stock) in an enterprise operating in an economy outside of the investor's market.[2] Considered as the most powerful vector of integration amongst economies, FDI can be understood as the long-term investment of capital by a person or corporate entity in one nation into a company based in the host state. As illustrated by Herdergen, FDI derives its value from its potential to transfer knowledge and technology, create jobs, boost overall productivity, enhance competitiveness and entrepreneurship, and ultimately eradicate poverty through economic growth and development.[3] A description which arguably lends itself to a humanitarian air: one which posits foreign capital as the medium through which economically robust nations may lift developing host countries out of a state of impoverishment.

However, inherent in the synergistic value of foreign capital lies a sharp tension between foreign investors' preference for legal regimes which guarantee a low level of commercial risk, and host states' interest in maintaining political flexibility and autonomy. An exercise in which investment legislation and contractual practice may tip the balance in favour of the alien by limiting the

[2] World Bank Databank <https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD> accessed 8 February 2025.
[3] Matthias Herdergen, *Principles of International Economic Law* (2nd edn, Oxford University Press 2016) 405.

policy-making ambit of host countries.[4] This phenomenon transpires because of the recurrent inequality of bargaining power between these two actors, forcing the host state to walk on a tight rope, carrying the risk of deterring foreign investors if they do not submit to provisions of capital flow which guarantee stability of investment. Notwithstanding the opportunities for economic development, this power imbalance has allowed for FDI to be weaponized against host nations, marginalizing their ability to secure the welfare of their own citizens and often with little guarantee of facilitating synergies between foreign capital and sustainable development. Scholarly opinion has observed the vague correlation between the flows of FDI and the economic development of the host state, describing this market principle as a mere fallacy promulgated by credible financial institutions such as the World Bank and the IMF to accommodate the interests of investors.[5]

While such scepticism aligns with Akingumbe's conception of the manipulation of IEL by actors seeking to imbed their models of organization, extraordinary assertions require extraordinary evidence as well as a historical pattern of exploitation which dispels any hint of aberration in a modern case study. Accordingly, it is imperative to understand that under the default rules of international investment agreements, FDI enjoys protection regardless of its contribution to sustainable development and it is up to the host state to adopt measures which deny such protection.[6] However, as alluded, host countries often risk scaring off foreign investors if they impose national legislation which limits the scope of investor discretion, often leaving vulnerable hosts in a political stalemate. Due to the disconnect between sustainable development and the protections afforded by investment agreements which heavily skew the favour towards the interests of the alien, this form of host consent resembles one of economic duress rather than an economic pact between sovereign nations. Thus, in assessing the power dynamic produced by these pro-investor

[4] Ole Kristian Fauchald, 'International Investment Law in Support of the Right to Development?' [2021] LJIL 181.
[5] John Linarelli, Margot Salomon, Muthucumaraswamy Sornarajah, 'Foreign Investment: Property, Contract, and Protecting Private Power' in *The Misery of International Law: Confrontations with Injustice in the Global Economy* (1st edn, Oxford University Press 2018).
[6] ibid (n 4).

agreements, this innate tension will be engaged by the following question: Under what conditions are host states willing to surrender their sovereignty in international economic agreements?

Narrowing the Definition of Sovereignty in International Investment Law: Economic Self-Determination

From the outset, it may be counter-claimed that sovereignty is an amorphous concept subject to a multitude of competing interpretations. As attested by Koskenniemi, the concept of sovereignty is ambiguous,[7] a position underpropped by his assessment of the *Rights of Passage* case,[8] in which Portugal and India's competing opinion on the concept could not be resolved by providing a singular definition of sovereignty. This purported ambiguity also aligns with what Benton described as "layered sovereignties," a characteristic of the imperial order which allowed for 'centres of delegated legal authority to produce irregular and roughly concentrated zones of control around them.'[9] However, these conceptions provide for a quaint complication of a paramount concept, which proves greatly convenient to the foreign entities incentivized to undermine the sovereignty of a nation in vindicating their commercial interests. As sceptically argued by Guntrip, 'the mindset of those implementing the regime is to seek to minimize the impact of host State conduct on the investment and to compensate the foreign investor when the investment is detrimentally affected by State conduct'.[10] In other terms, the exercise of state sovereignty in IEL is perceived as an economic externality to these actors. One which impinges upon the security of their investment.

