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Pars Ram Brothers and Commercial Certainty: The Future of the Rolling Charge

Luke Broadway*

I. Introduction

A trustee commingles multiple innocent beneficiaries' funds in an account and dissipates these funds to a level at which the total remaining is insufficient to satisfy all claims. This situation is one in which any beneficiary could find themself. In these circumstances, the court finds itself having to answer a difficult question: how should these remaining funds be distributed?

Several approaches to distribution have arisen in England and Wales jurisprudence. These can be categorised as the first in, first out method, *pari passu* and the rolling charge. The 2018 Singapore High Court case of *Pars Ram Brothers (Pte) Ltd v Austrian & New Zealand Banking Groups Ltd*[1] offers useful insight into the debate as to the correct approach, and from this several tenets of discussion can be synthesised.

It is submitted that the uncertainty surrounding the correct method of distribution is unacceptable in the contemporary commercial context of trust law, and that courts must therefore alight on a settled approach to resolving contests between rival beneficiaries. Following this, the three alternative methods will be analysed against the *Pars Ram* discussion points. It is concluded that, although not always practicable, the rolling charge is the most appropriate approach to adopt as default in England and Wales and should be incorporated moving forward. The

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[1] [2018] SGHC 60.

pari passu approach should be used where the rolling charge is inappropriate, whilst the first in, first out rule should be formally recognised as redundant in this context.

II. Alternate Methods

In order to outline the functioning of the separate approaches, let us assume that A, B and C are all separate beneficiaries who have their equitable interests managed by a shared trustee (T).[2] T places £100 belonging in equity to A into an account, followed by a further £100 belonging to B. T then dissipates £100 from the account, before depositing a further £200 belonging in equity to C. There is £300 in the account, with £400 having been deposited and £100 withdrawn (*see table 1*). Upon discovering the breach, the beneficiaries will likely wish to retrieve their funds from the account, meaning the insufficient commingled funds must be distributed. There are several methods for doing so, with each, in most instances, producing different results (*see table 2*).

Table 1

Beneficiary	*Deposit*	*Withdrawal*	*Balance*
A	£100		£100
B	£100		£200
		£100 (Dissipated)	£100
C	£200		£300

A. Clayton's case

The first and most infamous method of distributing mixed funds between innocent beneficiaries is the first in, first out approach from *Devaynes v Noble*,[3] or *Clayton's* case. This principle dictates that "when sums are mixed in a bank account as a result of a series of deposits, withdrawals are treated as withdrawing the money in the same order as the money was deposited."[4] As such, in our above example, the £100 dissipated by T would be attributed to A's £100, as this deposit was the *first in* and the dissipation was the *first out*. As a result of A footing the entire

[2] Sarah Lowrie and Paul Todd, 'In Defence of the North American Rolling Charge' [1997] DLJ 43, 51.

[3] (1816) 35 ER 781.

[4] *Barlow Clowes International Ltd v Vaughan* [1992] 4 All ER 22, 35.

£100 dissipation, B would be entitled in equity to their full £100, and C would be similarly entitled to their £200 (*see table 2*).

B. Pari passu

The *pari passu* (or *pro rata*) approach attributes "all gains and losses in proportion to the total contributions made by each"[5] trust. As laid out by Lord Woolf in *Barlow Clowes*,[6] the practical reality of this method involves "establishing the total quantum of the assets available and sharing them on a proportionate basis among all the investors [...], ignoring the dates [of investment]".[7] As articulated in *Re Diplock's Estate*,[8] all beneficiaries "share pari passu, each being innocent."[9] In our example, the total quantum of the assets is £300, three-quarters of the total £400 deposited. Consequently, each beneficiary is entitled in equity to three-quarters of their original contribution, and must each accept a proportional one-quarter loss. For A and B this entitlement is £75 each, whilst C has a claim for £150 (*see table 2*).

C. Rolling charge

The rolling charge is the most complex of the three methods. Commonly attributed to the Ontario Court of Appeal case of *Re Ontario Securities Commission v Greymac Credit Corporation,*[10] this method treats "the commingled fund as a blend or cocktail of credits made at different times and from different sources".[11] Withdrawals are treated "in the same proportions as the different interests in the account [...] bear to each other at the moment before the withdrawal is made."[12] As such, each beneficiary's rateable interest must be "recalculated at *every instance of withdrawal*".[13] In our example, as their deposits occur before the dissipation, the rolling charge recognises A and B's equities as equal, apportioning the loss of the dissipated £100 equally between them (£50 each). C's funds are deposited after

[5] David Hayton et al, Law of Trusts and Trustees (LexisNexis 2017) 90.35.
[6] *Barlow* (n 4).
[7] *Barlow* (n 4) 36.
[8] [1948] Ch 465.
[9] ibid 539.
[10] (1986) 55 OR (2d) 673.
[11] *Pars Ram* (n 1) [15].
[12] *Barlow* (n 4) 35.
[13] *Pars Ram* (n 1) [15].

the dissipation, and therefore the rolling charge considers them unaffected by the withdrawal, entitling them to £200 (*see table 2*).

Table 2

	A's Claim	*Percentage of Contribution*	*B's Claim*	*Percentage of Contribution*	*C's Claim*	*Percentage of Contribution*
First In, First Out	£0	0%	£100	100%	£200	100%
Pari Passu	£75	75%	£75	75%	£150	75%
Rolling Charge	£50	50%	£50	50%	£200	100%

III. Uncertainty and Contemporary Context

Table 2 highlights the potential for significant financial variation depending on the method adopted. In fact, the simplicity of the above examples may misrepresent the gravity of these potential variations. Imagine, for example, that the sums in question are ten or even one-hundred times larger than those above. With thousands at risk, the consequences can swiftly become severe.

Given the serious potential for substantial outcome variation between method of distribution, one would expect this area to be firmly settled. Unfortunately, this is not so. Following a discussion of the relevant authorities, it will be demonstrated not only that this area of law is uncertain, but that in the contemporary commercial context of trust law, this uncertainty is unacceptable.

A. Authorities

Current England and Wales authority for resolving contests between rival beneficiaries is uncertain and in need of clarification "at a high level".[14] The first in, first out approach from *Clayton's* case arose from a dispute between banker and customer,[15] and was adopted for use in an equitable distribution in *Pennell v Deffell*[16] in 1853. The method was eventually overruled for use in resolving contests between beneficiary and trustee in *Re Hallett's Estate*,[17] but was relied on in *Re Diplock's Estate*[18] for distribution between innocent beneficiaries (though "unenthusiastically"[19]).

14 Matthew Conaglen, 'Contests between Rival Trust Beneficiaries' (2005) 64(1) CLJ 45, 47.
15 Lowrie and Todd (n 2) 61.
16 (1853) 43 ER 551.
17 (1880) 13 Ch D 696, 750.
18 *Re Diplock's Estate* (n 8) 554.
19 Lowrie and Todd (n 2) 61.

Despite the rule's criticism having extended far beyond *Re Diplock's Estate*, the principle is yet to be abolished in England and Wales.

Continued acceptance of the first in, first out rule is not universal, with many international jurisdictions having overruled the approach entirely.[20] In *Re Ontario*, the court was "not aware of any argument of logic [...] or fairness which would support"[21] its application. Similarly, the Royal Court of Jersey described the rule's results as "haphazard".[22] In *Re Walter J. Schmidt & Co*,[23] American judge Learned Hand J suggested the rule delivered "a common misfortune"[24] and had "no relation whatever to the justice of the case."[25] Finally, the New South Wales Supreme Court found the rule to be inapplicable "as a matter of principle".[26]

England and Wales authority suggests the rule cannot be treated as a mere exception,[27] and thus the case remains a tokenistic starting point based on "long-established general practice."[28] However, a modern judicial trend against the rule has left it in a jurisprudential void,[29] remaining the first port of call,[30] but being regularly bypassed by courts with little effort. In *Russell-Cooke Trust Co v Prentis (No. 1)*,[31] for example, Lindsay J considered that the method could be displaced by even "a slight counterweight"[32] and that it may be best referred to as an exception rather than a rule.[33]

Unfortunately, even once the rule has been bypassed, the options available to courts remain unsatisfactory. England and Wales courts, despite willingness to do so,[34] have refused to accept the rolling charge. This refusal remains tentative, with reasons against its implementation being based predominantly on arguments of practicability,[35] not principle. Thus, the uncertainty caused by the continued

[20] Conaglen (n 14) 46.
[21] *Re Ontario* (n 10).
[22] *In re Esteem Settlement* [2002] JLR 53 [107].
[23] (1923) 298 Fed 314.
[24] ibid 316.
[25] ibid 316.
[26] *Re French Caledonia Travel* [2003] NSWSC 1008 [169].
[27] Conaglen (n 14) 46.
[28] *Barlow* (n 4) 33.
[29] Mark Pawlowski, 'The demise of the rule in Clayton's case' [2003] Conv 339, 345.
[30] *Barlow* (n 4) 33.
[31] [2002] EWHC 2227 (Ch).
[32] ibid [55].
[33] ibid.
[34] *Barlow* (n 4) 35.
[35] ibid.

existence of the first in, first out is not reduced by the availability of other methods, but instead increased.

The only certainty existing in this area of equity is that the *pari passu* approach *is* an actionable method of distribution in England and Wales. However, where certainty exists in the procedure, the functioning and outcome of this method lacks the degree of certainty necessary in the contemporary commercial context. It is clear therefore that clarification in this area of trust law is overdue, particularly given the trust's new role as an "entrepreneur for commercial uses."[36]

B. Contemporary commercial context

Although cited as the "greatest and most distinctive achievement"[37] of English jurisprudence, the trust's roots are alien from its contemporary applications. Stemming from the discretionary conscience of equity and the "Chancellor's foot",[38] trusts arose as instruments by which ownership interests were preserved in situations involving dishonest temporary landlords who, relying on the common law, would refuse to return land to knights returning from crusades.[39] Equity, in bypassing the common law's bite, "recognised that the true beneficial ownership of the land remained with the knight,"[40] thus introducing the concept of split ownership between law and equity.[41] The objectives of these earlier trusts were ostensibly private, rather than commercial.[42] This early model was inherently flexible, enabling the court to act as a pillar of conscience in unconscionable situations. Although the trust remains useful as the "characteristic device"[43] for the organisation of intergenerational wealth,[44] the traditional conception has expanded into its contemporary role as a "commercial device",[45] requiring a greater emphasis on certainty.

This shift into the commercial sphere is by no means minor. Langbein, for example, states that "over 90% of the money held in trust in the United States is

[36] Ruiqiao Zhang, 'The new role trusts play in modern financial markets: the evolution of trusts from guardian to entrepreneur and the reasons for the evolution' (2017) 23(4) T&T 453, 453.

[37] Frederic Maitland, 'The Unincorporated Body', *McMaster University Archive* (1902) <https://econpapers.repec.org/paper/hayhetpap/maitland1902.htm> (accessed August 2020).

[38] John Selden, *Table Talk of John Selden* (Selden Society 1927) 25.

[39] Alastair Hudson, *Equity & Trusts* (9th edn, Routledge 2017) 37.

[40] ibid.

[41] ibid.

[42] Zhang (n 36) 454.

[43] John Langbein, 'The Secret Life of the Trust: The Trust as an Instrument of Commerce' (1997) 107(1) YLJ 165, 165.

[44] ibid.

[45] Paul Davies and Graham Virgo, *Equity & Trusts: Text, Cases, & Materials* (2nd edn, OUP 2016) 25.

in commercial trusts as opposed to personal trusts."[46] Furthermore, in the United Kingdom (UK), Thornton sets out that commercial trusts hold well over £200 billion in beneficial interests.[47] Examples of implementations across UK[48] and international markets include pension trusts, real estate trusts, oil royalty trusts and asset securitisation trusts.[49]

The trust offers clear benefits to commercial parties, for example through the automatic imposition of a fiduciary duty. The no conflict and no profit elements[50] assist in preventing fund managers from "being swayed",[51] therefore protecting investors' interests.[52] This prophylaxis offers further commercial benefits, with investors being more likely to commit capital when able to rely upon the managers' "being bound by [even] conventional fiduciary standards."[53] Furthermore, when this duty is breached, beneficiaries may rely on the strength of equity's proprietary remedies. The ability of an investor with an equitable interest to employ equity's "metaphysical"[54] methods and trace their mismanaged funds into mixed accounts and claim property *in specie* is exceptionally powerful.

It is apparent from this that the use of the trust in commerce introduces a conflict between equitable flexibility and commercial certainty. As noted by Hayton, Pigott and Benjamin, a continuing theme of commercial law is its need to defend itself against any "unanticipated impact"[55] of trust law and the potentially unwarranted strength of equitable proprietary remedies. Yip and Lee recognise that this inventiveness may be exploited by lawyers seeking advantages in commercial litigation - this poses clear challenges.[56]

With trillions held in commercial trusts worldwide,[57] it is vital that all components of trust law, including the approach taken in resolving contests between rival beneficiaries, are as certain as possible so as to promote general certainty within commercial dealings. Without this, the ability to assess costs and manage

[46] Langbein (n 43) 166.
[47] Rosy Thornton, 'Ethical Investments: A Case of Disjointed Thinking' [2008] CLJ 396, 396.
[48] Zhang (n 36) 456.
[49] Langbein (n 43) 168–172.
[50] *Boardman v Phipps* [1967] 2 AC 46.
[51] *Bray v Ford* [1896] AC 44, 51 (Herschell LJ).
[52] Matthew Conaglen, 'The nature and function of fiduciary loyalty' (2005) 121 LQR 452, 460.
[53] Langbein (n 43) 183.
[54] *Re Diplock's Estate* (n 8) 520.
[55] David Hayton et al, 'The Use Of Trusts In International Financial Transactions' (2002) 1 JIBFL 23, 25.
[56] Man Yip and James Lee, 'The commercialisation of equity' (2017) 37(4) LS 647, 651.
[57] Langbein (n 43) 168.

risk is thwarted,[58] with prudent investment being impossible and the likelihood of expensive litigation being increased.

The results of the uncertainty surrounding the correct approach of distributing commingled funds are plain in commercial trust cases such as *Re Ontario*. In this case before the Ontario Court of Appeal, $5,696,600 had become commingled in an account known as G account. The parties' respective positions in the account were as follows: $4,683,000 belonged in equity to one group of beneficiaries (*the companies*), $841,285.26 belonged to a different group of beneficiaries (*the participants*), whilst $172,314.74 was the trustee's. After $4 million was moved from G account into a separate account (C account), $1,343,191.34 was dissipated from the G account. As a result, G account's balance was reduced to $353,408.66 whilst the C account's balance remained at $4 million. Having established interests in the funds, the court was tasked with establishing the respective entitlements to the remaining $4,353,408.66 from the G and C accounts (*see table 3*).

Table 3

Beneficiary	*Deposit into G Account*	*Withdrawal from G Account*	*Balance of G Account*	*Balance of C Account*
The Companies	$4,683,000		$4,683,000	$0
The Participants	$841,285.26		$5,524,285.26	$0
Trustee	$172,314.74		$5,696,600	$0
		$4,000,000 (Transferred to C account)	$1,696,600	$4,000,000
		$1,343,191.34 (Dissipated)	$353,408.66	$4,000,000

As seen in table 4 below, the different methods of distribution available to the Court produced hugely different results for the beneficiaries. In fact, the variance in recoverable funds between the methods for either party in *Re Ontario* was $309,565.53 –[59] a vast sum, particularly in 1986 when the case was decided. It

[58] Iain MacNeil, 'Uncertainty in Commercial Law' [2009] EdinLR 68, 70.

[59] See table 4.

is submitted therefore that the expense of litigation caused by the uncertainty as to the entitlement to the $309,565.53 could have been easily avoided with increased certainty surrounding the methods of distribution.

Table 4

	The Companies' Claim	*Percentage of Contribution*	*The Participants' Claim*	*Percentage of Contribution*
First In, First Out	$4,000,000	85.4%	$353,408.66	34.9%
Pari Passu	$3,690,434.47	78.8%	$662,974.19	78.8%

IV. Discussion and Analysis

Having established that greater certainty is essential, it will now be demonstrated that, although not always practicable to implement, the rolling charge is the appropriate approach to adopt as default in England and Wales jurisprudence and should be incorporated moving forward. The *pari passu* approach should be used where the rolling charge is inappropriate, whilst the rule from *Clayton's* case should be formally recognised as redundant in this context. This analysis will be guided by reference to tenets of debate synthesised from *Pars Ram.*

A. Pars ram

The 2018 case of *Pars Ram* offers useful insight into the debate as to the correct approach to be taken when distributing innocent beneficiaries' commingled funds. Pars Ram Brothers (the company), prior to its liquidation, traded primarily in spices. Trades were financed by banks who, through a chain of loans and securitisations, would have the company's financed stock (or the proceeds) held on trust for them by the company.[60] Upon entering insolvency proceedings, remaining pepper stocks were found in the company's warehouse. Given its perishability, it was agreed that the pepper would be sold, with the proceeds being held on trust for creditors.[61] Of the 17 categories of pepper sold, the proceeds of four were disputed. For the 13 non-contentious categories, only the lending banks could claim an interest. However, for the four disputed categories, both the lending banks *and* general creditors were permitted to assert interests.[62] The total sum of claims made against the disputed categories exceeded the $4.68 million total of their sale

60 *Pars Ram* (n 1) [2].
61 ibid [3].
62 ibid [4].

proceeds,[63] meaning it was necessary for the court to identify the correct method for distributing the remaining funds.