Nonetheless, sovereignty in the context of IIL may be most succinctly defined as economic self-determination. A maxim which is codified in the UN General Assembly, stipulating that: 'Every State has the sovereign and inalienable right to choose its economic system … in accordance with the will of its people,

[7] Martti Koskenniemi, 'Sovereignty' in *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2009).
[8] Case concerning Right of Passage over Indian Territory, Portugal v India [1957] ICJ Rep 125.
[9] Lauren Benton, 'Anomalies of Empire' in *A Search for Sovereignty: Law and Geography in European Empires* (CUP 2014).
[10] Edward Guntrip, 'Self-Determination and Foreign Direct Investment: Re-Imagining Sovereignty in International Investment Law' [2016] 65 ICLQ 829.

without outside interference, coercion or threat in any form whatsoever.' If FDI is the instrument employed by foreign investors to attain favourable conditions, then national sovereignty is the primary bargaining chip at the disposal of the host state. The ability to calibrate its own economic agenda, aligning the interests of its foreign investors with the interests of its citizenry.

But consent is never truly genuine and unencumbered if an investment treaty is assented to by a nation which is in a state of economic desperation. The coerced nature of such consent is what led progressive economists Grisnpun and Kreklewich to describe modern bilateral investment treaties as "conditioning frameworks" in the sense that they 'constrict economic and social decision making at the domestic level and exert pressures upon less powerful countries to accept overriding dictates of globalisation and regionalisation in the world economy'.[11] An emphatic description but one which falls within the scope of Akingumbe's socio-legal thought, probing 'the context in which [such] agreements are implemented'.[12] Thus, in interpreting the nature of a state's concession of sovereignty in exchange for the synergistic value of FDI, a modern case study should be interpreted vis-à-vis the degree of vulnerability of the host state at the time of the investment regime's application.

SECTION 2 - A PARALLELISM OF DOMINANCE IN THE ORIGINS OF INTERNATIONAL INVESTMENT LAW

Tracing the Imperial Origins of International Investment Law: Grotius' Justification of Piracy for the VOC's Commercial Affairs

In assessing the contemporary network of global economic relations, governed by regional and international bilateral investment treaties, one must refrain from scrutinizing these frameworks without reference to the historical power structures which forged these legal maxims. As described by Akingumbe, 'conceptualizing IEL as a social phenomenon is a multidisciplinary exercise',[13]

[11] Ricardo Grinspun and Robert Kreklewich 'Consolidating Neo-Liberal Reforms: "Free Trade" as a Conditioning Framework' 43 [1994] 33.
[12] ibid (n 1).
[13] ibid (n 1).

requiring a combination of legal analysis as well as an understanding of the evolving role of the law in these social interactions. Amongst its subtleties, imperial international law was based on the fiction of superiority of civilization as well as on armed power.[14] Lacking in democratic legitimacy, this artificial construct of superiority allowed the powerful entities of the Global North to enjoy vast riches, leaving the rest of the world in thraldom. This period also paved the way for the emergence of the modern principles of IEL, as now found in the diplomatic protection of alien interests. A potent historical example of the manipulation of legal doctrines in the vindication of private commercial interests can be found in the work of lawyer Hugo Grotius, providing advice for the affairs of the Dutch East India Company ('VOC').

Considered a transformative point in the development of the body of rules and customs governing international economic relations, on 25 February 1603, a Portuguese carrack named the *Santa Catarina* embarked on a voyage from Macao to Melaka through the treacherous pirate-infested waters of the Riau Archipelago. During this voyage, this richly laden trade ship was attacked by two vessels commissioned by the VOC, under the command of Jakob van Heemskerk and his Johorean allies. Relying upon evidence of prior hostility by the Portuguese against the Dutch, as well as the laws of public and private armed conflict, Grotius was tasked with justifying the capture of the richly laden treasure ship *Santa Catarina* by the VOC as an act of self-defence sanctioned by the natural laws of armed conflict. Accordingly, he formulated an extensive treatise titled *De Jure Praedae* ('On the Law of Prize and Booty') for the purpose of ousting the possibility of this un-sanctioned aggression from falling under any interpretation of piracy. In short, the crux of Grotius' argument was that the VOC was engaged in an act of economic self-preservation because the Portuguese were impinging upon its commercial activity in the West-Indies, preventing them from exercising their natural right to trade with one another.[15] As deduced by Porras, Grotius' treatise elevated the protection of commerce to a level