For reasons discussed below, the court concluded that the rolling charge was most appropriate, thus further establishing the credibility of the rolling charge internationally. Several pillars of discussion have been synthesised from the judgement of Audrey Lim JC, and these will be used to guide the following analysis. These pillars are: outcome fairness and rough justice,[64] party intention,[65] and impracticability.[66]

B. Outcome fairness and rough justice

A key concern when determining the method of distribution is the fairness of the final apportionment. For litigants, this is naturally of paramount importance. However, given the nature of the scenario, in which the funds are insufficient to satisfy all claims, it is of course impossible for any method of distribution to provide complete justice to all beneficiaries.[67]

The fairness of the first in, first out rule requires little analysis. As set out by Learned Hand J, the rule delivers "a common misfortune […] which has no relation whatever to the justice of the case."[68] *Pars Ram* offers no fresh criticism, though this is perhaps because the judicial and academic condemnation of the principle is already extensive. The rule has been said to produce "arbitrary"[69] results as well as being "unfair to early investors".[70] As can be seen in table 2, the rule is harsh on beneficiary A who, in reality, is in a position no different to that of beneficiary B. As a result of this indisputable criticism, the *Clayton* "rule of convenience",[71] despite remaining a starting point, is often sidestepped "in favour of a method that would produce a more just and equitable outcome."[72]

The excessive injustice of the first in, first out approach may explain why England and Wales trust law has been content with the "rough justice"[73] of *pari passu*. Henderson J in *Charity Commission v Framjee*[74] describes this roughness

63 ibid [6].
64 *Pars Ram* (n 1) [26(b)].
65 *Pars Ram* (n 1) [22].
66 *Pars Ram* (n 1) [19].
67 *Re International Investment Unit Trust* [2005] 1 NZLR 27 [73]; *Graham v Arena Capital Limited* [2017] NZHC 973 [42].
68 *Re Walter* (n 23).
69 *Barlow* (n 4) 46.
70 *Barlow* (n 4) 32.
71 *Re Diplock's Estate* (n 8) 554.
72 *Pars Ram* (n 1) [11].
73 *Charity Commission for England and Wales v Framjee* [2014] EWHC 2507 (Ch) [61].
74 ibid.

as "unavoidable",[75] noting that the *pari passu* method responds to the human feeling that those affected by common misfortunes should bear any resulting burden equally.[76] It is certainly unavoidable that the shortfall in funds must be accounted for and reflected in the apportionments to the beneficiaries. However, it is submitted that the rough justice afforded by the *pari passu* approach can, in many cases, be avoided. The only possible justification for accepting such rough justice is in response to the rolling charge's impracticability.

The predominant issue with *pari passu*'s rough justice is, simply, its inherent inaccuracy. This was recognised by Rimer J in *Shalson v Russo*,[77] in which it was noted that the *pari passu* approach ignores evidence of the transactional reality of the beneficiaries' monies.[78] As suggested by Audrey Lim JC in *Pars Ram*, an application of *pari passu* may "be unfair to the most recent contributors as they may have their interests in the fund diminished by withdrawals *prior* to their contribution".[79] This is undesirable from an academic perspective, although it could be justified with pragmatic arguments[80] if the differences in outcome between methods of distribution are negligible. Unfortunately, in many commercial cases, these differences are often extensive.[81]

Let us refer back to our example involving A, B and C beneficiaries. A's £100 is placed into the account, followed by B's £100. £100 is then dissipated, before C's £200 is deposited. The balance is £300, with £400 having been deposited and £100 withdrawn.[82] C's £200 is placed into the account *after* the £100 is dissipated by the trustee. This begs the question of why C should be affected by this dissipation? They are, for all intents and purposes, in a separate situation to the A and B beneficiaries. If the court were to adopt the *pari passu* method, C would be made to share the impact of a dissipation they were not party to. The rolling charge, conversely, recognises the true position of C and returns to them their £200 contribution.

The judgement of Henderson J in *Framjee* incorrectly purports that the *pari passu* method is rooted in equality. In *Barlow Clowes*, Woolf LJ cites *Sinclair v Brougham*[83] as justification for a *pari passu* distribution, Lord Sumner's judgement asserting that the *pari passu* approach may be adopted when the investors' claims

75 ibid [61].
76 ibid.
77 [2003] EWHC 1637 (Ch) [149]–[150].
78 Hayton et al (n 5) 90.36.
79 *Pars Ram* (n 1) [16].
80 See iv.d.
81 See table 4.
82 See table 1.
83 [1914] AC 398.

are "equal and […] for the present purpose identical."[84] Woolf LJ spends little time assessing whether the *Barlow Clowes* investors' claims are "equal and […] for the present purpose identical",[85] concluding simply that they are. It is suggested that a more thorough analysis of the facts against the *Sinclair* dicta would have revealed that investors' claims are often not as equal as is initially apparent.[86] It is true that equal "equitable charges rank pari passu".[87] However, as recognised by Conaglen, it cannot be said that all contributors necessarily have equal equities just by virtue of being in the same account.[88] The rolling charge, unlike *pari passu*, recognises the differing equities of the contributors and distributes accordingly, unfairly prejudicing neither early nor late beneficiaries.

Audrey Lim JC in *Pars Ram* suggests that the rolling charge is likely to "produce a fairer and more equitable result compared to the *pari passu* method".[89] The fairness of the rolling charge's result is clear. However, can it be said that the rolling charge is "more equitable"?[90] This must be answered in the affirmative, as the method aligns more completely with equitable tracing principles, namely the lowest intermediate balance rule and equitable conceptions of chronology.

Following the lowest intermediate balance rule,[91] if a claimant's money is mixed with other monies in an account and the balance of the account falls below the value of the claimant's contribution, the amount the claimant can recover is limited to the "maximum amount that can be regarded as representing their money."[92] In *Roscoe v Winder*[93] a beneficiary's £455 was paid into an account by a trustee. The account's balance then fell, through dissipation, to £25, but then increased back to £358 following an unrelated deposit from the trustee. The court held that the highest figure available to the claimant was "the smallest amount to which the balance […] had fallen"[94] (£25), because the trustee had had no

84 ibid 458.
85 ibid.
86 However, adoption of *pari passu* was justified by impracticability concerns – see iv.d.
87 *Barlow* (n 4) 44.
88 Conaglen (n 14) 48.
89 *Pars Ram* (n 1) [21].
90 ibid.
91 Hayton et al (n 5) 90.36.
92 Graham Virgo, *The Principles of Equity & Trusts* (OUP 2018) 566–567.
93 [1915] 1 Ch 62.
94 ibid 70.

intention "to clothe those [newly deposited] moneys with a trust in favour of the"[95] beneficiary.

Despite criticism of the rule in situations of commingling with both beneficiaries and trustees,[96] the principle remains good law, having received judicial support in *The Federal Republic of Brazil v Durant International Corp*.[97] Here, Lord Toulson reminds us that if money in a bank account dwindles such that it "has ceased to exist, it cannot metamorphose into a later property interest."[98] It is clear that this rule follows and abides by proprietary principles, and thus, as Smith advocates, "must apply between innocent beneficiaries."[99] Whilst the *pari passu* method ignores this fundamental principle, the rolling charge recognises the account's lowest intermediate balance at each withdrawal and distributes accordingly. Therefore, even on a matter of principle, the rolling charge is preferable over *pari passu*.

It is apparent that the lowest intermediate balance rule and rolling charge both base their operations on a chronological analysis of a fund's transactional history. Despite arguments to the contrary, it is submitted that a chronological analysis is appropriate when resolving contests between rival beneficiaries. Given the contemporary commercial context in which trusts are employed, many beneficiaries will seek to trace through electronic accounts. This raises the need for reconciliation of tracing, chronology and bank accounts.

The crux of tracing is value, this being the "only constant that exists before, through and after the substitutions".[100] Despite seeming prima facie vital, cases such as *Foskett v McKeown*[101] have migrated tracing's emphasis away from strict chronology and transactional links[102] by clarifying that tracing operates through "attribution not causation."[103] Although the need for chronology is lessened, it is not negated entirely, and it is apparent that a degree of chronological analysis remains essential. For example, when discussing the possibility of tracing into a debt (backwards tracing), Leggatt LJ in *Bishopsgate Investment Management v Homan*[104]

[95] ibid.
[96] Tatiana Cutts, 'The Role of Tracing in Claiming' (University of Oxford 2015) 183; Virgo (n 92) 567.
[97] [2015] UKPC 35.
[98] ibid [17].
[99] Lionel Smith, 'Tracing in Bank Accounts: the Lowest Intermediate Balance Rule on Trial' (2000) 33 Can Bus LJ 75, 80.
[100] Lionel Smith, *The Law of Tracing* (OUP 1997) 119.
[101] [2001] 1 AC 102.
[102] Alexandra Clarke, 'The future after *Durant*: is backwards tracing the way forward?' [2016] OUULJ 91, 93.
[103] *Foskett* (n 101) 137.
[104] [1995] Ch 211.

suggests it is not possible since value "cannot be followed into something which existed […] before the money was received".[105]

Any further analysis of the legitimacy of backwards tracing is not within the scope of this article. However, it is clear that the distribution of a commingled fund relies on tracing's approach to chronology. Despite attaching weight to the order of transactions, the rolling charge's focus on chronology is different to that of the first in, first out approach. The rolling charge is not concerned with the often arbitrary order of specific contributions, but instead the chronological connection between deposits and withdrawals. As per *Foskett*, the rolling charge operates through attribution, not causation, selectively adopting the transactional history so as to attribute withdrawals to deposits and obtain "the substance of the transaction[s] in question and not […] the strict order".[106] The first in, first out rule, conversely, is inherently causative, its principles based not on attribution of value but on debt appropriation.[107] It is therefore true that the rule "has nothing to do with tracing".[108]

Cutts writes that, "even though there is a long-established consensus that a bank account cannot be conceptualised as a linear progression of independent debts,"[109] trust law has not yet "outgrown the process of appropriating debits and credits chronologically".[110] Cutts' argument's focus on the reality of bank accounts' functioning is indisputable. However, this is not the reasoning behind the procedure of distributing commingled funds. The process is inherently artificial.[111] No amount of evidence is available to assist in determining exactly which beneficiary's money was dissipated at any certain point;[112] the commingled funds lack identity and ownership is "impossible to determine".[113] Instead, presumptions are required to interpret deposits and withdrawals so as to determine how best the remainder should be distributed.

This artificiality may appear primitive; this is not so. The rolling charge is utilised to best distribute the funds in the account according to its transactional history. Although physically impossible to conclude what happened to a beneficiary's money after being commingled, it is possible to construct a narrative so as to assume how the losses could have occurred following dissipation. Despite

105 ibid 221.
106 *Foskett v McKeown* [1998] Ch 265, 283; *Brazil* (n 97) [38].
107 D.A. McConville, 'Tracing and the Rule in Clayton's Case' (1963) 79 LQR 388, 401.
108 *Barlow* (n 4) 44.
109 Cutts (n 96) 15.
110 ibid.
111 Smith (n 99) 78.
112 ibid.
113 *Re Ontario* (n 10) [682a-b].

Cutts' position, such analysis can apply to bank accounts because the content of the mixed bulk is unimportant. Whether it be a bank account, stocks of pepper,[114] or any other collection of fungibles – the contexts are analogous. A degree of chronological attribution is necessary to best establish the respective equities of the claimants so as to appropriately distribute their commingled assets.

It is therefore submitted that, as suggested in *Pars Ram*, the rolling charge is the "fairer and more equitable"[115] method of distribution, and should be incorporated moving forward. However, this incorporation cannot be immutable, and must give way to alternative party intention and administrative impracticability concerns.

C. Party intention

Audrey Lim JC in *Pars Ram* sets out that the intention of the parties is "an important overarching consideration"[116] for choosing a method of distribution. This intention may be express, inferred or presumed and,[117] although all the circumstances of the case should be considered,[118] it is likely that the terms and structure of the relevant contribution or investment will be indicative.[119]

Where no explicit intention is present, implied and presumed intentions must be relied upon. These pose greater difficulty to the courts and are plainly harder to ascertain with certainty. In *Pars Ram*, Audrey Lim JC relies on the *Barlow Clowes* judgement as an example of the courts interpreting the facts to presume the parties intended to distribute *pari passu*.[120] Lord Woolf sets out that, when investments are "required […] to be paid into a common pool this indicates that the investors did not intend to apply"[121] the rule from *Clayton's* case. Furthermore, his Lordship continues to state that, despite even a potential intention to invest separately, the existence of a common misfortune generates a common pool, meaning the first in, first out rule again cannot be presumed to have been intended.[122]

This, as Audrey Lim JC recognises,[123] is an inappropriate example to rely upon on as a guide by which to assess party intention. The two methods with a realistic chance of application in the case were that of *Clayton's* case and *pari passu*, the former of which the court was openly opposed to. Despite seeming "ready

[114] *Pars Ram* (n 1) [35].
[115] *Pars Ram* (n 1) [21].
[116] *Pars Ram* (n 1) [26].
[117] ibid [22].
[118] ibid [25].
[119] ibid [25].
[120] *Pars Ram* (n 1) [23].
[121] *Barlow* (n 4) 42.
[122] ibid.
[123] *Pars Ram* (n 1) [39].

to implement"[124] the rolling charge, the method was never given a chance due to its impracticability. As such, *Barlow Clowes* offers little guidance on the intention necessary to engage the *pari passu* method, but instead the intention needed to stray from the first in, first out rule.

Helpfully, Audrey Lim JC also introduces *Re International Investment Unit Trust*[125] (*Re IIUT*) as an example of the presumed intention necessary to trigger a *pari passu* distribution.[126] Williams J in *Re IIUT* identifies two key factors indicative of this intention. Firstly, in the case, the investors knew that similar returns were offered to all, and due to the repayment structure, they would have known that their funds would be used to repay earlier investors. Secondly, the pattern-less nature of the funds indicated that all funds were available to all investors.[127] Williams J's comments in *Re IIUT* are much more appropriate as a guide as to the intention required to distribute *pari passu* than Woolf LJ's in *Barlow Clowes*, the latter serving as an instrument for distinguishing from the first in, first out rule rather than as a practicable set of principles for assessing investor intention.

The first in, first out method from *Clayton's* case has been recognised not as a rule, but instead an "evidential presumption and no more"[128] which must give way to contrary intentions.[129] Such contrary intentions seem likely. For example, the *Barlow Clowes* judgement suggests that, in commercial contexts, it "can be presumed that [investors] would not want to subject what was left of the pool to the vagaries of chance […] of the first in, first out principle."[130] It is unlikely that any agreement would lead the court to conclude that investment funds were intended to be distributed first in, first out. Campbell J in *Re French Caledonia Travel* suggests that there may be rare situations, such as in *Re Diplock's Estate*, in which *Clayton's* presumed intention has "some reality."[131] Further analysis shows, however, that even this tentative proposal seems generous, given that the approach was only relied upon in *Re Diplock's Estate* for its convenience against the "difficulty and complication in practice"[132] of a rateable distribution. This judgement is over 70 years old, and it is unlikely that such difficulties would arise today.[133] Thus, there is no material chance of the *Clayton* presumed intention arising in contemporary

[124] ibid.
[125] [2005] 1 NZLR 27.
[126] *Pars Ram* (n 1) [24].
[127] ibid.
[128] *Q&M Enterprises Sdn Bhd v Poh Kiat* [2005] SGHC 155 [56].
[129] *Re Hallet* (n 17) 728.
[130] *Barlow* (n 4) 41.
[131] *Re French Caledonia Travel* (n 26) [171].
[132] *Re Diplock's Estate* (n 8) 554.
[133] See iv.d.

cases, meaning there is little standing in the way of abolition of the first in, first out rule in this context.

The *Pars Ram* and *Re IIUT* judgements suggest that a pattern-less fund in which contributions are mixed and likely used to repay other investors may be indicative of an intention to distribute *pari passu*. It is also clear from *Pars Ram*'s analysis of *Barlow Clowes* that an intention not to use the first in, first out method is not necessarily equal to an intention to distribute *pari passu*, the court's reasoning being more of an artificial escape from being bound to apply *Clayton's* case.

In the United Kingdom, commercial trusts generally fall into two categories – unit trusts and investment trusts. Unit trusts are "collective investment scheme[s] under which the property is held on trust for the participants",[134] whilst investment trusts collectively pool investors' money together so as to spread funds across a diversified portfolio.[135] Regardless of the phraseology of collective pools and schemes, it is suggested that, for commercial parties seeking investment certainty, it should be prima facie presumed that their intention is to adopt the method most reflective of the transactional history – the rolling charge. As Smith argues, it seems overtly fictitious to assume that investors form a common intention "to embark on some kind of joint venture, sharing losses like partners."[136] Of course, if the intention to distribute *pari passu* is clearly established, such as in *Re IIUT*, this must prevail. However, in absence of such clear intention, it should be taken as default that the intention of the parties is to distribute with the rolling charge.

D. Impracticability

The main barrier to adoption of the rolling charge is its potential impracticability. Quite simply, the approach's implementation costs more, leading courts to prefer the cheaper, rough justice of *pari passu*. Case law identifies two distinct elements to the rolling charge which can prove expensive: the complex calculations, and the organisation of raw data. Although both elements can be easily sidestepped by distributing *pari passu*, it is submitted that, given the increased availability of sophisticated computer software, only the latter is a justifiable bar to the rolling charge.

A clear example of the rolling charge's prohibitive cost comes from *Barlow Clowes*. Barlow Clowes International (BCI) received capital from investors on the terms that it would be invested into risk-free government backed bonds. However, it was later discovered that much of the investment capital had been used illegally by BCI's co-founder, Mr Clowes, for the personal purchase of expensive luxury

[134] Financial Services and Markets Act 2000, s 237(1).
[135] Zhang (n 36) 457.
[136] Smith (n 99) 90.

items.[137] As a result, upon liquidation, the "amount of assets available fell far short of what would be needed to satisfy all the investors' claims in full."[138] Distribution of these remaining funds was complicated by the size of the BCI operation, with the £100 million in investments consisting of contributions from around 11,000 investors.[139] The Court of Appeal eventually settled on the *pari passu* method of distribution, finding the first in, first out rule and the rolling charge inappropriate. Among other reasons, these two methods failed due to their impracticability.

It is not explicitly specified by Woolf LJ whether difficulties in apportioning the funds using *Clayton's* and the rolling charge were due to the organisation of the data, or the actual act of implementing the rules and conducting the necessary calculations. However, his Lordship's reference to the "expense and time which will be involved in having to apply [them]"[140] suggests that the issue stems from the application of the rules, and not the availability or organisation of raw accounts. Computer technology was of course much less accessible in 1992 when this judgement was given, and as such it is no surprise that the Court of Appeal were hesitant to decide upon a method of distribution reliant on the complex calculation of vast quantities of data when simpler methods were available.

Concerns over the cost of locating, organising and inputting the raw data involved with large-scale trust transactions were expressed in 2014's *Framjee*. Here, Henderson J recognised that modern computers are more than capable of performing the necessary calculations,[141] and that the prohibitive barrier in modern claims arises instead from the "reconstruction of the raw data […] needed in the absence of any computerised record keeping".[142] No figure is offered by Henderson J as to how expensive organising the Dove Trust's records would have been, however estimations given by Mander J in New Zealand's *Arena Capital*[143] suggest that similar data organisation tasks at the commercial level could cost hundreds of thousands of dollars.[144] Such tasks are inevitable when parties fail to correctly manage records. Although a number of modern automated services are available to convert paper documents into digital datasets,[145] these are expensive and remain useless against incomplete, poorly managed or non-existent accounts. Thus, when fraudsters obfuscate transactional paths, rendering it "practically

137 Diana Wright, 'UK: Lessons of a systematic swindler - the barlow clowes affair.' (*Management Today*, 1 Jun 1992) <https://www.managementtoday.co.uk/uk-lessons-systematic-swindler-barlow-clowes-affair/article/409293> (accessed August 2020).

138 *Barlow* (n 4) 26.

139 *Barlow* (n 4) 26.

140 *Barlow* (n 4) 35.

141 *Framjee* (n 73) [55].

142 ibid.

143 *Arena* (n 67).

144 ibid [13].

145 See for example United States organisation Smooth Solutions–https://smoothsolutions.com/clients/financial-documents-scanning/.

impossible to match credits against debits",[146] there is little courts can do other than distribute *pari passu*.

The *pari passu* approach is the simpler and cheaper approach to adopt. It is not necessary to construct a precise transactional history,[147] as only the "total quantum of the assets available"[148] and a list of the beneficiaries' respective contributions are required. Once obtained, the calculations needed to distribute are comparatively simple.[149] Conversely, incomplete records will almost always thwart the deployment of the rolling charge, and in these instances *pari passu* is the only available solution. Similarly, even if present, the expense of locating, organising and inputting the raw data can be prohibitively costly. Smith asks, quite fairly, whether it is "really a principle of private law that parties' rights may be forfeited to convenience?"[150] Naturally, such outcomes are undesirable, however when costs are high, it is uneconomical to waste significant proportions of the recoverable fund on organising data when the *pari passu* method remains available. *Pars Ram* offers no insight into determining when such costs become too high as to be uneconomical, and it seems that what constitutes a cost "likely to exhaust the fund available"[151] remains at the judge's discretion.

When the necessary data is present, it is no longer an acceptable argument to claim that the rolling charge's calculations are too expensive to implement; powerful computer software is too readily available to courts,[152] lawyers and commercial litigants to justify this reasoning. Given that both the rolling charge and *Clayton's* case calculations require a full transactional history, if one method is available, so is the other.[153] As such, the two approaches cannot be distinguished on practicability grounds. However, given the number of arguments in favour of the rolling charge over the first in, first out approach, the latter is simply redundant in these circumstances.

V. Conclusion

The current uncertainty, when viewed against trust law's contemporary commercial context, is unacceptable and costly. Thus, for the reasons laid out above and in *Pars Ram*, the rolling charge should be adopted as default in England and Wales. Its outcomes are more accurate, more equitable and fairer than those

146 *National Crime Agency v Robb* [2014] EWHC 4384 (Ch) [65].
147 Lowrie and Todd (n 2) 57.
148 *Barlow* (n 4) 36.
149 See ii.b.
150 Smith (n 99) 88.
151 *Barlow* (n 4) 39.
152 *Framjee* (n 73) [55].
153 Conaglen (n 14) 48.

of the other available methods. Similarly, its operation aligns closely with equitable tracing principles, and its distributions are more likely to match the presumed intentions of commercial parties.

Despite this, the use of the rolling charge should not be unqualified. Use of the method should be displaced either when an intention to adopt *pari passu* is clear, or in response to impracticability concerns. That said, concerns based solely on the rule's calculations are no longer justifiable thanks to the availability of accessible computer software to courts, lawyers and litigants. Instead, only a lack of transactional data, or excessive costs of constructing digital accounts, should render the rule's application impracticable. In response to the arguments canvassed above, the first in, first out rule should be formally recognised as redundant for resolving contests between rival beneficiaries.

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Interpretative, iterative, and kindred: implication in fact as contractual interpretation

Timothy Ke*

I. Introduction

The eccentric proposition that a court can make a contract on the parties' behalf by implying terms based on what it considers fair or just is, in similar or gentler terms, said to be 'almost blasphemy.'[1] Because a judge 'finds in himself the criterion of what is reasonable,'[2] the yardstick for determining contractual outcomes might become unpalatably close to being measured, not by the length of the Chancellor's foot,[3] but by the foot of a Justice of the common law. If, however, implication of terms in fact is considered an instance of contractual interpretation, a court implying a term is squarely positioned as a *reader* of a contract, not an author of one. This adjoined conception properly characterises considerations of the commercial background (including considerations of fairness and justice), ensuring due regard is had to the express terms of a contract and that implication is only performed when confidently warranted according to legal principle.

This article advocates for this adjoined conception to construction and implication, defending particularly the principles advanced by the Privy Council in *Attorney General of Belize v Belize Telecom Ltd* ('*Belize*').[4] The once-dominant *Belize* ruling characterised implication in fact as part and parcel of contractual interpretation,

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1 *Per* Lord Wright in the 1935 Holdsworth Club lecture, cited at *Liverpool City Council v Irwin* [1976] QB 319, 330 (Lord Denning MR).

2 ibid.

3 A proverbial shorthand pointing to the unpredictability of English equity's reliance on a judge's conscience, originating from Samuel H. Reynolds (ed), *The Table Talk of John Seldon* (Clarendon Press 1892) 61.

4 [2009] UKPC 10.

such that the many tests for implying terms in fact were given coherence by a single enquiry: whether the term would give shape to the objective meaning of a contract. *Belize* has, in the five years past, fallen out of fashion with English courts, a shift spearheaded by the 2015 Supreme Court ruling, *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* ('*Marks & Spencer*'),[5] which sought to segregate the two processes, abolishing the single enquiry in *Belize*.

In efforts to revitalize the *Belize* principles, this article will cast for, and attempt to grasp, a common *raison d'être* of the two processes, namely, to give effect to the parties' presumed intentions by interpreting and fulfilling a contract's objective meaning. Part II offers, first, brief accounts of the law on interpretation and implication in fact, highlighting the significance within both processes of ascertaining the objective meaning of the parties' contract. A detailed contention will follow that the common paramountcy of contractual meaning unites the two processes as means to the same end. Part III presents a rebuttal of Lord Neuberger's arguments made in *Marks & Spencer*, which is the most significant judicial opposition to the assimilation of the two processes to date. Primary focus will be due to his Lordship's argument that the processes are *sequential* and thus separate. A perspective is advanced that perhaps too often lacks due emphasis in the literature—that implication is, like interpretation, very much an *iterative* process. It is a diligent exercise of comparing rival constructions of a contract's unspoken meaning against the other express terms and the commercial background. As an iterative process, implication in fact systematically requires that due heed is paid not only to the commercial background, but also to express provisions of a party's contract—such that the account of the processes as kindred should be welcomed, not shunned, as a matter of principle.

This article recognizes that the assimilated approach is not the current prevailing view. Several recent authorities have accepted *Marks & Spencer*'s approach,[6] but these authorities do not give independent reasons for why implication does not fall under the umbrella of interpretation. This paper addresses *Marks & Spencer* directly, defending the approach in *Belize*.

Less relevant to this article, and thus set aside, are the formulations of implied terms which do not depend upon the parties' intentions and circumstances.[7] These include, *inter alia*, terms implied by custom or common law[8] and by statute.[9]

[5] [2015] UKSC 72.

[6] E.g. *Parker v Roberts* [2019] EWCA Civ 121 [88]; *Law Debenture Trust Corp Plc v Ukraine* [2018] EWCA Civ 2026 [205]; *Sparks v Biden* [2017] EWHC 1994 (Ch) [36].

[7] *Marks & Spencer* (n 5) [15] (Lord Neuberger), [69] (Lord Carnwath); *Luxor (Eastbourne) Ltd v* Cooper [1941] AC 108, 137 (Lord Wright).

[8] E.g. *Hutton v Warren* (1836) 1 M & W 466 (HC) (fair allowance for farm labour).

[9] E.g. s.12(1), s.12(3) Sale of Goods Act 1979 (that the '[seller] has a right to sell the goods').

II. A Common Purpose—Interpreting the Objective Meaning of Contracts

A. Interpretation

Though not wholly identical, implication and interpretation of terms share a fundamental similarity as devices achieving the same purpose—that of discerning the overall objective meaning of the contract authored by the parties themselves.

The stage must first be set by briefly affirming that interpretation is, at its core, concerned with the objective meaning of the contractual language which the parties have chosen first-hand to utilize. The roots of the authoritative modern approach to interpretation are due to Lord Wilberforce in two landmark rulings.[10] In a later judgement, *Investors Compensation Scheme Ltd v West Bromwich Building Society* ('*ICS*'),[11] Lord Hoffmann neatly summarised the principles laid down in both cases, in the course of which his Lordship famously propounded that 'interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge … available to the parties … at the time of contract.'[12] Since *ICS*, several more iterations of the principles of contractual interpretation have been handed down by the Supreme Court.[13] There do not, however, appear to be fundamental differences between the leading authorities on interpretation, with the most notable point of contention being the balance between literal interpretations adhering closely to express wording and contextual interpretations according greater weight to background material.[14]

The law of interpretation is generally seen as one of 'continuity rather than change,'[15] a view sustained by the courts' tendency to cite several of the leading cases together when speaking of the "principles of construction" and treating all such cases as authoritative.[16] One critical consensus between all aforementioned cases—and the one highlighted by the present section—is that "interpretation" is the ascertainment of the 'objective meaning of the language which the parties had

10 *Prenn v Simmonds* [1971] 1 WLR 1381 (HL); *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 3 All ER 570 (HL).

11 [1998] 1 WLR 896 (HL).

12 ibid 912.

13 Seminal cases succeeding *ICS* include *Chartbrook v Persimmon Homes Ltd* [2009] UKHL 38; *Re Sigma Finance Corp* [2009] UKSC 2; *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; *Arnold v Britton* [2015] UKSC 36; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24.

14 See Hugh Beale and others (eds), *Chitty on Contracts* (33rd edn, Sweet & Maxwell 2019) [13-043] ("*Chitty*").

15 *Wood* (n 13) [15].

16 E.g. *BSI Enterprises Ltd v Blue Mountain Music Ltd* [2016] ECC 11 [38]–[39]; *Teeside Gas Transportation Ltd v Cats North Sea Ltd* [2020] EWCA Civ 503 [55]–[56]; *Systems Pipework Ltd v Rotary Building Services Ltd* [2017] EWHC 3235 [16].

chosen to express their agreement.'[17] Passages from almost all seminal cases cited above can be read in direct support of this proposition.[18]

B. Implication—belize telecom

Like what the authorities preceding it had done for interpretation, the Privy Council's seminal *Belize* ruling engrains within the process of implication the ascertainment of objective contractual meaning. As will be discussed, the weight *Belize* places on the parties' objective intentions is, in fact, not novel—and its roots can be perceived in the settled law dating over a century back.

At a high level of abstraction, the traditional legal tests habitually employed by the courts to determine whether implication is possible are recognised to be twofold.[19] The first is where the proposed term is necessary to give 'such business efficacy to the transaction as must have been intended at all events by both parties who are business men.'[20] The second is where the implied term is so obvious as to go 'without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common "Oh, of course!"'[21]

Crucially, within the traditional tests, there is a strong emphasis on the parties' objectively ascertained intentions. The editors of *Chitty* observe that both the "business efficacy" and "officious bystander" tests for implication are 'predicated to depend on the presumed intention of the parties,'[22] a view also reflected in the courts, both in the business efficacy[23] and officious bystander[24] contexts. Indeed, where one party lacks any knowledge of a proposed term for instance, there can be no mutual intention to include it. In *Spring v National Amalgamated Stevedores and Dockers Society*,[25] the obviousness (officious bystander) test failed on this basis—instead of responding, "Oh, of course!" to the proposed term, in all likelihood

[17] *Wood* (n 13) [10]–[11].

[18] *Reardon Smith* (n 10) 574H; *ICS* (n 11); *Chartbrook* (n 13) [33]; *Re Sigma* (n 13) [12]; *Rainy Sky* (n 13) [14]; *Arnold* (n 13) [77].

[19] More recent authorities have furnished tests for implying terms, perhaps most notably *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 52 ALJR 20 (PC) wherein Lord Simon of Glaisdale advanced a five-stage test incorporating the two traditional tests just mentioned. Additional factors include: (i) whether implication would be 'reasonable and equitable,' (ii) whether the proposed term is 'capable of clear expression,' and (ii) whether any express term is liable to be contradicted by it.

[20] *The Moorcock* (1889) 14 PD 64, 68.

[21] *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206, 227.

[22] *Chitty* (n 14) [14-006].

[23] *Liverpool City Council v Irwin* [1977] AC 239, 266E.

[24] *Hughes v Greenwich LBC* [1994] 1 AC 170, 179A–B.

[25] [1956] 2 All ER 221.

the claimant would have responded, "What's that?" to the subject matter of the term. Sir Leonard Stone V-C was prepared to reject the implied term on this basis alone.[26]

Because of the considerable import of the parties' presumed intentions, it is submitted that *Belize* assumes a critical place in the patchwork of the law on implied terms preceding it. *Belize*'s approach to implied terms is holistic in nature. Lord Hoffmann's advice on the Board's behalf cautioned against treating the previous tests advanced as having a life of their own, including the familiar "business efficacy" and "officious bystander" formulations. Undue fixation on those tests would, for the Board, detract from the overarching question of implication courts are to answer: 'whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean.'[27] The many tests for implied terms are therefore not to be regarded as independent hurdles 'to be surmounted,' but rather as differing expressions of the same central idea.[28] The centrality of contractual meaning within both interpretation and implication is what knots the two processes together. As pithily put by Lord Pearson, implied terms, 'though tacit, formed part of the contract which the parties made for themselves.'[29]

Marks & Spencer[30] is generally seen to have heralded a return to the law pre-*Belize*,[31] centred strictly on the two traditional tests and certain ancillary rules, such as those derived from *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*,[32] and detached from the central question of the objective meaning of contracts. The error of this approach is discussed in Part III of this article.

C. One raison d'être

Incorporating implication within the 'superstructure of contractual interpretation'[33] enables a more nuanced understanding of the two processes—that the *raison d'être* of implication, like interpretation, is to give effect to the parties' objectively understood intentions. Two points are pertinent.

Firstly, implication is an exercise in ascertaining a contract's meaning. Sir Thomas Bingham MR (as he then was) famously observed that courts are not

[26] ibid 231D.
[27] *Belize* (n 4) [21].
[28] ibid [28].
[29] *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601, 609 (Lord Pearson).
[30] *Marks & Spencer* (n 5).
[31] See e.g. Yihan Goh, 'Lost but found again: the traditional tests for implied terms in fact' (2016) 3 JBL 231.
[32] See (n 19) above.
[33] As expressed by counsel in *Groveholt Ltd v Hughes* [2010] EWCA Civ 538 [45].

performing the 'usual role in contractual interpretation'[34] when implying terms. Indeed this holds true, but only insofar as the courts are not '[attributing] the true meaning to the language in which the parties *themselves* expressed their contract.'[35] Instead, the courts are manifesting the contract's 'true meaning' into words on the parties' behalf. This notion breathes life into Sir Bingham MR's subsequent description of implication as an exercise in 'interpolation'[36]—if the express terms are graphical points on an axis of meaning, the courts will blot additional points along the trajectory highlighted by those express terms and the admissible background. Points are never added based on fairness, but only to give effect to the interpretation with the most apparent fidelity to the graphical trajectory of the contract, because that is the best the law can do.

Because the object is thus to understand the instrument's meaning and not to improve it, the implied term is seen to represent the parties' unexpressed intentions.[37] As early as 1888,[38] this focus on reasonably understood, objective meaning has been the justificatory basis for implying terms in fact (what Kramer calls 'licence to supplement'[39]). It is immaterial that "objective" meaning contains an element of fiction when failing to align with parties' actual subjective intentions. In the English objectivity-driven law of contracts,[40] subjective intentions are not accorded the same materiality as their objective counterparts. They are fluctuating and fleeting, and there is a limit to human recollection of subjective intentions in the months or years following contract creation. Though beset by occasionally controversial consequences,[41] objective interpretation is a 'legal construction that

[34] *Philips Electronique Grand Public SA v British Sky Broadcasting* [1995] EMLR 472, 481 (CA).

[35] ibid. Added emphasis.

[36] ibid.