[14] ibid (n 5).
[15] Ileana Porras, 'Constructing International Law in the East Indian Seas: Property, Sovereignty, Commerce and War in Hugo Grotius De Iure Praedae - The Law of Prize and Booty, or "On How to Distinguish Merchants from Pirates"' [2006] 31 BJIL 803

commensurate with the national identity, stating that 'commerce inhabits every inflection of the text'.[16] Painting a portrait of the Portuguese's aggression as preventing or actively impeding the VOC from exercising any one of the rights bestowed by nature, Grotius elevated the right to free trade as sufficient legal ground upon which to initiate and wage a just war.[17] An undoubtedly ingenious jurisprudential formulation but one which has imbedded an arguably problematic precedent into the substratum of global economic relations.

As deliberated by Ittersum, 'the natural law and natural rights that Grotius formulated in *De Jure Praedae* cannot be divorced from Dutch imperialism and colonisation of the early modern period.'[18] The justification for this act of aggression allowed the Dutch East India Company to partly shape the Eurocentric framing of international law, allowing the alien entity of the VOC to define the nature and extent of Portuguese sovereignty. Grotius rationalization of the VOC's unsanctioned aggression allowed for the act of preventing or actively impeding a party from exercising any one of the rights bestowed by nature to suffice as legal ground upon which to initiate and wage a just war.[19] Effectively, the legal apology embodied in *De Jure Praedae* formulated a fundamental tenet of IEL for the purposes of a multinational corporation by elevating the right of economic self-preservation to such fundamental significance, such as to override the sovereignty of the Portuguese under attack. Thereby, justifying the infiltration of the Sta. Catarina as a legitimate act of war and rendering the ship's highly marketable cargo as a prize in the King's war against Portugal.

Collating the right to engage in commercial activity with the sanctity of natural law, this justification allowed for the VOC to function as both a commercial entity and as a sovereign nation in itself.[20] Article 37 of the VOC's charter identified

[16] ibid.
[17] Peter Borschberg, *Hugo Grotius, the Portuguese, and Free Trade in the East Indies* (NUS Press 2011).
[18] Martine Julia van Ittersum, 'Hugo Grotius in Context: Van Heemskerck's Capture of the "Santa Catarina" and its Justification in "De Jure Praedae" (1604-1606)' [2003] 31 AJSS 511.
[19] Peter Borschberg, 'The Seizure of the Sta. Catarina Revisited: The Portuguese Empire in Asia, VOC Politics and the Origins of the Dutch-Johor Alliance (1602-c.1616)' [2002] JSAS 31.
[20] Katie Miles, 'Historical Evolution of Foreign Investment Law' in *The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital* (CUP 2013).

Portugal together with Spain as an enemy of the state, rendering their interests susceptible to attack and legitimate seizure as booty of war. But the jurisprudential rationalization of the VOC's attack on the Portuguese has created a precedent which has carried on in the contemporary IEL landscape, justifying military incursions into non-European territories under the premise of protecting private commercial interests. A precedent which permits the alien entity of foreign investors to prescribe a dominant position for themselves by universalizing their commercial affairs, despite the traditional orthodoxy that the alien is considered to be the most abstract and powerless entity within the alien-state dynamic.

Mutated Imperialism under the Guise of Established Principles of International Economic Law

Traces of these historical dynamics of imperialism may be found in the modern doctrines of IEL, often affording special protections to foreign investors by facilitating inherently unbalanced investment regimes. Scholars such as Linarelli have asserted that 'it may credibly be maintained that the modern system of international law is based on a continuation of the international law of the imperial system under a new guise.'[21]

In other words, that the pre-existing self-prescribed position of powerful economic actors of the imperial order has been transplanted into the contemporary economic landscape. While the customary principles of IEL have been designed to guard against asymmetries in international economic relations, the indeterminacy of these doctrines has allowed alien entities to formulate a fiction of economic development and create a narrative of foreign investors as victims. Indeed, this picture of powerful multinational corporations in need of protection against a developing state devoid of funds and legal expertise is not apposite.[22] However, the malleability of these principles has allowed the foreign investor to imbed asymmetrically structured regimes which encroach upon the host's policy-making ambit.

[21] ibid (n 5).
[22] ibid (n 5).

For instance, the principle of "non-intervention" stipulates that every sovereign state has the discretion to conduct its affairs without outside interference, though examples of abrogation of this principle are not anomalous. Thomas has written that developing countries hold a valid claim that the coercion exerted by the IMF falls within the ambit of intervention, thereby undermining the integrity of this supposedly cardinal principle.[23] Additionally, Miles has observed that the "Calvo Doctrine", which seeks to temper the law of diplomatic protection of aliens, has not found 'acceptance as rule of international law.'[24] A principle which strives towards striking a balance between host states and foreign investors, stipulating that: 'Aliens should be afforded no more than the same treatment as nationals and must limit themselves to filing claims in the local judicial system'.[25] Arguably, this principle is too concrete and definitive such as to be accepted into the substratum of customary international law. Contrarily, the "international minimum standard" which stipulates that 'Each Party shall accord to investments … of another Party treatment in accordance with … fair and equitable treatment and full protection',[26] has been imposed by capital exporting-states of the Global North as an existing, universally applicable rule of international law.'[27] Thereby, allowing investors to take advantage of their position of leverage by selectively universalizing their commercial affairs under the authority of these fundamental principles.

The root of this issue has been identified in 'the history of imperialism, the calculated, often brutish use of force, and the manipulation of legal doctrines to acquire commercial benefits [which has] driven the construction of international investment law.[28] Drawing upon the malleability of IEL principles, Katie Miles has observed that through the study of pivotal historical power structures such as the VOC's infiltration of the Santa Catarina, it is revealed that IIL may serve as a 'vehicle for controlling through legal means resistance emanating from

[23] Caroline Thomas, *New States, Sovereignty, and Intervention* (Gower 1985).
[24] Kate Miles, 'International Investment Law and Universality: Histories of Shape-Shifting' [2014] 5 CILJ 986.
[25] ibid.
[26] Article 1105 (1), North American Free Trade Agreement (NAFTA).
[27] ibid (n 25).
[28] ibid (n 18).

capital-importing states.'[29] In other words, the imperial origins of IEL, imbedded from the jurisprudential rationalization of aggression masqueraded as the protection of private commercial interests, have mutated into the modern neo-liberal landscape. Thereby, elevating the interests of foreign investors through a form of legal liturgy which falsely presumes that the international relations of IIL operate in flat hierarchies.[30] A narrative now promulgated by credible financial institutions such as the IMF and the World Bank.

While Akingumbe's socio-legal lens advocates that dominant economic actors are imbedding their norms of governance upon vulnerable hosts, it may also be argued that this description of developing nations as victims of economic domination is overreaching. For instance, Ranjan has asserted that this vilification of IIL constitutes a narrow minded and ideologically charged narrative. He writes that 'to portray third world countries as innocuous victims of some form of conspiracy hatched by the transnational capitalist class … not just oversimplifies the whole debate, but is also patently wrong.'[31] Indeed, such a dogmatic characterization of the foreign investment landscape would undermine the purpose served by investor protections, providing the same privileges to alien entities as to host state nationals. Notwithstanding the cogency of such reservations, this analysis does not purport that this form of exploitation by dominant foreign entities is absolute. Rather, it is argued the very existence of regimes which facilitate this exploitation demonstrates that the rules of IIL are not always driven by balance but are often predicated upon a universalisation of commerce. To pragmatize Akingumbe's arguably ideological project, this paper observes the striking similarity between the imperial patterns of dominance, and the contemporary principles of IEL, which appear to have survived the course of history, and seeped into a more sophisticated form of manipulation under the modern IIL regime.

[29] ibid (n 18).
[30] Thamil Ananthavinayagan, 'Critical Perspectives of International Investment Law' [2021] HIILP 1.
[31] Prabhash Ranjan, 'Why High-Profile Investors and Multinational Companies Sue India' (The Wire 10 December 2018) < https://thewire.in/law/why-high-profile-foreign-investors-and-multinational-companies-sue-india> accessed 08 February 2025.

SECTION 3 - CONTEMPORARY MODALITIES OF POWER IN GLOBAL ECONOMIC GOVERNANCE: THE CPA IN IRAQ

In contrast to the techniques employed by the feeble recourse of the imperial system, the guise under which the modern rules of IIL camouflage the intention to project power is far more nuanced. When recounting frameworks which encourage the unrestricted flow of foreign capital, none embody the same robust combination of incentives and protections that those prescribed by the Coalition Provisional Authority ('CPA') in Iraq. Epitomizing the kind of wish list that foreign investors and donor agencies dream of for developing markets,[32] this regime perfectly captures the World Bank's ambitions for IIL reform, 'ensuring ease of market entry and … imposing few restrictions on sectors in which investors can invest'.[33] Notwithstanding the robustness of this regime, Akingumbe's socio-critical lens necessitates an investigation of the context in which these agreements were struck such as to discern the power dynamic permeating this period of purported reconstruction.