[37] *Luxor* (n 7) 137 (Lord Wright).

[38] *The Moorcock* (1888) 13 PD 157, 158-159. Aff'd (1889) 14 PD 64, 64 (CA).

[39] Adam Kramer, 'Implication in Fact as an Instance of Contractual Interpretation' (2004) 63 CLJ 384, 396.

[40] See generally Gerard McMeel, 'The Objective Principle of Construction' in Gerard McMeel, *McMeel on the Construction of Contracts* (OUP 2017).

[41] See e.g. Paul Davies, 'Recent Developments in the Law of Implied Terms' [2010] LMCLQ 140, 144 contending that a wholly objective approach is 'dangerous' for suggesting that the 'only matter of importance is what the reasonable observer would understand the contract to mean' and that 'subjective intentions of a party are now irrelevant.' But any assertion that subjective intentions ought to be material during the construction of contracts must overcome the settled rationale for the inadmissibility of subjective intentions for that purpose, namely, that all meaningful certainty of the words of the parties' agreement would be destroyed, not least because parties pursue and agree to objective terms with differing degrees and subjects of emphasis: see *Prenn v Simmonds* [1971] 1 WLR 1381, 1385 (HL) (Lord Wilberforce). It must also demonstrate why the law should insist on according materiality to subjective intentions at the interpretation stage, when a mechanism insulating against injustice created by mechanical disregard for subjective intentions already exists—the power in equity to rectify a contract to give effect to actual subjective intentions where proper evidence can be presented of a 'real intention and a real mistake in expressing that intention': see *Inland Revenue Commissioners v Raphael* [1935] AC 96, 143 (HL).

reflects the needs of society,'[42] as seemingly accepted in leading English authorities[43] and also reflected in the German law concept of 'constructive' interpretation to fill gaps in contractual instruments.[44]

As an enquiry into the objective meaning of a contractual instrument, implication is properly described as 'an exercise in the construction of the contract as a whole.'[45] Sales J has rightly preferred the "contractual meaning" rationale over certain old cases, such as *Shirlaw v Southern Foundries (1926) Ltd*,[46] which instead took terms implied in fact to operate based on 'some free-standing principle of law.'[47] Indeed, if implication did not give effect to contractual meaning, the courts would be in want of some alternative justification for it. The fundamental rationale of implication in fact is at stake. Unlike terms implied in law, the terms courts can imply in fact are not limited by long-established custom[48] or statutory guidelines.[49] Implication in fact necessarily constitutes an *ad hoc* licence for the courts to modify contracts. It is difficult to see how such intrusive power is justified unless the modification is the product of a genuine attempt to ascertain what the parties meant themselves. After all, if judicial rewriting of contracts is so forbidden,[50] what are the courts to do but interpret the parties' own contract?

The second critical point to be understood is that implication and interpretation are not identical procedures. The Board in *Belize* itself acknowledged an important difference between the two: the question for implied terms 'is not what any particular language in the instrument means but whether, without it having been expressly stated, that is the meaning of the instrument.'[51] In a legal document, which can be expected to provide expressly for all material contingencies, the implied term's textual absence is the very reason Sir Bingham MR considers implication more 'ambitious' than interpretation.[52] The law mustn't allow this 'extraordinary power'[53] to generate mischief. Thus, there is generally seen

42 Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press 2005) 148. See also Adam Kramer, 'Common Sense Principles of Contract Interpretation (And How We've Been Using Them All Along)' (2003) 23(2) OJLS 173, 176–177.

43 E.g. *Marks & Spencer* (n 5) [21] (Lord Neuberger), [66] (Lord Carnwath); *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 459 (Lord Steyn).

44 Hugh Beale and others, *Cases, Materials and Text on Contract Law* (Oxford: Hart 2010) 749.

45 *The Reborn* [2009] EWCA Civ 531 [9] (Lord Clarke).

46 See [1940] AC 701, 717.

47 *F & C Alternative Investments (Holdings) Ltd v Barthlemy (No 2)* [2012] Ch 613 [272] (Sales J) (HC).

48 E.g. *Shell UK Ltd v Lostock Garages Ltd* [1977] 1 All ER 481, 487.

49 E.g. s.14(3) Sale of Goods Act 1979.

50 *Synochem International Oil (London) Co Ltd v Mobil Sales and Supply Corp* [2000] 1 Lloyd's Rep 339 [29].

51 [2009] UKPC 10 [34].

52 Leonard Hoffmann, 'Language and lawyers' (2018) 134 LQR 553, 563.

53 *Philips* (n 34).

to be a "necessity" threshold before terms may be implied.[54] The standard is not 'absolute necessity' but one of necessity to give a contract 'commercial or practical coherence,'[55] often expressed as 'business efficacy.'[56] Indeed, it may even be said that the standard is necessity to give effect to the parties' presumed intentions, faithful to the central question in *Belize*. As Lewison observes in his leading text,[57] the origin of the "necessity" principle was expressed as giving 'business efficacy to the transaction as *must have been intended* … by both parties.'[58] Nevertheless, implication may thus differ from interpretation insofar as the necessity test does not exist within the latter.

One criticism levelled at *Belize* is that a central question fixated on what a contract 'would reasonably be understood to mean'[59] creates the unduly lenient standard of "reasonableness" instead of "necessity."[60] It would seem such a concern is misplaced. Indeed, the Board in *Belize* emphasized from the outset that, bad as bargains may be, the courts have no general power to improve upon contracts to make them fairer or more reasonable.[61] A score of seminal rulings succeeding *Belize* affirm that the *Belize* principles kept the "necessity" requirement intact.[62] Even if it is true that *Belize* incorporates necessity as one of many factors to assess what the parties objectively meant, it must remain fatal to the implied term if it is not necessary to imply.

Moreover, contrary to what Davies suggests,[63] the presence of a necessity test does not remove implication from the umbrella of interpretation. On the contrary, *Belize* reveals that the necessity test goes further than merely asking whether a term is "necessary" to give the contract "business efficacy," i.e. to make the contract work. It also invites the court to assess whether the term is "necessary" to give effect to the contract's *objectively ascertained meaning*.[64] This is well illustrated by *The Reborn*.[65] The owners of a vessel entered a voyage charterparty with the defendant charterers. The charterparty conferred upon the charterers a sole discretion to nominate a

54 *Luxor* (n 7) 125 (Lord Russell); *Hughes v Greenwich LBC* [1994] 1 AC 170, 179 (HL).
55 *Marks & Spencer* (n 5) [21].
56 *The Moorcock* (1889) 14 PD 64, 68.
57 Sir Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell 2011) 296.
58 *The Moorcock* (n 56) 68 (Bowen LJ). Added emphasis.
59 *Belize* (n 4) [21].
60 E.g. Elizabeth MacDonald, 'Casting Aside 'Officious Bystanders' and 'Business Efficacy'?' (2009) 26 JCL 97, 99.
61 *Belize* (n 4) [16].
62 *The Reborn* (n 45) [15], [18]; *Geys v Société Générale* [2013] 1 AC 523 [55]; *Arnold* (n 13) [112]; *Marks & Spencer* (n 5) [62], [77].
63 Davies (n 41) 146.
64 *Belize* (n 4) [23].
65 [2009] EWCA Civ 531.

port berth for the vessel to lie within.[66] During loading, the vessel was damaged by a hidden underwater projection at a nominated port berth, and the owners claimed breach of an implied term for the charterers to nominate a safe berth. The court accepted that the term was not necessary to 'make the contract work,'[67] i.e. to achieve business efficacy. For instance, a logical result could be reached via clause 20 of the charter by which the owners might be taken to agree they would take the loss if they failed to investigate the loading port's dangers.[68] Supporting that result, the word, 'safely,' was struck out by mutual agreement from clause 1 that the vessel would 'safely get and lie always afloat' at the loading port wherein it was damaged.[69] Importantly, to conclude that the implied term should be rejected, the court expressly asked Lord Hoffmann's question of what the charterparty *objectively meant*, i.e. whether the charterers 'agreed to take the risk' of the berth's unsafety,[70] and concluded, "no."

Hooley attributes the difference in outcome between *The Reborn* and the very similar case of *The Moorcock*[71] to the latter having no access to *Belize*'s "contractual meaning" approach.[72] In *The Moorcock*, the claimant's vessel was damaged by an underwater projection at the defendants' berth. To achieve business efficacy, the Court of Appeal deemed it necessary to imply a term that the defendants would take reasonable care to ascertain the safety of the riverbed. This result was owed, *ratio*, to the claimant's inevitable susceptibility to underwater dangers—the claimant was powerless during the vessel's operations to avoid contacting the ground at the defendants' berths.[73] Likewise, the charterers in *The Reborn* had sole discretion to elect at the agreed port any possible berths of their choosing, and the owners were inevitably susceptible to dangers at those berths.[74] Like the charterers in *The Reborn*, the defendants in *The Moorcock* did not have the riverbed vested in them and had no control over its state,[75] but this did not bar the implied term. In *The Reborn*, if those critical express clauses inconsistent with the proposed implied term—clauses 1 and 20, to name a couple—simply did not exist, nor the parties' motivations behind those express clauses, the proposed term may well have been readily implied. Donaldson J in *The Evaggelos Th* said, if he was faced with a 'simple' charter which 'provided that the vessel was only to go to such port or place … as might be nominated by the charterer, … I should have no hesitation in implying a

[66] ibid [6], [43].
[67] ibid [45].
[68] ibid [42].
[69] ibid [5].
[70] ibid [45].
[71] (1889) 14 PD 64.
[72] Richard Hooley, 'Implied terms after Belize Telecom' (2014) 73(2) CLJ 315, 336.
[73] *The Moorcock* (n 56) 64.
[74] [2009] EWCA Civ 531 [43].
[75] *The Moorcock* (n 56) 64.

qualification that the port or place had to be safe.'[76] Of course, such blindness to clauses 1, 20, and the parties' knowledge of the facts on which the implied term is based, is quite unrealistic. Presumed intention depends fundamentally on the parties' minds regarding what the transaction was to them.[77] Often the clearest and most accessible objective records of the parties' knowledge and intentions are the express provisions themselves.

The importance of express language reveals a strength of considering implication to be an exercise in contractual interpretation: it places the parties' contract front and centre. Donaldson J, above, immediately continued that he was '*not faced with a simple charter*. Any suggested implied term has to be considered against the general business background to the transaction *and the express terms of the charter*.'[78] Nor was the charter in *The Reborn* "simple." If the implied term that the nominated berths were safe was declared "necessary," fulfilling what may have been deemed "business efficacy," the result would have contradicted the charter's reasonable meaning. *Inter alia*, the omission of the warranty of safety under clause 1 pointed to a lack of any express warranty of safety, and the owners of the vessel apparently assumed the risks of damage under clause 20.

If implied terms are only justified because they give shape to the parties' objective meaning, then even an ideal as foundational as "business efficacy" must give way to the parties' objectively interpreted intentions. Interpreting contractual meaning is (or should be) the core objective within the necessity threshold itself.

D. The concept of unspoken meaning

Not every scholar is receptive to the categorization of implication within the umbrella of interpretation. Recently, it was expressed that interpretation concerns 'what is there'[79] whereas implication concerns 'inserting what is not there.'[80] Lord Sumption argues extrajudicially that '[i]mplication *fills a gap* in the written

[76] [1971] 2 Ll Rep 200, 204 (QB).
[77] *The Moorcock* (n 56) 68. See also the main text surrounding *Spring* (n 25).
[78] *The Evaggelos Th* (n 76). Emphasis added. This passage also reads in full support of the "iterative" approach to implication advocated for in Section III(b) of this article.
[79] *Greenhouse v Paysafe Financial Services Ltd* [2018] EWHC 3296 (Comm) [12].
[80] *Byron v Eastern Caribbean Amalgamated Bank* [2019] UKPC 16 [22].

instrument. It is not possible to identify by a process of construction something which *ex hypothesi* is not in the agreement at all.'[81]

Whilst it is true that implied terms operate as '*ad hoc* gap fillers,'[82] it is only a gap in the express contractual wording being filled, not the contract's contextual meaning arrived at when the express terms are read in their proper commercial context. Instead of deriving meaning solely from the express terms of a document, there is a seamless bed of context from which the parties' true objective intentions may be ascertained. No acontextual statement has ever been made.[83] Because of contextual considerations, words contained within a document, whether a literary novel or a formal contract, are always capable of evoking meaning beyond the prosaic or "natural" meaning they carry. To some, the phrase, "Macbeth is unworthy," might mean that the regicidal usurper in the Shakespearean tale is unfit for the throne. But to the shipowner who named his vessel, "SS Macbeth," the phrase might have a nuanced contextual meaning—that his ship is unseaworthy. If the shipowner himself makes it known to the owner of a dockyard that "Macbeth is unworthy," his words carry a connotation that he intends to contract for repairs. The full extent of his meaning is not captured by the prosaic sense of his language.

Lord Sumption's above assertion that it is impossible to construe what is textually absent seemingly isolates the textual meaning in a contractual instrument and excludes contextual meaning, placing the latter altogether beyond the reach of construction. This does not reflect reality. Take for example the 'officious bystander' test,[84] where a bystander asks of both parties during negotiations, "Did you mean to include term *x*?" Term *x* is spelled out by the courts as an implied term if the parties respond, "But of course, term *x* goes without saying." Naturally, the parties *meant* that term *x* should have effect without having to record it expressly, as without the future conflict having arisen, the context so obviously supports it. That is contextual meaning, the fact that 'one can intend something without it crossing one's mind'[85] or without transcribing it.

Indeed, without context, words lack autonomous meaning altogether. Asking, "What is the acontextual meaning of language?" likely drums up images of dictionaries and grammar books. However, the law has always recognized dictionaries and grammars as 'only part of the material needed for interpretation.'[86] What a speaker *really* means may not be understood simply by parsing dictionary

81 Jonathan Sumption, 'A question of taste: the Supreme Court and the interpretation of contracts' (2017) 17(2) Oxford University Commonwealth Law Journal 301, 311. Added emphasis.

82 *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 459 (Lord Steyn).

83 *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2005] RPC 9 (HL) [64].

84 *Shirlaw v Southern Foundries* (n 21).

85 Kramer (n 39) 399.

86 Hoffmann (n 52) 560.

definitions together. In contracts, like in wider society, the admissible background assists in determining 'speaker meaning'[87] and not just word meaning. To use Wittgenstein's example, when asking someone to 'show the children a game,' this presumably does not mean 'show them how to gamble,' even if gambling is a game by definition.[88] Implied terms spell out the parties' unspoken meaning, even if parties provide no words to convey spoken meanings.

A commonly cited criticism of this theory is made by Davies: '[s]ilence is inherently ambiguous; there should be no interpretation of silence.'[89] But this is not wholly accurate. Silence may be ambiguous *ab initio*, but ambiguity does not unconditionally render interpretation inappropriate. By contrast, the facts of the case can sufficiently cure the ambiguity in silence to justify implying a term, or such justification can even be presumed in the absence of contrary evidence. For instance, when a court interprets a contract, especially a professionally drafted one, silence will usually indicate that no term is to be implied, as the drafters could reasonably have been expected to provide for all material contingencies.[90] But where, for example, an express term states that an obligation must be performed to a single party's satisfaction, the court's hesitation in the face of ambiguity is readily overturned by the sensible presumption that satisfaction will not be capriciously withheld, and the court is satisfied to imply a term to that effect.[91] Likewise, it will be an exceptional case where the very act of contracting does not give rise to an implied term that neither party may obstruct performance by the other.[92] Hence, where a contractor could not begin construction until the other party supplied him with the relevant plans, it was readily implied that the other party would supply the materials within a reasonable period to enable completion of the work by the time agreed.[93] And where a footballer was transferred by one football club to another, with a portion of the transfer price made conditional on the footballer scoring twenty goals for the receiving club, the receiving club impliedly undertook to give the footballer a reasonable opportunity to score twenty goals.[94] It will be noticed that the implied terms in such cases are comfortably of the type that would satisfy the test of "necessity" at common law, that is, they are needed to give the

[87] ibid.

[88] Ludwig Wittgenstein, *Philosophical Investigations* (G.E.M. Anscombe tr, Oxford 1972) 33.

[89] Paul Davies, 'Recent developments in the law of implied terms' [2010] LMCLQ 140, 145.

[90] *Belize* (n 4) [17].

[91] *Dallman v King* (1837) 4 Bing NC 105 (CtCP); *Braunstein v Accidental Death Insurance Co* (1861) 1 B & S 782 (KB).

[92] *Mackay v Dick* (1881) 6 App Cas 251, 263 (HL); *Sprague v Booth* [1909] AC 576, 580 (PC); *Colley v Overseas Exporters* [1921] 3 KB 302, 309.

[93] *Roberts v Bury Commissioners* (1870) LR 5 CP 310, 325.

[94] *Bournemouth and Boscombe Athletic Football Club v Manchester United Football Club* (CA, 22 May 1980).

contract business efficacy and would assuredly have "gone without saying" at the negotiating table. They are valid meanings which plainly figure in the court's objective interpretation of the parties' unspoken intentions.

Moreover, there is little danger that the ambiguity in silence would produce a liberal or artificial interpretation which deviates unduly from the parties' objective intentions. Courts may only imply a term where it is 'confidently' justified upon satisfaction of the strict "necessity" threshold,[95] and are powerless to 'improve upon' contracts on grounds of reasonableness or fairness.[96] Even when interpreting express terms, 'probably 999 times out of 1000,' departure from the parties' wording is not warranted.[97] Sir Bingham MR emphasizes that implication is tangibly more stringent still,[98] and thus there is no obvious basis for imposing an additional barrier against interpretation of silence. The parties' meaning under the contract may not be express, but is ascertainable, nonetheless.

III. Addressing Marks & Spencer

Lord Neuberger delivers the majority judgement. His Lordship goes further than merely considering implication more 'ambitious'[99] than interpretation; the two are, for Lord Neuberger, altogether 'different processes governed by different rules.'[100] As a consequence, courts following the approach in *Marks & Spencer* resort to the traditional tests for implied terms preceding *Belize*, but these tests will effectively have lives of their own, no longer employed as tools for ascertaining the meaning of a contractual document,[101] as that is no longer the central question. This section provides rebuttals to Lord Neuberger's argument. An account of implication in fact as an "iterative process" is advanced—a methodical and principled exercise of putting rival constructions of a contract's (con)textual meaning against the

95 *Reigate v Union Manufacturing Co* [1918] 1 KB 592, 605 (Scrutton LJ).
96 *Belize* (n 4) [16] (Lord Hoffmann).
97 *Per* Lord Hoffmann in a conversation with Kate Gibbons of Clifford Chance, reported at Kate Gibbons, 'A Conversation with Lord Hoffmann' (2010) 4 LFMR 242, 243.
98 *Philips* (n 34) (Sir Thomas Bingham MR).
99 ibid.
100 *Marks & Spencer* (n 5) [26].
101 See generally Goh (n 31).

express terms and material background considerations—and the proper way to understand the process.

A. No words to construe?

Briefly, Lord Neuberger presents a contention correspondent to that of Lord Sumption: 'the words to be implied are *ex hypothesi* not there to be construed.'[102] The breadth of this argument was addressed above, but Lord Neuberger adds that speaking of construing the contract as a whole 'begs the question as to what construction actually means in this context.'[103] With great respect, this curiously circular argument appears to ignore the point of the approach in *Belize*. *Belize* provides a functional account of construction in the context of implication. As a tool of interpretation, implication supplements a contractual instrument with implied terms which manifest its objectively interpreted, unspoken meaning. It is difficult to see why this commits the question-begging fallacy at all, even more so because implication fits squarely into Lord Neuberger's own conception of interpretation as an "iterative" process, to which discussion now turns.

B. The iterative process of implication in fact

The crux of Lord Neuberger's contention against assimilating implication with interpretation figures in the following proposition: the two processes are sequential and thus separate, in that a court cannot practically decide whether a term should be implied until it decides 'what the parties have expressly agreed' via interpretation.[104]

Courts must indeed have due regard to the express terms before terms may be implied,[105] not least because it is well-established that implied terms may not contradict express terms,[106] and thus the court must comprehensively understand the latter before considering the former. Even so, there should be no bright line between the two processes. It has long been considered important to ascertain the commercial purpose of a contract, against which rival constructions

[102] ibid [27].
[103] ibid.
[104] ibid [28].
[105] E.g. *Hamlyn & Co v Wood & Co* [1891] 2 QB 488, 491 (Lord Esher MR); *Re Sigma Finance Corp* [2008] EWCA Civ 1303 [98] (Lord Neuberger, dissenting), aff'd [2009] UKSC 2.
[106] *Marks & Spencer* (n 5) [28].

of the contract can be compared.[107] Lord Neuberger himself emphasized that interpretation is 'something of an iterative process, namely checking each of the rival meanings against the other provisions of the document and investigating its commercial consequences.'[108] This dictum was advanced in a dissenting speech which has proven influential, 'wholeheartedly endorse[d]' in the High Court[109] and approved in both the Court of Appeal[110] and Supreme Court.[111] Considering an implied term to simply represent another 'iterative' meaning reads Lord Neuberger's 'iterative process' theory full-circle. A court will imply a term where it is satisfied that the term represents the parties' intentions 'with confidence,' in a manner which the express terms simply fail to achieve.[112] The sequential approach and iterative approach are not mutually exclusive; implication can at once take both forms. When all relevant express terms have been construed, and deemed to plainly defy a contract's commercial purpose, implied terms serve as last-resort iterations of meaning. The court must test the implied term's meaning against, *inter alia*, commercial sense, the admissible background, and of course—the other express provisions to ensure they are not conflicted against. Indeed, the implied term can be "fashioned" to accord with express terms,[113] with the newly fashioned term being *ex hypothesi* another "iterative" meaning. The implied term is properly an iteration of meaning, but it is an intrusive iteration; hence it must be considered last.

The crucial advantage of the "iterative" approach is procedural. The value lies in encouraging the court to pay due heed to *both* of the two major considerations Lord Neuberger identified: (i) all relevant express terms, and (ii) the commercial consequences of the rival constructions.[114] Ideal interpretations of a contract will produce results aligning insofar as possible with both. There is no magic in the court's handling of the contract when such attractive interpretations are achieved.

[107] *Prenn* (n 10) 1385B (Lord Wilberforce); *Reardon* (n 10) 995H (Lord Wilberforce).

[108] *Re Sigma* (n 13) [98].

[109] *Bank of New York Mellon (London Branch) v Truvo NV* [2013] EWHC 136 (Comm) [43], [78].

[110] *Napier Park European Credit Opportunities Fund Ltd v Harbourmaster Pro-Rata Clo 2 BV* [2014] EWCA Civ 984 [31]–[32].

[111] *Arnold v Britton* [2015] UKSC 36 [77]; *Wood v Capita Insurance* [2017] UKSC 24 [12].

[112] *City Alliance Ltd v Oxford Forecasting Services Ltd* [2001] 1 All ER (Comm) 233 (CA) [13].

[113] *Dymoke v Association for Dance Movement Psychotherapy UK Ltd* [2019] EWHC 94 (QB) [60].

[114] *Re Sigma* (n 13) [98]. "Commercial consequences" can be said to include (i) the overall purpose of the clause and the document, (ii) the facts and circumstances known or assumed by the parties at the time of contracting, and (iii) commercial common sense, but (iv) disregarding subjective evidence regarding the parties' intentions: *Arnold v Britton* [2015] AC 1619 (SC) [15].

They are very often produced by diligent analyses of rival meanings, repeated until a permissible construction is found.

There have been unfortunate occasions where a court, relying on the commercial background, side-lines the express provisions in favour of an inconsistent but attractive implied term. An illustration is *Equitable Life Assurance Society v Hyman* ('*Equitable Life*').[115] In that case, the defendant and fellow policyholders entered retirement policies with the Society under which the policyholder's pension would be calculated with reference to a guaranteed annuity rate (GAR) as opposed to the market rate at the relevant time. However, the final bonus, a significant limb of the pension, was not expressly subject to the GAR but instead, under article 65 of the Society's articles of incorporation, purported to be modifiable under the absolute, sole discretion of Equitable Life's directors. Exercising this discretion, the directors lowered the GAR policyholders' bonuses to equalize with other non-GAR policyholders, intending to reflect the fact that both GAR and non-GAR policyholders contributed the same amounts initially to the pension pot.[116] At first instance, before Sir Richard Scott V-C, it was common ground that the directors' discretion was 'very wide' but not absolute: for instance, the discretion would be exceeded if the directors modified the bonuses based on irrational, improper or irrelevant factors.[117] Sir Richard Scott V-C accepted that the policyholders had a reasonable expectation that the bonus would reflect the GAR held by the policyholders, but that 'a reasonable expectation does not become a contractual right.'[118] The 'policyholders' reasonable expectations' (PRE) is a concept having wider significance in the pensions industry and for the purposes of the case, it was 'no more than one of the factors to be taken into account by the directors,' not the court.[119] Having reviewed the PRE and the contractual documents, the judge held that the directors had *not* breached their wide discretion in modifying the bonus. The manner of exercising the discretion was not deemed irrational nor improper, nor were the factors accounted for irrelevant.[120]

On appeal, however, a majority in the Court of Appeal[121] and a unanimous House of Lords[122] reversed the decision. In the House of Lords, it was accepted

[115] [2002] 1 AC 408 (HL).
[116] *Equitable Life* [1999] PLR 297 (Ch) [46], [66].
[117] ibid [100].
[118] ibid [103].
[119] ibid.
[120] ibid [110].
[121] [2000] 2 WLR 798.
[122] [2002] 1 AC 408.

that no breach of any express prohibition relating to the discretion occurred.[123] Nevertheless, the House of Lords implied a term under article 65 of the Society's articles of incorporation preventing the discretion from being exercised to bring the GAR pension below market rates. For the court, the 'self-evident commercial purpose'[124] of the GAR was to secure the policyholder from a fall in market rates, and thus the GAR policyholders' reasonable expectations would be frustrated if the pensions' value was equalized with market-based non-GAR pensions when the market rate fell below the guaranteed rate.

The term implied by the House of Lords seems to distort the natural meaning of the contractual wording, nothing of which expressly prevented the variation of the bonuses. Under the policy, the bonus was made expressly subject to allocation 'under the rules and regulations of the Society,'[125] which encompassed the broad discretion reserved by the directors 'to apportion the amount … on such principles, and by such methods, as they may from time to time determine.'[126] As Lord Grabiner writes extrajudicially, the contract 'plainly produced a workable result.'[127]

Lord Steyn's judgement did stress that the 'legal test for the implication of [a term in fact] is a standard of strict necessity.' However, as McCaughran rightly notes, Lord Steyn's statement is incomplete: strict necessity *for what*?[128] Lord Steyn's assessment of 'strict necessity' concluded that the 'implication is essential to give effect to the reasonable expectations of the parties.'[129] *Equitable Life* is the first case to place such reliance on "reasonable expectations" in satisfying the necessity threshold, and this reliance is submitted to be at odds with the rest of the law. Consider, for instance, the "officious bystander" test, which was not applied in *Equitable Life*. It may perhaps be conceded that the GAR policyholders would have responded, "Of course," to the proposed term preventing Equitable Life from lowering the bonus below market value. However, it is far from likely, let alone obvious, that Equitable Life would have responded in kind. The "reasonable expectations" concept is shaped by one party's interests and usually involves a concession by the other. "Necessity" to give effect to "reasonable expectations"

[123] ibid 452D.
[124] ibid 459F.
[125] ibid 418C.
[126] ibid 415C.
[127] Anthony Grabiner, 'The iterative process of contractual interpretation' (2012) 128(Jan) LQR 41, 58.
[128] John McCaughran, 'Implied terms: the journey of the man on the Clapham omnibus' (2011) 70(3) CLJ 607, 612.
[129] *Equitable Life* (n 122) 459H.

from what is beneficial for *one* party differs from "necessity" to give effect to *both* parties' presumed intentions, such that they would surely have agreed to the term if proposed by a bystander.[130] In so treating the 'strict necessity' requirement, the "necessity" element becomes hollow, because it is only employed to achieve what is "reasonable" from the perspective of one party's interests.

It is also improper to explain away the House of Lords' analysis as evaluating what is "necessary" to give effect to what the contract would 'reasonably be understood to mean.'[131] It is critical to understand that "reasonable understanding" here refers to fidelity to the contract's objective meaning and not to commercial reasonableness—and what the contract "reasonably meant" appears clear: the modification of bonuses fell within the directors' wide discretion reserved in article 65. Instead of deriving the contract's commercial purpose from a mixture of the express words and the commercial background as the iterative approach would require, the House of Lords in *Equitable Life* expressly set the express terms aside and considered solely the background factors surrounding the policies.[132] This formulation is apt to mislead, setting "fairness" or "reasonableness" as the touchstone instead of "necessity to make the contract work." For precisely this reason, Lord Grabiner warned of the 'temptation … [for] the court to look for (and 'find') the commercial purpose not in those clear words, but in the background to the transaction or in broader notions of (supposed) commercial common sense.'[133]

By contrast, the iterative approach to implication discourages the displacement of a contract's meaning by an abstract assessment of what is commercially fair or reasonable in the mind. The process requires that the contract be read as a whole and the way provisions interact be properly understood.[134] A brief reminder can be had to Lord Neuberger's formulation of interpretation as an iterative process, and the implication of terms in fact shall squarely be placed into this framework. When interpreting express terms, the court's inevitable point of departure is the language of the provision itself.[135] The court is subsequently prepared to conduct the iterative exercise of evaluating suggested interpretations against (i) the natural meaning of the clause and other relevant express provisions, and (ii) the commercial consequences of the rival interpretations.[136] If all competing constructions of the express terms are deemed to plainly contradict the contract's reasonably understood meaning, the court may consider the appropriateness of

[130] McCaughran (n 128) 612.

[131] *Belize* (n 4) [21].

[132] *Equitable Life* (n 122) 449E.

[133] Grabiner (n 127) 49.

[134] Konrad Rogers and Joe-han Ho, 'TAEL One Partners: contractual interpretation as an iterative process' [2015] JBL 393, 400.

[135] *Re Sigma Finance Corp* [2008] EWCA Civ 1303 [98].

[136] ibid. For detail on the types of considerations constituting the "commercial consequences," see (n 114) above.

an implied term as a last-resort iteration of meaning.[137] When a court puts the proposed implied term against the other express provisions and the commercial consequences, one of two scenarios neatly follows, and both scenarios enshrine the parties' contract as both the starting point and the guiding compass:

(i) Where the contract does provide expressly on a topic, it will seldom be the case that a term will be implied, the co-existence of an implied and express term on a single subject being an unlikely phenomenon.[138] Indeed, courts have 'no power to improve upon the instrument,'[139] a prohibition which is fully forceful when the parties' express terms elicit a clear result, even if that result lacks fairness or wisdom.

(ii) Where the contract is silent on a topic, likewise, the 'most usual inference is that nothing is to happen.'[140] Even if a term is nevertheless declared necessary to imply, there is little risk of a judicially creative result because no implied term can contradict any express term in the contract. This is not only a matter of logic, as implied terms plainly contradicting express terms will not figure in a reasonable interpretation of the document, but of authority.[141]

The iterative process is underscored by a single enquiry: mindful of the express terms, and with the commercial background properly characterised, what is the objectively interpreted meaning of the parties' contract? Where an implied term is at issue, the court takes assistance from our notional "officious bystander," the "business efficacy" concept, the strict test of "necessity," and other analytical tools developed by the common law.[142] But these are employed as *tools*, nothing more ambitious, in order to answer the single decisive enquiry of what the terms *actually are*, detached from the court's view of what they ought to be. This approach harmonizes with the widely accepted proposition that the modern approach to interpretation is underscored by guiding principles, not rigid rules.[143] As opposed to wooden rules, which might lead to opposite results depending on

[137] The need to consider an implied term as an iterative meaning will likely be obvious with little deliberation where the conditions necessary for implying a term are present.

[138] *Fraser Turner Ltd v PricewaterhouseCoopers LLP* [2018] EWHC 1743 (Ch) [48], aff'd [2019] EWCA Civ 1290 [33].

[139] *Belize* (n 4) [16]. See also *Trollope* (n 29) 609 (Lord Pearson).

[140] ibid [17].

[141] E.g. *Marks & Spencer* (n 5) [28]; *BP Refinery* (n 19) 26; *Duke of Westminster v Guild* [1985] QB 688, 700.

[142] E.g. whether implication would be 'reasonable and equitable,' whether it is 'capable of clear expression,' and not contradictory to any express term: *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 282–83 (Lord Simon of Glaisdale).

[143] See *Chitty* (n 14) [13-042].

which rule is preferred,[144] principles guide the court through the increasingly labyrinthine considerations surrounding contemporary commercial disputes, drawing upon the manner 'which any serious utterance would be interpreted in ordinary life.'[145] Considering an implied term to be another "iterative meaning" and an 'interpretative technique'[146] keeps intact the significance of textual fidelity and allows the court to apply red ink to a contract only when it is assuredly obvious that the parties must have intended the effect of the term. Such guiding principles underpinning implication in fact indeed seem to be paradigms of "good interpretation."

IV. Conclusion

Progress for a truly principled account of the implication of contractual terms is made in earnest if it is considered in light of the objectives it endeavours to achieve. Unlike in torts, all contractual liability is voluntarily undertaken.[147] The implication of terms in fact is a valid enterprise only because it is a means of putting the parties' objective intentions into practice. When cast into the throes of complex factual and legal matrixes surrounding modern contract law litigation, there are two cementing principles advocated by this article from which the courts may draw assistance.

First, a court is thoroughly a *reader*, not an author, of contracts, and it must approach the task of implying terms in fact accordingly. It ought to be concerned only with discovering the parties' objective intentions by analysing the express contract, the admissible evidence, and notions of commercial sense in a process properly described as 'an exercise in the construction of the contract as a whole.'[148] No matter how tempting the result, the court will exceed its remit if it implies a term on grounds of fairness or reasonableness,[149] which is part of the trouble of erroneously considering implication in fact to be justified by free-standing principles of law.[150] On the contrary, implication in fact is an inevitably intrusive, necessarily *ad hoc* licence for the courts to modify contracts. The soundest justification for implication in fact which can overcome its ambitious nature is instead its capacity, as an instance of contractual interpretation, to fulfil the

[144] ibid.
[145] *ICS* (n 11) 912G.
[146] *Marks & Spencer* (n 5) [71] (Lord Carnwath).
[147] *The Achilleas* [2008] UKHL 48 [12] (Lord Hoffmann).
[148] *The Reborn* [2009] EWCA Civ 531 [9] (Lord Clarke). See Part II(C).
[149] See Part II(C) and Part III(B).
[150] See Part II(C).

parties' own objectively interpreted intentions.[151] In treating implication in fact as a process of contractual interpretation, the court should be confident that it is not only possible, but proper, for implication in fact to involve an interpretation of a contract's unwritten contextual meaning where the express terms are silent on a critical issue.[152] Never should an obligation which did not arise from the parties' own hands crystallize as a term implied in fact.