"Reconstruction": Knitting Together Narrative and Legal Rule

Comparable with the Dutch East India Company, the CPA was a quasi-sovereign, commercial entity which emerged following the invasion, and subsequent occupation of Iraq. Led by senior American diplomat Paul Bremer, the CPA enjoyed wide discretionary powers in its mission to repair the Iraq economy and deteriorated post-war infrastructure. In assuming the governance of the state, the CPA derived its authority under the laws of armed conflict. Regulation Number 1 permitted the CPA to exercise authority 'under relevant U.N. Security Council resolutions, including Resolution 1483, and the laws and usages of war.'[34] Following the Coalition's occupation of Iraq, the country was in a state of anguish. With an inexperienced financial sector, destroyed infrastructure, and a generally mismanaged and corrupt government, foreign investment was considered vital in lifting the Iraqi people out of a future of

[32] The Economist, 'Let's All Go to the Yard Sale", *The Economist* (Middle East and Africa, 25 September 2003).
[33] Daniel Xavier and Kobina Egyir Forneris, *Investment Law Reform: A Handbook for Development Practitioners* (Investment Climate Advisory Services of the World Bank Group 2010) 8.
[34] Regulation Number 1, Coalition Provisional Authority.

impoverishment.[35] Thus, the CPA's privatization of a bulk of state-owned enterprises (Order 39, 26 and 51), embodied a form of neo-liberal 'shock therapy',[36] under the humanitarian guise of reconstructing the downtrodden state of the post-war Iraqi economy. However, as illustrated, the relationship between foreign capital and sustainable development is idiosyncratic, often granting investors protections regardless of their contribution to the welfare of the host country.

Employing Akingumbe's contextually assisted socio-legal lens, we discover that akin to the Santa Catarina's cargo, fully laden with valuable goods from the ports of Macau and China, the vast oil wealth of Iraq is also a crucial variable in assessing the legitimacy of the CPA's reconstruction project. At the time of the invasion, Oil was central to the Iraqi economy representing 79 percent of Iraq's Gross Domestic Product and 95 percent of Iraqi government revenue.[37] The commercial potential of the country's oil wealth and the private contracts granted to US multinationals in the bidding process mirrors the revenue generated at the auction and marketability of the *Sta. Catarina* cargo.[38] Theoretically, the neo-liberal economic formula stipulates that opening the market to foreign investment would serve to invigorate the Iraqi economy by re-vitalizing domestic businesses and boosting national employment.

However, beyond the inevitable economic risk incorporated by foreign investment, the degree to which foreign capital improves the welfare of the host state is contingent upon the provisions under which foreign capital flows into the host economy. Not the mere flow of FDI itself. But the provisions incorporated by the CPA regime appear to be underwritten by a 'logic that enforces control, domination and exploitation disguised in the language of salvation, progress, modernization, and being good for everyone.'[39] Lending an

[35] Farrah Hassen, 'Economy and Infrastructure (Public Finance) Working Group: The Future of Iraq Project' (The National Security Archive, 1 September 2006) https://nsarchive2.gwu.edu/NSAEBB/NSAEBB198/index.htm accessed 08 February 2025.
[36] Dave Whyte, 'The Crimes of Neo-Liberal Rule in Occupied Iraq' [2006] 47 BJC 177.
[37] Fahad Siddiqui, 'The Coalition Provisional Authority and Iraq: Investment Law and Policy in Action' [2013] 4 OHRLP 84.
[38] Peter Borschberg, 'The Seizure of the Sta. Catarina Revisited: The Portuguese Empire in Asia, VOC Politics and the Origins of the Dutch-Johor Alliance (1602-c.1616)' [2002] JSAS 31.
[39] David Schneiderman, 'The Coloniality of Investment Law' [2019] UTFL.

imperial air of superiority to the Anglo-American Coalition, one which permitted them to be impervious to interests of the Iraqi citizens. While the privatization of the Iraqi economy was driven by a policy of US market liberalization and a promise of salvation, the subtlety in which the CPA's provisions tip the balance in favour of the Coalition appears to exceed the ambit of reconstruction policy.