Second, the implication of terms in fact ought to be an "iterative process,"[153] just as the interpretation of express terms is widely accepted to be. The iterative process knows only a single trajectory.[154] The process demands that all relevant express terms are accounted for and the interplay between them understood. It demands that the commercial background to transactions and commercial sense are properly characterised and that their subordination to the express terms is appreciated as a plain fact. With this, the context is set. Rival interpretations of a contract's express terms are considered against this context for their suitability. Should all competing interpretations of express terms be deemed inappropriate, the court considers an implied term as a last-resort, but true, iteration of meaning, faithful to the same interpretative, iterative exercise. The iterative account should be celebrated as a formula which properly conceptualizes all competing considerations before the court on its seldom uncomplicated, often laborious, and always solemn task of implying terms in fact.

The judgement of the Privy Council in *Belize* represents a welcome endeavour giving practical substance to the doctrinal justification of terms implied in fact. It has, peripherally, also provided a well-considered, enjoyable, and empowering framework upon which this article's central thesis and the analysis of implication in fact as an iterative process in Part III was constructed, for which the author is grateful. Only time will tell if the venture in *Belize* strikes home, and whether a court of law will again declare that implication in fact and interpretation are, in truth, kindred.

[151] ibid.

[152] See Part II(D).

[153] See Part III(B).

[154] As much as it is 'an iterative process,' interpretation is also 'essentially one unitary exercise': *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 (SC) [21], [28]; *Arnold v Britton* [2015] AC 1619 (SC) [76]–[77].

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The Gambia v Myanmar: Paving The Yellow Brick Road to International Accountability for The Crime of Genocide

Vatsal Raj*

I. Introduction

The International Court of Justice (ICJ) handed down its much-awaited decision on the Request for the indication of provisional measures in the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)[1] earlier this year. In a refreshingly rare ruling that witnessed the ICJ taking a unanimous decision on every count, the Court adopted a humanist perspective and bypassed the pitfalls of an outdated State voluntarist outlook to grant four of the six provisional measures requested by the Republic of The Gambia (hereinafter, "The Gambia").[2] The ICJ's decision on the narrow issue of indication of provisional measures sets a powerful precedent for global genocide prevention and breaks new ground for enforcing States' obligations to prevent and punish genocide under international law. The critical provisional measures ordered by the ICJ contribute directly to the reduction in violence against 600,000 Rohingya that remain in the State of

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1 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v Myanmar*) (Order of 23 January 2020) General List No 178 [132] <https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf> accessed 1 August 2020.

2 ibid [86].

Rakhine[3] and are a binding guarantee on their safety. The decision reaffirms with all legal and moral force flowing from the highest international judicial authority that the Rohingya are a protected group under the Genocide Convention[4] and enjoy a distinct identity.

The ICJ's decision is unique on two particularly significant counts. Firstly, the ICJ heard a genocide case filed by a non-contiguous and non-warring nation against an accused State for the first time in history and as a consequence enlarged the scope of erga omnes partes in international law. Secondly, this case is the only instance in ICJ's history when the Court investigated genocide claims on its own, relying solely on the reports of independent UN investigators. This case note explores the substance and ramifications of ICJ's novel approach in humanising its jurisprudence on the legal prerequisites for granting provisional measures before concluding in favour of the appropriateness of provisional measures as a true jurisdictional guarantee of preventive character capable of protecting the rights of the most vulnerable populations.

II. The Case

A. Background

The Rohingya are an ethnic Muslim minority, often described as the "most persecuted minority in the world",[5] predominantly residing in Rakhine State in the Republic of the Union of Myanmar (hereinafter, "Myanmar").[6] The Rohingya practice a Sufi-inflected variation of Sunni Islam and possess a distinct cultural identity which differs from Myanmar's dominant Buddhist majority religiously, linguistically and ethnically. In 2017 a Rohingya population of around 1 million resided in Rakhine State, however, this population has since been reduced to 600,000 owing to a violent history of persecution and strife.[7] International academics have often compared the legal conditions faced by the Rohingya in

[3] UNHRC, 'Detailed findings of the Independent International Fact-Finding Mission on Myanmar' UN Doc A/HRC/42/CRP.5 (16 September 2019).

[4] Convention on the Prevention and Punishment of the Crime of Genocide 1951 (hereinafter, "Genocide Convention").

[5] UN OHCHR, 'Human Rights Council opens special session on the situation of human rights of the Rohingya and other minorities in Rakhine State in Myanmar' (5 December 2017) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22491&LangID=E> accessed 5 August 2020.

[6] Elizabeth Albert and Lindsay Maizland, 'The Rohingya Crisis' (*Council on Foreign Relations*, 23 January 2020) <https://www.cfr.org/backgrounder/rohingya-crisis> accessed 10 August 2020.

[7] UNHRC (2019) (n 3).

Myanmar to apartheid.[8] State policies reflective of institutionalised discrimination have largely stripped the Rohingya of citizenship, access to basic healthcare, education and employment.[9]

In August 2017, the Arakan Rohingya Salvation Army (ARSA) was held responsible for attacks on police (Ion htein) and military (hereinafter, "Tatmadaw") posts in Rakhine State.[10] Myanmar retaliated by declaring ARSA as a terrorist organisation and commenced indiscriminate military campaigns in Rakhine State.[11] Myanmar termed these military campaigns as "clearance operations"[12] and employed social media to spread propaganda designed to incite hatred and violence against the wider Rohingya population.[13] According to reports, several hundred thousand Rohingya were forced to flee to the neighbouring country of Bangladesh and around 10,000 were killed as a result of Tatmadaw's brutal "clearance operations".[14] Myanmar claimed that its operations represented "a legitimate response to attacks by Rohingya insurgents".[15] However, in 2018, UN investigators warned of an ongoing genocide in Myanmar and detailed gang rapes and mass slaughter[16] as part of systemic "clearance operations" carried out by the Tatmadaw, intended to destroy Rohingya as a group.[17] According to the 2019

[8] Amnesty International, 'Myanmar: Rohingya trapped in dehumanising apartheid regime', (21 November 2017) <https://www.amnesty.org/en/latest/news/2017/11/myanmar-rohingya-trapped-in-dehumanising-apartheid-regime/> accessed 7 August 2020.

[9] UN OHCHR, 'Statement by Ms. Yanghee Lee, Special Rapporteur on the situation of human rights in Myanmar at the 37th session of the Human Rights Council' (12 March 2018) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22806&LangID=E> accessed 5 August 2020.

[10] Albert and Maizland (n 6).

[11] ibid.

[12] ibid.

[13] Paul Mozur, 'A Genocide on Facebook, With Posts from Myanmar's Military' (New York Times, 15 October 2018) <https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html> accessed 6 August 2020.

[14] UNHRC, 'Report of the Independent International Fact-Finding Mission on Myanmar' UN Doc A/HRC/39/64 (27 August 2018) [36]; See Medecins Sans Frontieres, '"No one was left": Death and Violence Against the Rohingya in Rakhine State, Myanmar' (March 2018) <https://www.msf.org/sites/msf.org/files/msf_death_and_violence_report-2018.pdf> accessed 14 August 2020.

[15] Wa Lone et al., 'Massacre in Myanmar' *Reuters* (*Reuters*, 8 February 2018) <https://www.reuters.com/investigates/special-report/myanmar-rakhine-events/> accessed 14 August 2020.

[16] UNHRC, 'Report of the Special Rapporteur on the situation of human rights in Myanmar', UN Doc A/HRC/34/67 (14 March 2017).

[17] Poppy Elena McPherson and Ruma Paul, 'Myanmar army chief must be prosecuted for Rohingya genocide: UN rights envoy' (*R*euters, 25 January 2019) <https://www.reuters.com/article/us-myanmar-rohingya-un/myanmar-army-chief-must-be-prosecuted-for-rohingya-genocide-u-n-rights-envoy-idUSKCN1PJ1AK> accessed 2 August 2020.

Report of the UN Fact Finding Mission (FFM), a history of oppression and denial of rights had forced 740,000 Rohingya to flee the country and the 600,000 that remained, faced a serious risk of recurrence of genocidal actions.[18] An undeniable two-fold threat confronted the Rohingya population, one to their physical safety and the other to their cultural existence.

B. The request for provisional measures

The Gambia, a self-described "small country with a big voice on human rights"[19] filed a case[20] against Myanmar on the alleged breaches of the Genocide Convention, pursuant to Articles 36(1) and 40 of the Statute of the Court[21] and Article 38 of the Rules of the Court.[22] At the heart of the proceedings was The Gambia's Request for indication of provisional measures – a litmus test for international law – aimed at the cessation of atrocities targeted towards the Rohingya and the preservation of evidence for future accountability.[23]

The Gambia filed its Request for the indication of provisional measures[24] pursuant to Article 41 of the Statute of the Court[25] and Articles 73, 74 and 75 of the Rules of the Court.[26] In its Application, The Gambia described a brutal campaign involving "[d]ecades of gradual marginalisation and eroding of rights, resulting in a State-sanctioned and institutionalised system of oppression affecting the lives of Rohingya from birth to death".[27] In light of the ongoing severe and irreparable harm suffered by members of the Rohingya group, The Gambia was categorical in stating that the continuing situation in Myanmar not only requires, but compels the indication of provisional measures under Article 41(1) of the Statute of the Court as a matter of extreme urgency.[28] The Gambia reminded the Court that

[18] UNHRC (2019) (n 3).

[19] Owen Bowcott, 'Gambia files Rohingya genocide case against Myanmar at UN court' (*The Guardian*, 11 November 2019) <https://www.theguardian.com/world/2019/nov/11/gambia-rohingya-genocide-myanmar-un-court> accessed 15 August 2020.

[20] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v Myanmar*) (Application Instituting Proceedings and Request for Provisional Measures) General List No 178. <https://www.icj-cij.org/files/case-related/178/178-20191111-APP-01-00-EN.pdf> accessed 14 August 2020.

[21] Statute of the International Court of Justice, Art 36(1) and 40.

[22] Rules of Court 1978, Art 38.

[23] *The Gambia* (n 20) [132].

[24] ibid.

[25] Statute of the International Court of Justice, Art 41.

[26] Rules of Court 1978, Art 73–75.

[27] UNHRC (2018) (n 14) [20].

[28] *The Gambia* (n 20) [113].

acts of genocide are part of a continuum, as recognised by Raphaël Lemkin in his pioneering work,[29] and therefore the intervention of the Court does not have to await the final moment, "when there is already something to apologise for; the failure to act, and the resulting catastrophe that might have been prevented".[30]

Provisional measures, much like injunctions in a domestic case, are ordered to safeguard the relevant, plausible rights of the parties that risk being extinguished before the Court determines the merits of the case.[31] Therefore, for the purposes of The Gambia's Request for indication of provisional measures, the Court was not called upon to establish the existence of breaches of the Convention imputable to a party, but to determine to its satisfaction, the existence of a plausible threat of genocide to the Rohingya.[32] In its Application, The Gambia asked the Court to order Myanmar "to do what it is already obligated to do under the Genocide Convention, but has refused to do and cannot be counted upon to do without the Court's intervention."[33] To achieve this The Gambia requested six provisional measures on "genocide-related activity"[34] – the first and the second mandate Myanmar to act with immediate effect to prevent further genocide, the third is aimed at the preservation of evidence in order to ensure the integrity of the Court's proceedings, the fourth and the fifth require Myanmar to provide periodic reports on implementing measures and the sixth instructs Myanmar to cooperate with the UN agencies in preventing and reporting genocide.[35]

III. The Order

The Genocide Convention[36] is often considered the first modern treaty protecting human rights[37] and was adopted in the aftermath of the Holocaust on 9 December 1948. The ICJ is the ultimate guardian of the Genocide

[29] Raphaël Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (2nd edn, The Lawbook Exchange 2005) 79–94.

[30] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v Myanmar*) (Verbatim Record 2019/18) General List No 178 62 [28] <https://www.icj-cij.org/files/case-related/178/178-20191210-ORA-01-00-BI.pdf> accessed 15 August 2020.

[31] *LaGrand* (*Germany v United States of America*) (Judgment) [2001] ICJ Rep 466 [102].

[32] *The Gambia* (n 1) [43], [44].

[33] *The Gambia* (n 30) 63 [32].

[34] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*) (Separate Opinion of Judge Lauterpacht) [1993] 433 [73]. See *The Gambia* (n 30) 66 [6] for The Gambia's usage of the term "genocide related activity" in its pleadings.

[35] *The Gambia* (n 30) 66–72.

[36] Genocide Convention 1951.

[37] See UN Office on Genocide Prevention and Responsibility to Protect, 'The Convention on Prevention and Punishment of the Crime of Genocide' <https://www.un.org/en/genocideprevention/genocide-convention.shtml> (accessed 2 August 2020).

Convention with the duty to prevent and punish the crime of genocide. The ICJ has declared that genocide "shocks the conscience of mankind" and results in "great losses to humanity".[38] However, history has shown that genocide as a crime is notoriously difficult to prove given the high evidentiary requirements set for establishing genocidal intent. In its long history, the Court's Orders on provisional measures have been rather scarce and it has successfully held a country guilty of genocide only once before, in the case of Bosnia and Herzegovina v Serbia and Montenegro,[39] wherein, almost all allegations of genocide were found unproven, barring the genocide in Srebrenica on 11 July 1995. A mere preponderance of probability is insufficient; the evidence to establish genocidal intent must be fully conclusive and may take several years to present and substantiate beyond reasonable doubt.[40] Therefore, pending the final disposal of the case, an order on provisional measures is often the only safeguard standing between life and death for millions of persecuted minorities.

Through its landmark ruling the ICJ recognised the indispensability of provisional measures to prevent genocide by ordering a country to cease all genocidal actions until the final disposal of the case. The ICJ overcame its decadal hesitation about authorising provisional measures and not only granted them, but actively expanded upon its existing jurisprudence to humanise the legal prerequisites and relax the legal thresholds for indicating provisional measures. In an hour-long reading of the landmark verdict in open court, ICJ's 15-member bench, presided upon by Judge Yusuf Abdulqawi, concluded, "[t]he court is of the opinion that the Rohingya in Myanmar remain extremely vulnerable [to genocidal actions]".[41] The Court granted four of the six provisional measures requested by The Gambia.[42] The first two provisional measures granted are de facto restatements of State responsibility under the Genocide Convention that order Myanmar to "take all measures within its power" in relation to the members of the Rohingya population within its territory, to prevent commission of acts within the scope of Article II of the Genocide Convention, including killing, causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to bring about the group's destruction.[43] The Court went so far as to instruct Myanmar to ensure that any irregular armed units or organisations subject to its control do

[38] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*) (Order of 13 September 1993) [1993] ICJ Rep 325 [51].

[39] ibid.

[40] Andrew Gattini, 'Evidentiary Issues in the ICJ's *Genocide* Judgment' [2007] J Int Crim 889.

[41] *The Gambia* (n 1) [72].

[42] ibid [86].

[43] ibid.

not conspire to commit genocide or incite commission of genocide.[44] The third provisional measure requires Myanmar to ensure the preservation of evidence related to allegations of acts within the scope of the Genocide Convention and the fourth imposes an obligation on Myanmar to submit periodic reports on implementational measures.[45]

IV. Analysis

A request for the indication of provisional measures is examined on the touchstone of three legal prerequisites: (1) first, the Court must be satisfied of its prima facie jurisdiction over the dispute including the question of the Applicant's standing (2) second, the rights whose protection is sought must be at least plausible,[46] meaning that there is a chance that the Court will eventually find a violation on the merits and there must exist a link between such rights and the measures requested and third, (3) there must be a showing of risk of irreparable prejudice before the Court delivers its final decision and of the resulting urgency.[47] An analysis of the ICJ's stand on the aforementioned legal prerequisites, in this case, reflects its proactive and evolving approach to enforcing State responsibility in the face of atrocity crimes.

A. Prima facie jurisdiction over the dispute and the question of the Gambia's Standing

The ICJ may indicate provisional measures only if the acts complained of are prima facie capable of falling within the provisions of the Genocide Convention such that "the dispute is one which the Court could have jurisdiction ratione materiae to entertain."[48] Therefore, the first step in establishing prima facie jurisdiction of the ICJ, is to determine the existence of a dispute under the meaning of the Genocide Convention and the Statute of the Court. The existence of a dispute is a matter for objective determination[49] and is defined as "a dispute between States where they hold clearly opposite views concerning the question of performance or non-performance of certain international obligations", and where

44 ibid.

45 ibid.

46 See *Immunities and Criminal Proceedings* (*Equatorial Guinea v France*) (Provisional Measures, Order of 7 December 2016) [2016] ICJ Rep 1165 [71].

47 See *Certain Activities Carried out by Nicaragua in the Border Area* (*Costa Rica v Nicaragua*) (Order of 8 March 2011) [2011] ICJ Rep 6.

48 *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* (*Islamic Republic of Iran v United States of America*) (Provisional Measures, Order of 3 October 2018) [2018] ICJ Rep 623 [30].

49 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v Russian Federation*) (Judgment of 1 April 2011) [2011] ICJ Rep 70 [30].

"[t]he claim of one party [is] 'positively opposed' by the other".[50] The Gambia and Myanmar are UN Member States and are therefore bound by the jurisdiction of the ICJ under Article 36(1) of the Statute of the Court.[51] Being parties to the Genocide Convention, the two nations are also subject to Article IX of the Convention[52] which accords jurisdiction to the ICJ in case of a dispute between Contracting Parties relating to the interpretation, application or fulfilment of the Genocide Convention.

In its decision, the ICJ adopted a novel formula for the determination of the existence of a dispute and relaxed its threshold[53] by taking cognisance of numerous documents and statements exchanged between parties in the UNGA and other multilateral fora to suggest the existence of divergent views.[54] These included the UN FFM reports that recounted instances of widespread rape and sexual assault[55] as well as Resolutions by the Organisation of Islamic Cooperation (OIC),[56] of which The Gambia is a member, and statements by The Gambia in the UN General Assembly[57] condemning Myanmar for its alleged acts of genocide. The threshold for the ICJ to accept statements made in the context of international fora is rather high, consequently, the Court has rarely ever considered exchanges between parties in such fora to determine the existence of a dispute. In doing so, the ICJ generally attaches special importance to the author of the document, their intended or actual addressee and its content, as it did in Marshall Islands v India.[58] In this regard, the Court has held that "a statement can give rise to a dispute only if it refers to the subject-matter of a claim with sufficient clarity to enable the State against which [that] claim is made to identify that there is, or may be, a dispute with

[50] *Iran* (n 48) [28].

[51] Statute of the International Court of Justice, Art 36(1).

[52] Genocide Convention 1951, Art IX.

[53] *The Gambia* (n 1) [27].

[54] See *Belgium Questions relating to the Obligations to Prosecute or Extradite* (*Belgium v Senegal*) (Judgment of 20 July 2012) [2012] ICJ Rep 422, 443–445 and *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v Russian Federation*) (Judgement of 1 April 2011) [2011] ICJ Rep 70 [51], [53].

[55] UNHRC, 'Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar' UN DOC A/HRC/39/CRP.2 (17 September 2018) [458]–[748].

[56] See OIC, 'Resolution No. 4/46-MM on the Situation of the Muslim Community in Myanmar' OIC DOC OIC/CFM-46/2019/MM/RES/FINAL (2 March 2019) [11(a)]; OIC, 'Final Communiqué of the 14th Islamic Summit Conference' OIC DOC OIC/SUM-14/2019/FC/FINAL (31 May 2019) [47].

[57] UNGA Official Records, 74th Session, 8th Plenary Meeting, UN DOC. A/74/PV.8 (26 September 2019) [31].

[58] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (*Marshall Islands v India*) Jurisdiction and Admissibility (Judgement) [2016] ICJ Rep 255.

regard to that subject matter".[59] The existence of a dispute must be determined by an examination of facts as a matter "of substance, not form" and "may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for".[60] It is interesting to note that the ICJ applied this consideration to Myanmar's failure to respond to The Gambia's Note Verbale[61] transmitted to Myanmar's Permanent Mission to the UN on 11 October 2019, through which The Gambia's had voiced its concerns over Myanmar's ongoing breach of its obligations under the Genocide Convention and customary international law. The ICJ, while establishing prima facie existence of a dispute, noted that "the Court considers that the lack of response may be another indication of the existence of a dispute between the Parties"[62]

The last step in establishing the ICJ's prima facie jurisdiction is the ascertainment of The Gambia's standing before the Court. As mentioned earlier The Gambia v Myanmar is the first instance in the Court's history where a non-injured State filed a case alleging genocide against a non-contiguous and non-warring nation, solely on the basis of their shared values as State parties to the Genocide Convention, in a bid to enforce the mutual obligation that the authors of acts of genocide do not enjoy impunity.[63] The Gambia, in not claiming the status of an "injured state", presented the ICJ with the curious question of deciding its standing in the court of law. The ICJ drew support from its observations in Belgium v Senegal,[64] wherein, the Court had accepted the admissibility of claims brought by the Applicant on the basis of the erga omnes nature of obligations enshrined in the Convention against Torture[65] and had categorically observed that the relevant provisions in the Convention against Torture were "similar" to those in the Genocide Convention.[66] Although, Vice-President Xue states in his separate opinion that, "[t]his interpretation of the Convention against Torture, in my view, drifts away from the rules of treaty law" [67], he interestingly agrees[68] with

[59] ibid [46].

[60] *Georgia* (n 54) [30].

[61] *The Gambia* (n 1) [28].

[62] *The Gambia* (n 20) [21].

[63] *The Gambia* (n 1) [41].

[64] *Belgium Questions relating to the Obligations to Prosecute or Extradite* (*Belgium v Senegal*) (Judgement of 20 July 2012) [2012] ICJ Rep 422.

[65] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1987.

[66] *Belgium* (n 69) 449 [68].

[67] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v Myanmar*) (Separate Opinion of Vice-President Xue) General List No 178 [5] <https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-01-EN.pdf> accessed 14 August 2020.

[68] ibid [8].

the refreshing position taken by the Court, which challenges and expands upon Article 48 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts[69] and therefore leads to a novel approach to enforcing State responsibility in the face of atrocity crimes.

The ICJ allayed Myanmar's apprehensions as to the circumvention of Article 34 of the Statute of the Court,[70] by holding that, The Gambia instituted proceedings in its own name as mandated by Article 34 and may, in its sovereign capacity, obtain support from other States or international organisations such as the OIC, since this does not amount to a circumvention of Article 34. Lastly, the ICJ also clarified that Myanmar's reservation to Article VIII of the Genocide Convention[71] does not bar the jurisdiction of the ICJ under Article IX[72] of the Convention.[73] Strikingly, the ICJ was explicit in its interpretation of the terms "competent organs of the United Nations" under Article VIII[74], wherein, the Court declared that the said terms are not broad enough so as to encompasses the Court within their scope of application. By answering the aforementioned questions of law the ICJ not only provides a reasoned Order on the issue of prima facie jurisdiction of the Court, but takes meaningful strides towards laying the groundwork for the consolidation of an autonomous legal regime of provisional measures.

B. Plausibility of rights whose protection is sought and the link between such rights and the provisional measures requested

The ICJ's orders on provisional measures play a more restorative than retributive role to "humanise the law of nations, in the dehumanised world of our days"[75] and in doing so the Court need not establish definitively the existence of fundamental rights; it is sufficient that such rights are plausible, that is, "grounded in a possible interpretation of the Convention."[76] The plausibility of rights is judged by establishing a link between the rights claimed[77] by the Applicant and

[69] International Law Commission Articles on State Responsibility 2001, Art 48.
[70] Statute of the Court, Art 34.
[71] Genocide Convention, Art VIII.
[72] ibid Art IX.
[73] *The Gambia* (n 1) [36].
[74] Genocide Convention, Art VIII.
[75] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates)* (Provisional Measures, Order of 23 July 2018) [2018] ICJ Rep 406 [28].
[76] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Provisional Measures, Order of 28 May 2009) [2009] ICJ Rep 139 [60].
[77] Giorgio Gaja, 'Obligations and Rights Erga Omnes in International Law' (2005) 71(1) International Law Institute Yearbook Krakow Session 135.

the rights in dispute before the judge.[78] The Gambia sought to protect the rights of "all members of the Rohingya group who are in the territory of Myanmar, as members of a protected group under the Genocide Convention"[79] – the rights claimed – and deduced specific genocidal intent (dolus specialis) from the systemic oppression and persecution of the Rohingya in Myanmar, "including denial of their legal status and citizenship … followed [by] the instigation of hatred … on racial or religious grounds"[80] – the rights in dispute before the judge. Whereas, Myanmar contented that genocidal intent is not the only plausible inference that may be drawn from the evidence adduced before the Court.[81]

The plausibility of rights, more so in this case, is closely linked with the issue of standing. The Gambia's characterisation of the rights, the determination of whose violation is sought, is not essentially of a bilateral nature. Rightfully so, The Gambia appealed to the erga omnes nature of the provisions of the Genocide Convention it seeks to invoke and the Court obliged. In Bosnia and Herzegovina v Serbia and Montenegro[82] the ICJ had recognised the prohibition of genocide as a peremptory norm of international law (jus cogens) while noting that norms of jus cogens affirm the highest principles of international law. In its Order, the ICJ reaffirmed that the erga omnes partes rights mirror the erga omnes obligations enshrined in the Genocide Convention. The rights and obligations enshrined by the Convention are erga omnes[83] therefore, all 152 State parties to the Genocide Convention enjoy a legal interest in preventing and punishing acts of genocide.

The Gambia's case takes the concept of erga omnes partes to its logical extreme. Vice-President Xue expresses his "serious" reservations with regard to the supposedly low standard of plausibility applied by the Court, in his separate opinion.[84] Vice-President Xue seems to echo the argument put forth by Myanmar when he writes, "[t]he evidence and documents submitted to the Court in the present case, while displaying an appalling situation of human rights violations,

78 See *Continental Shelf of the Aegean* (*Greece v Turkey*) (Provisional Measures, Order of 11 September 1976) [1976] ICJ Rep 3 [25].

79 *The Gambia* (n 20) [126].

80 UNHRC (2018) (n 55).

81 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v Myanmar*) (Verbatim Record 2019/19) General List No 178 28 [22] <https://www.icj-cij.org/files/case-related/178/178-20191211-ORA-01-00-BI.pdf> accessed 18 August 2020.

82 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*) (Judgment of 26 February 2007) [2007] ICJ Rep 43 [161].

83 See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia v Serbia*) (Judgment of 3 February 2015) [2015] ICJ Rep 3 [87].

84 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v Myanmar*) (Separate Opinion of Vice-President Xue) General List No 178 [2] <https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-01-EN.pdf> accessed 16 August 2020.

present a case of a protracted problem of ill-treatment of ethnic minorities in Myanmar rather than of genocide”.[85] In stark contrast, Judge ad hoc Kress opines, “I have come to the conclusion that the materials provided by The Gambia so far are sufficient to enable the Court to conclude that the plausibility test was met with respect to the question of genocidal intent”.[86] Judge Kress proceeds to hold that, “the exceptional gravity of violations alleged does not justify the application of a stringent standard of plausibility as a prerequisite for the indication of provisional measures”.[87] This dichotomy in opinions is perhaps best reconciled by The Gambia in its oral pleadings, when Mr. Reichler, Agent for The Gambia, puts it rather succinctly, “[p]lausibility is not a zero-sum game … [t]he plausibility of one explanation does not exclude the plausibility of another”.[88] That is to say, “protracted problem of ill-treatment of ethnic minorities”[89] may be a constitutive of genocide and does not bar the possibility of genocide itself.

In its Order, the ICJ substantiated the appropriateness of the provisional measures requested, by citing emblematic instances of oppression referenced in UN FFM reports. These included the instances of extreme violence perpetrated against the Rohingya, the denial of legal status, identity and citizenship and the instigation of hatred on ethnic, racial and religious grounds.[90] The Court found that Myanmar’s lack of accountability and public condemnation[91] of crimes of genocide and its deliberate attempt to destroy evidence of wrongdoing to cover up the crimes such as the “mass demolition and terrain clearance throughout northern Rakhine State”,[92] warrant the indication of the majority of provisional measures requested.

C. Risk of irreparable prejudice and urgency

The ICJ has the power to indicate provisional measures “if there is an urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused”,[93] pending the final disposal of the case. Also, “the condition of

85 ibid [3].

86 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v Myanmar*) (Separate Opinion of Judge *ad hoc* Kress) General List No 178 [5] <https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-03-EN.pdf> accessed 17 August 2020.

87 Ibid [6].

88 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v Myanmar*) (Verbatim Record 2019/20) General List No 178 32 [7] <https://www.icj-cij.org/files/case-related/178/178-20191212-ORA-01-00-BI.pdf> accessed 16 August 2020.

89 *The Gambia* (n 84).

90 *The Gambia* (n 1) [55].

91 UNHRC (2019) (n 3) [224].

92 UNHRC (2018) (n 55) [1000]–[1003].

93 *Iran* (n 48) [78].

urgency is met when the acts susceptible of causing irreparable prejudice can 'occur at any moment' before the Court makes a final decision".[94] The burden to show the risk of irreparable prejudice and urgency falls on the Applicant. The Gambia's extensive reliance on UN reports, including reports from the UN Special Rapporteur on the human rights situation in Myanmar,[95] UN Special Advisor on the Prevention of Genocide[96] and the Independent International FFM on Myanmar,[97] coupled with the absence of prior international criminal findings posed a novel challenge to the ICJ with regard to its legal threshold for determining the reliability of reports. More so, since Myanmar challenged the credibility and impartiality of all of the aforementioned reports.

When asked to rely on third-party findings of fact, the ICJ has almost always shown a greater willingness to attach due importance to findings generated through and tested in court-like, adversarial settings, unlike the ones presented in Court by The Gambia. For example, in DRC v Uganda, the ICJ indicated its willingness to give "special attention" to "evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information".[98] The ICJ reinforced this approach in Bosnia and Herzegovina v Serbia and Montenegro, by expressing its readiness to accept factual findings made at the International Criminal Tribunal for the Former Yugoslavia.[99] Nonetheless, there have been some remarkable exceptions to this, otherwise stringent, legal standard. Such as in Croatia v Serbia, where the Court laid emphasis on the UN Special Rapporteur report for carrying "evidential weight" due to "the independent status of its author" and because it was "prepared at the request of organs of the United Nations, for the purposes of the exercise of its functions".[100]

Building upon such exceptions, in the present case, the ICJ relied extensively on the UN reports cited by The Gambia to illustrate the steps that reflect Myanmar's "continuing intention to destroy the Rohingya as a group".[101] The Gambia drew the attention of the Court to the internment camps that confine 20 per cent of Myanmar's Rohingya population[102] in addition to a State policy of severe restrictions on movement, forced starvation, denial of healthcare and

94 ibid.
95 *The Gambia* (n 20) [7].
96 ibid [9].
97 ibid [10].
98 *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*) (Judgement of 19 December 2005) [2005] ICJ Rep 168 [61].
99 *Bosnia* (n 82) [214].
100 *Croatia* (n 83) [189]–[191].
101 *The Gambia* (n 21) 37 [4].
102 ibid 37 [5].

education "designed to make life in northern Rakhine unsustainable for [the 600,000] Rohingya who remain [there]".[103] The UN FFM reports highlighted the verifiable patterns of violence bearing the hallmarks of genocide, which show that the Rohingya were raped and killed en masse.[104] The ICJ's ruling is progressive in proactively identifying widespread sexual violence as a constitutive of genocide. Rape as an instrument of genocide was first recognised in the Akayesu ruling in 1998[105] but has since been rarely cited as an incriminating indicator of genocidal intent. The presentation of chilling accounts of brutal sexual violence perpetrated against women, girls, men, boys and transgender individuals by the Tatmadaw was central to convincing the Court of the plausibility of rights and the urgency of the measures requested.

Lastly, the ruling left an indelible humanising impact which may be inferred from the unique standard of proof propounded by Judge Cançado Trindade in his separate opinion. According to Judge Cançado, the human vulnerability rather than the plausibility test as laid out in positivist jus gentium, should be the prerequisite to indicate provisional measures.[106] The human vulnerability consideration will have a ripple effect on the ICJ's future rulings since it originates from the promise of extending protection to the fundamental rights of persons in situations of extreme vulnerability that remains at the core of the Convention. The ICJ paid heed to the UN Mission's concluding remarks on the human rights situation in Myanmar, "the State continues to harbour genocidal intent"[107] and consequentially "the Rohingya people remain at a serious risk of genocide under the terms of the Convention".[108] Through its ruling, without pre-judging the merits of the case, the ICJ successfully developed a sophisticated approach to understanding genocide as a continuum rather than an event. This new-found understanding of one of the gravest

[103] UN OHCHR, 'Statement by Ms. Yanghee Lee, Special Rapporteur on the situation of human rights in Myanmar at the 37th session of the Human Rights Council' (12 March 2018) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22806&LangID=E> accessed 7 August 2020.

[104] UNHRC (2018) (n 14) [36]–[39].

[105] *The Prosecutor v Jean-Paul Akayesu* (Judgment) ICTR-96-4-T, Trial Chamber 1 (2 September 1998).

[106] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v Myanmar*) (Separate Opinion of Judge Cançado Trindade) General List No 178 [72] <https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-02-EN.pdf> accessed 4 August 2020.

[107] UNHRC (2019) (n 3) [238].

[108] ibid [242].

international crimes to have plagued mankind will have profound and everlasting effects on ICJ's current jurisprudence and subsequent judgements.

IV. Conclusion

The Gambia's initiative and the ICJ's response signals the end of impunity. While Myanmar's unwillingness to utter the word "Rohingya" during the course of the proceedings, is a circle that is never likely to be squared, it is noteworthy that Myanmar's previous denials of wrongdoing in the "clearance operations" transformed into selective admissions of use of excessive force. Although, pursuant to Article 94 of the UN Charter[109] and the LaGrand case,[110] orders on provisional measures under Article 41[111] are binding on Myanmar, the lives of the Rohingya depend solely on State cooperation and a calibrated UN response helmed by the ICJ.

[109] Charter of the United Nations 1945, Art 94.
[110] *LaGrand* (*Germany v United States of America*) (Judgement) [2001] ICJ Rep 506 [109].
[111] Statute of the International Court of Justice, Art 41.

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Non-Refoulement in International Human Rights Law – India's Legal Obligation to Protect Refugees

Snehal Dhote*

I. Introduction

The rise in authoritarian regimes has led to instability in the world order. Implementation of inhumane and life-threatening policies has forced millions of people to flee their homes and seek refuge in other parts of the world. Fleeing collectively, these asylum seekers are not welcomed by States and are left without support, often stranded in between seas and oceans. As States do not entertain asylum seekers, multiple non-profit organisations have now come up to assist them. The most recent example of such help is Banksy's search and rescue ship called Saint Louis.[1] Coloured in pink graffiti, the ship roams around in the Mediterranean Sea to look out for stranded asylum seekers. These rescued people, however, have to be taken to ports or borders of States for their rehabilitation. Unfortunately, in response to the asylum seekers' request, State often shut their doors. The United Nations High Commissioner for Refugees (UNHCR) has requested States to let the persons rescued by Saint Louis inside their territory since the ship has reached its maximum capacity, but to no avail. This is merely one example of how States treat refugees who knock on their doors. With the advent of the COVID-19

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1 Lorenzo Tondo and Maurice Stierl, 'Banksy Funds Refugee Rescue Boat Operating in Mediterranean' (*The Guardian*, 27 August 2020) <www.theguardian.com/world/2020/aug/27/banksy-funds-refugee-rescue-boat-operating-in-mediterranean> (accessed 27 August 2020).

pandemic, multiple other challenges have cropped up and now asylum seekers are more vulnerable than ever.