Bremer Orders: Provisions for the Purpose of De-Risking Foreign Investment

One of the central components of the regime's robustness is its framing, and the focus on the idea of reconstruction in the place of occupation. Order 1 ('De-Ba'athification') mandated the removal of members of the Ba'ath party from public sector jobs.[40] A form of de-risking which insures investors against the re-emergence of the pre-invasion regime, while excluding Iraqis from being hired by the CPA in this reconstruction project. The de-ba'thification of Iraq provided a great opportunity for foreign investors to exclude national interference in their operations, as this provision permitted the CPA to hire only a small number of nationals to work for the reconstruction which resulted in the unemployment of thousands of Iraqis.[41] A form of de-risking which arguably exceeds the remit of the national treatment principle, allowing the investor to undermine the influence of domestic entities upon foreign investment.

Arguably the most robust order promulgated by the civil administrator, Order 39 ('Foreign Investment') provided additional incentives specifically designed to induce foreign investment in Iraq.[42] The objective of this order may be discerned in its preamble which stipulates that '…the need for the development of Iraq and its transition from a non-transparent centrally planned economy to a market economy…'[43] Despite its reconstructive rhetoric, this Order was designed to privatize the Iraqi economy and strip the Iraqi authorities of all economic sovereignty and prerogatives. Predicated upon the "trickle-down" theory that the protection of foreign investors increases a state's attractiveness

[40] Order Number 1, The Coalition Provisional Authority.
[41] Rajiv Chandasekaran, *Imperial Life in the Emerald City: Inside Iraq's Green Zone* (Alfred A Knopf, 2006) at 326.
[42] ibid (n 32).
[43] Order Number 39, The Coalition Provisional Authority.

to FDI, which in turn leads to the development and welfare of the Iraqi people, this order unduly appeals to the interests of the foreign investor. Camouflaging any intention of economic domination, provisions such as Section 8 ('Use of Real Property') prevents foreign investors or business entities from acquiring Iraqi land but permits the use of leases for up to 40 years, subject to unlimited renewal. At face value, Order 39 appears to adhere to the principle of national treatment, a custom which stipulates that a country must 'accord to foreign investors and to foreign-controlled enterprises in its territory treatment no less favourable than that accorded in similar situations to domestic enterprises,'[44]. But looking towards other investment-enabling provisions, Order 37 ('Tax Strategy for 2023') granted tax immunity to foreign investors and contractors in 2023, while suspending the collection of import taxes, customs duties on products leaving Iraq under Order 12 ('Trade Liberalisation Policy').

Additionally, the Bush administration undertook additional measures to guarantee immunity from prosecution for white-collar crimes and corporate crimes,[45] under Executive Order 13303, which stipulates that those commercial entities operating in the Iraqi oil sector were exempt from US judicial proceedings, if their violation fell within the bracket of the oil industry, or under the project of reconstructing the Iraqi economy. Effectively, suspending the normal rule of law in the US and Iraq. This veritable legal arsenal of tax immunity, legal immunity, and the conferral of a controlling interest of foreign contractors over national assets, rendered the commercial activity of the Coalition as almost unimpeachable. The Economist declared this neo-liberal economic experiment as a 'capitalist dream,'[46] with the immediate effect of privatizing 200 Iraqi state companies, allowing foreign firms to retain 100% ownership of Iraqi banks, mines, and factories, and permitting foreign investors to repatriate the entirety of their profits out of Iraq.[47] But what were the implications of the CPA's de-risking of foreign investment on the economic self-determination and correlative market landscape of the sovereign Iraqi state?

[44] Article 3, The General Agreement on Tariffs and Trade 1947.
[45] ibid (n 34).
[46] 'Iraq's Economic Liberalization: Let's All Go to the Yard Sale, *The Economist* (Middle East & Africa, 25th September 2003).
[47] Naomi Klein, 'Iraq is not America's to Sell' *The Guardian* (Middle East, 07 November 2003).

The Result of Abrogating Host State Sovereignty: A Humiliating Form of Governance Sanctioned by Outmoded International Law

As captured by Akingumbe's employment of a socio-legal conduit towards the form and effect of IEL, the analysis of the relationship between the effectiveness of investment state agreements and the Coalition's mode of economic governance is best achieved by examining the context underpropping these relationships and the subsequent economic impact. In all, the dumping of foreign commodities and the deepening of the country's debt to the IMF through the exploitation of the national oil industry proved an effective formula for US firms such as Toys R US, Halliburton, Bechtel, Mobil, Shell, Phillip Morris, Kentucky Fried Chicken and Pepsi to attain lucrative contracts.[48] Akin to the highly marketable cargo of the Santa Catarina, the CPA tendered the majority of its bids in a non-competitive manner, favouring the interests of specific US private contractors.[49]

Bypassing the customary maxims of international law which fortify the *jus cogens* sovereign right of a people to determine their own social, economic, and cultural future, by positing these prime contractors in the role of the gatekeepers of the Iraqi reconstruction project, here we may observe the theoretical reach of neo-liberal economic rule exceeding its grasp. We may observe the clear cost of the CPA's commercial risk minimization formula which, further than depriving sovereign states from freely governing their own economic policy, produces devastating consequences for the market landscape of the host state. Facilitating the cleansing force of violence through military occupation, the promise of salvation through Western economic saviour, the imposition of a heavily skewed investment framework, and the exoneration of alien/investor liability in the event of endemic poverty, how can such a blatant form of economic domination be in harmony with the customary principles of international law?

[48] ibid (n 34).
[49] Whyte, 'The Crimes of Neo-Liberal Economic Rule in Occupied Iraq' [2023]

Under Article 55 of The Hague Regulations, it is provided that '… the occupying state shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties and administer them in accordance with the rules of usufruct.'[50] Effectively, the laws of belligerent occupation prescribed by Article 55 outlaw the privatization of a host nation's national assets when under military occupation by a hostile alien entity. A customary maxim of international law which the British-American Coalition directly undermines by dumping foreign commodities, harming key national industries through the spending of Iraqi oil revenues, deepening the countries debt to the IMF, and increasing its dependency on external long-term capital. Additionally, Article 64 of the Geneva Convention of 1949 that the occupying power may subject provisions upon the population of the occupied territory 'which are essential to enable the Occupying Power to fulfil its obligations … to maintain orderly government of the territory, and to ensure the security of the Occupying power.'[51] But the ultimate price of this neo-liberal economic experiment was the decimation the Iraqi economy.

Connecting the Dots: Illuminating a Credible Pattern of Neo-Liberal Economic Domination Stemming from Imperial Origins

In both the CPA's economic occupation of the devastated post-war Iraqi territory and the VOC's armed infiltration of the treasure ship; Sta. Catarina, we may observe the following courses of action which led to the development of these international economic regimes. In both scenarios, the alien-investor entity is permitted to employ supposedly lawful violence to help orient subjects towards profitable activities outside the sphere of domestic laws, consolidate an authoritative form of legal legitimacy under the premise of protecting the sanctity of free commerce and effectively exonerating the liability of the alien entity in the enforcement of their self-serving and arguably skewed economic regime. Drawing upon the Iraq case study as modern evidence of this

[50] Article 55, The Hague Regulations 1907.
[51] Article 64, The Geneva Conventions of 1949.

phenomenon, the CPA's economic occupation proves tragically accurate in capturing the paradigm of an economically imbalanced alien-state dynamic.

Illuminating a prime example of the sovereignty of independent states being curtailed by market conditions, facilitated by the very rules of IEL which are designed to create balance, the CPA-Iraq case study showcases that the modern landscape has not been divorced from the anchors of the imperial order. That the language of international investment law, as forged by canonical incursions such as the VOC's historic conquests of commercial naval territory, may be used in the modern context to grant structural advantages to Western firms to penetrate and transform economies of weak bargaining power such as to accommodate their commercial preferences. A recondite tension which, while rooted in the past, should be expelled from the present international economic order.

Conclusion

Positing the CPA regime as modern evidence that the imperial underpinnings of IIL have not been divorced from the modern rules of IEL, Akingumbe's socio-legal rhetoric proves illuminating. Understandably, this portrait of investment law will be resisted by many of its personnel as the regimes constructed by sovereign states are ultimately founded upon the consent of the peoples bound to it. But such ideological resistance while legally grounded, fails to account for the coerced nature of such consent which further than depriving people of their choices, infiltrates the host state's decision-making process. Thus, to break the inextricable linkage between the modern modalities of IEL and the previous imperial economic order, closer attention to the post-investment phase of host countries is merited. Additionally, the IMF and the World Bank should work towards providing protection to foreign investors without abrogating the policy ambit of host states, for example, through the widespread use of investment insurances. Only through such equalizing measures may we better ensure that the states of the Global South are legally equipped to be masters of their own economic destiny.

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