This article will analyse the obligation of *non-refoulement* under international human rights law (IHRL). The general analysis applies to all states that have ratified international human rights treaties and conventions but are not parties to the 1951 Refugee Convention. The main focus of the article would remain India's responsibility under the principle of *non-refoulement*. I first give a context of the refugee situation and law in India and then move on to check the relevance of international law as a source in the Indian Constitution. Part A of Section IV analyses the contribution of the 1915 Refugee Convention towards the protection of refugees and asylum seekers, Part B focuses on IHRL regime, while Part C concludes that *non-refoulement* is customary international law. In Section V, I argue that India wrongly perceives *non-refoulement* as a non-obligatory principle. Section VI concludes.

II. Refugee Influxes after Independence and the Citizenship Amendment Act, 2019

The enactment[2] of the Citizenship Amendment Act (CAA), 2019 by the Indian Government had created a pandemonium in the nation. Nationwide protests erupted against the enactment of the CAA, with the longest being women-led Delhi's *Shaheen Bagh* protest. The selectivity in granting fast-track Indian citizenship to certain groups of refugees has been 'unwelcomed' by different groups of people for different reasons. With the insertion of a proviso for section 2(l)(b) in the 1955 Act, the CAA removes the 'illegal immigrant' status of people belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from Afghanistan, Bangladesh or Pakistan, who entered into India on or before 31 December 2014. This proviso excludes the Muslim community and thus violates article 14 of the Constitution by creating a differentiation on the ground of religion.

The Act has been opposed by the general population because it goes against the right to equality and the Constitution.[3] However, the Assamese indigenous population has opposed it out of fear[4] of the Bangla-speaking population

[2] In January 2020, the Citizenship Amendment Act, 2019 (CAA) came into force, amending the Citizenship Act, 1955.

[3] Roshni Sinha, 'Issues for Consideration: The Citizenship (Amendment) Bill, 2019' (*PRS Legislative Research*, 9 December 2019) <www.prsindia.org/billtrack/citizenship-amendment-bill-2019> (accessed 12 August 2020).

[4] PTI, 'It's not about religion, it's about Assam & Assamese pride: AASU advisor on anti-CAA protests' (*The Print*, 21 December 2019) <https://theprint.in/india/its-not-about-religion-its-about-assam-assamese-pride-aasu-advisor-on-anti-caa-protests/338982/> (accessed 12 August 2020).

overpowering them through a fast-track citizenship access.[5] During the British rule, Bengali administration governed Assam which led to an increase in Bengali speaking population in the State. With Bengali garnering more importance, and the Bengali speaking population taking over agriculture, the influx of Bangladeshi migrants during the 1970s caused agitation in Assam. As a settlement, the Assam Accord was signed in 1985 which set March 24, 1971, as the cut-off date of detection and determination of illegal migrants. The protesters in Assam say that the CAA violated the Assam Accord and that it threatens indigenous identity.

While this is not the first instance of refugee influx in India, such response of the State is surely a first. During partition, citizenship was granted to refugees in two waves.[6] In the first wave, Hindus and Sikhs returning from Pakistan were allowed inside without any limitation and were granted direct Indian citizenship. They were allowed to stay in the houses of Muslims who had initially left India to go live in Pakistan. However, the second wave brought back many of these Muslim families. With their houses being already occupied, these Muslims had nowhere to live. To address the scarcity of housing, the Indian Government decided to enact a permit system for further entry. Many were excluded in the cumbersome process of obtaining entry permits from the Indian High Commission in Pakistan. The influx of partition refugees was followed by the entry of Sri Lankan Refugees and the Afghan Refugees, who have also been granted Indian citizenship. Recently, the Union Finance Minister herself acknowledged that more than four lakh Sri Lankan Refugees and about a thousand Afghan Refugees have been granted citizenship in the last few years.[7]

While these groups opted for an Indian citizenship, many Tibetan refugees led by The Dalai Lama entered India after the Chinese invasion in Tibet in 1959. Out of approximately 80,000 refugees, many have decided to retain their refugee status as a symbolic move to protest against China for a free Tibet. From these instances, it is clear that India has been a melting pot of asylum seekers since

5 Section 6 of the CAA replaces eleven years with six years, thus reducing the aggregate period of residence or service of Government in India for the people belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from Afghanistan, Bangladesh or Pakistan. Citizenship Amendment Act 2019, s 6.

6 Abhinav Chandrachud, 'The Origins of Indian Citizenship' (*BloombergQuint*, 26 December 2019) <www.bloombergquint.com/opinion/citizenship-amendment-act-the-unsecular-origins-of-indian-citizenship-by-abhinav-chandrachud> (accessed 15 August 2020).

7 IANS, '2,838 Pakistanis, 914 Afghans given Indian citizenship in last six years: Sitharaman' (*Livemint*, 19 January 2020) <www.livemint.com/news/india/2-838-pakistanis-914-afghans-given-indian-citizenship-in-last-six-years-sitharaman-11579434722241.html> (accessed 27 August 2020).

Independence. Therefore, it becomes necessary to look at India's responsibility under international law for the protection of these groups.

III. International Law under the Indian Constitution

In order to ascertain which law would be directly applicable or would help in the interpretation of domestic law while creating binding legal obligations, looking into the sources of law is necessary. In India, the main source of law is the Constitution.[8] The Constitution of India in Article 51(c) directs the State to "foster respect for international law and treaty obligations in the dealings of organized peoples with one another". Further, Article 253 states that only the Parliament has the power to make laws to effectuate any treaty obligations, pointing towards India's Dualist nature. The Supreme Court in *Jolly George Varghese v Bank of Cochin*,[9] had held that international law would have to be incorporated into municipal law to create a binding effect. However, it can be seen that Indian courts have not only been resorting to international law to interpret Fundamental Rights but also to enforce them, thus functioning as a rather Monist State. It has often been argued that although formally India is considered to be dualist, in the current era, Parliamentary approval is not required to incorporate international law in the domestic order. This has made India a functionally monist State since the Courts are not only incorporating international law through interpretation but also directly applying it to the domestic law.[10]

In one of the landmark cases the Supreme Court dealt with the basic structure doctrine in the Constitution, referring to Article 51 of the Constitution.[11] Justice Sikri resorted to the Universal Declaration of Human Rights for the interpretation of inalienability of fundamental rights.[12] A similar reliance on international law could be seen in the recent decision of the Supreme Court in *Justice KS Puttuswamy*

[8] 'Constitution' (*Supreme Court of India*) <https://main.sci.gov.in/constitution#:~:text=The%20fountain%20source%20of%20law,Legislatures%20and%20Union%20Territory%20Legislatures> (accessed 25 August 2020).

[9] *Jolly George Varghese v Bank of Cochin* 1980 AIR 470.

[10] Aparna Chandra, 'India and International Law: Formal Dualism, Functional Monism' (2017) 57 *Indian Journal of Intl Law* 25.

[11] *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461.

[12] ibid.

v Union of India.[13] Further, in *People's Union for Civil Liberties v Union of India*,[14] the Supreme Court had held that the provisions of the International Covenant on Civil and Political Rights (ICCPR) which help in effectuating the provisions of the Constitution are directly enforceable.

Extending this reference on international law merely for the purpose of interpretation and enforcement of rights, the Supreme Court has also incorporated international legal instruments in domestic law. In *Vishaka v State of Rajasthan*,[15] the Supreme Court went on to incorporate the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) in Indian Law. Further, in *Vellore Citizens Welfare Forum v Union of India*,[16] Customary international Law was held to be automatically incorporated in the domestic law in the absence of any contrary municipal law. In *M.V. Elisabeth v Harwan Investment and Trading Pvt Ltd*,[17] the Court even applied treaties which have not been ratified by India. Therefore, it can be concluded that international law has always been a source of law[18] for the Indian legal system.[19]

IV. International Responsibility of States

Right after experiencing the wrath of WWII, the UN General Assembly established the UNHCR in 1950 for helping displaced Europeans. Realising the importance of a legal framework and following the legacy of Fridtjof Nansen, who introduced the 'Nansen Passport' which is the first-ever legal instrument for the protection of refugees' rights, the 1951 Refugee Convention and the 1967 Refugee Protocol were adopted. A total of 148 States are Parties to either or both the Convention as well as the Protocol. India is one of the non-signatory States.

The development of international refugee law got a head start with the creation of the UNHCR and the adoption of the Refugee Convention. However, obligations to protect refugees existed even before that, in instruments like the International Refugee Organisation Constitution and the Universal Declaration

[13] (2017) 10 SCC 1. In Part J of the judgement, the Court analysed India's commitments under International Law while referring to Article 51 of the Constitution. It held that constitutional provisions have to be interpreted in conformity with an international mandate.

[14] *People's Union for Civil Liberties v Union of India* AIR 1997 SC 568.

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

[16] *Vellore Citizens Welfare Forum v Union of India* 1996 5 SCR 241.

[17] *M.V. Elisabeth v Harwan Investment and Trading Pvt Ltd* AIR 1993 SC 1014 (Supreme Court of India).

[18] Guy S. Goodwin-Gill, 'The Office of the United Nations High Commissioner for Refugees and the Sources of International Law' (2020) 69 ICLQ 1.

[19] cf Chandra (n 10) 41.

of Human Rights (UDHR).[20] Moreover, post its adoption, multiple other human rights instruments were also adopted which protect several rights of asylum seekers, refugees and statelessness persons.

A. Member state responsibility under the refugee convention

Protection under the Refugee Convention is granted in *two levels*. The *first* is that a person should fulfil the conditions given under Article 1 of the Convention to qualify as a 'refugee'. The *second level* is that the person has to be declared a 'refugee' by the State in which they want to seek refuge.[21] It means that the under the Convention, a person could already be a refugee, but the State or UNHCR need to declare them as a 'refugee'. The moment a person fulfils the Convention definition requirement, they become a refugee and are entitled to the rights therein. However, to seek those rights from a State where they want asylum, a declaration of their refugee status is needed. While most rights are given at the *first level*, some specific rights are given in the *second level* i.e., when the person becomes a "lawful refugee".

Under Article 1, the Convention has a rather narrow definition of 'refugee' since it applies only to events occurring in Europe before 1951. Thus, the Protocol was adopted in 1967 to remove its geographical and temporal limits. So, combining both instruments, a 'refugee' is a person who has a "well-founded fear" of "persecution" "for reasons of race, religion, nationality, membership of a particular social group or political opinion", as a result of which they are "unable" or "unwilling" to return to a country of which they are nationals or were "former habitual residents". While the Convention does not define the necessary elements of this definition, there is ample of literature such as UNHCR publications, decisions of national and international adjudicatory bodies and other scholarly work, available for interpretation.

The UNHCR and domestic courts have observed that this "fear" has subjective as well as objective elements.[22] By subjective, it means that a person has to have a feeling of fear (of persecution) in their minds on returning to their country. An objective requirement means that the person's subjective fear has to fit in the overall factual scenario. If the subjective fear is not coupled with the

[20] Guy S. Goodwin-Gill and Jane McAdams, *The Refugee in International Law* (3rd edn, OUP 2007) 19–20.

[21] UNHCR 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees' (Geneva 1992)

[22] James Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press 2014) 91–92.

objective element of fear, then the asylum request of the person can fail. The assessment of the nature of the element is done on the basis of facts of the case. Due to the lack of a definition of "persecution" in the Refugee Convention or Protocol, the assessment of whether a case would fall under the ambit its ambit is highly subjective. Hathaway and Foster*23* have bifurcated "persecution" into two elements – 'serious harm' and lack of protection against that 'serious harm' in the domestic law of the person's country of origin. Linking Article 1 of the Convention to Article 33(1), this 'serious harm' would mean a threat to the life or freedom of the person. For the interpretation of what would constitute 'serious harm', violation of human rights has to be considered. On "former habitual residence", scholars[24] have observed that it provides relief to those persons who were already not living in their country of origin and thus would be stateless after not being able to return to their "country of former habitual residents".

The refugee status of a person is lost once they attain the nationality of any State, including their own State, or when the circumstances owing to which they had attained their refugee status cease to exist.[25] The Convention does not apply to persons who get "rights and obligations" similar to a national of that country where they are currently residing.[26] In order to maintain its function, Article 1E was inserted which says that a person who at that time, enjoys the "rights and obligations" like the nationals of that country have, then they would not be given the refugee status under the Convention or Protocol. It has been observed that such a treatment is given to persons prior to their attaining nationality, so this Article applies to the buffer period. Further, "rights and obligations" does not mean only fundamental rights and obligation, but all other rights which a national of that country normally enjoys. However, a few exceptions to these rights would be permissible. For example, Article 1E also excludes from its ambit, persons who have committed war crimes or crimes against humanity, or serious non-political crimes, or persons guilty of committing acts contrary to the principles of the UN. These exclusionary provisions were inserted in the Convention in order to make States accept the Convention. This provision has been added in the Convention because

[23] ibid 182–186.

[24] Guy S. Goodwin-Gill, 'The International Law of Refugee Protection' in Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long, and Nando Sigona (eds), *Oxford Handbook of Refugee and Forced Migration* (OUP 2014).

[25] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 1C.

[26] UNHCR 'UNHCR Note on the Interpretation of Article 1E of the 1951 Convention relating to the Status of Refugees' (Geneva 2009).

refugee law aims to protect persons who do not normally have the protection of any State or any basic rights.

The Convention and Protocol impose certain obligations on the State Parties and grants rights to the refugees after they qualify as 'refugees' under the *first level*, as mentioned above. All these rights and obligations do not have the same standard, and the Convention has divided them into three categories[27] – national treatment,[28] most favoured treatment[29] and treatment "accorded to aliens generally".[30] National treatment means that the rights granted to the refugees are similar to the standard accorded to the nationals of that country. Right to practice religion, access to courts, exemption from *cautio judicatum solvi* (exemption from the payment of bond-money) are some examples. In rights relating to intellectual property, rationing, elementary public education, public relief, social security, the standard is similar to what is accorded to the nationals of the country of their habitual residence. The standard of most favoured treatment means that the refugee would be given the rights as other people who are in the same circumstances as them. This standard applies to the right of association and right to work. Lastly, treatment "accorded to aliens generally" standard ensures the minimum standard of protection of the rights of aliens under international law. These rights generally include the right to life and property.

In addition to the above-mentioned categorization of rights, the Convention also imposes on the States, absolute obligations of *non-refoulement*[31] (explained in the next section), non-expulsion[32] and non-penalisation for unlawful entry.[33] The principle of non-expulsion applies to "lawful refugees" and says that they cannot be expelled from the State Party without a "decision reached in accordance with due process of law".[34] Expulsion means that once a State Party has lawfully allowed the request of the refugee for asylum, the State cannot expel a "lawful refugee" for any wrongful acts committed by them. It can do so only if it finds that the State's national security and public order is being threatened by allowing the refugee to

27 Paul Weis, 'Transnational Legal Problems of Refugees' (1982) 3 Mich. J. Int'l L 27.

28 Norwegian Refugee Committee and ICLA, 'The Obligation of States towards Refugees under International Law: Some Reflections on the Situation in Lebanon' (*NRC*, June 2016) <www.nrc.no/globalassets/pdf/reports/obligations-of-state.pdf> (accessed 25 August 2020).

29 ibid.

30 Paul Weis, *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis* (UNHCR 1990).

31 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 33.

32 ibid art 32.

33 ibid art 31.

34 UNHCR 'Note on Expulsion of Refugees' (24 August 1977) UN Doc EC/SCP/3.

stay. Here, expulsion does not mean sending the refugee back only to their origin country, but anywhere in the world. Since a refugee is a person who does not have the protection of any State, expelling under Article 32 in the name of national security and public order has to be the last resort. The provision also allows the State to adopt internal measures to take actions against the acts committed by the refugee in consideration. Such international measures have to it to be proportionate to the acts committed by the refugee in question. Further, the order of expulsion has to be passed only as per the due process of law, meaning that the refugee has to be given a sufficient chance to present their case before courts. In case the refugee is ordered to be expelled, sufficient time has to be provided to them to find another country to seek refuge in.

(i) Non-Refoulement under the Refugee Convention

Under the Convention, the principle of *non-refoulement* means that a refugee must not be sent back to territories where their life or freedom would be threatened because of their "race, religion nationality, membership of a particular social group or political opinion". Although the principle comes with an exception, *non-refoulement* is considered a non-derogable[35] and absolute obligation under the Convention. Its non-derogable nature has been affirmed in the Protocol under Article VII(1). Since *non-refoulement* "embodies the humanitarian essence"[36] and is one of the core principles of the Convention, Article 42(1) prohibits reservation of the State Parties to Article 33. One of the most important aspects of the principle of *non-refoulement* is that it is applicable at *level one* i.e. without the refugees being formally declared as 'refugees' by a State.[37] It therefore applies to declared 'refugees' as well as asylum seekers.[38] This view has also been affirmed by the Executive Committee of the UNHCR and the UN General Assembly.[39]

The obligation of *non-refoulement* is for all States Parties of either the Convention or Protocol. Breaking down the elements of Article 33, the obligation is not limited by a territorial application.[40] This means that State Parties are

[35] Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003) 107.

[36] ibid.

[37] ibid 116–18.

[38] ibid.

[39] UNGA Res 52/103 (9 February 1998) UN Doc A/RES/52/103; UNGA Res 53/125 (12 February 1999) UN Doc A/RES/53/125.

[40] Michelle Foster, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State' (2007) 28 Mich. J. Int'l L 223.

obligated not only when the refugees are on the territory or border of the State Party but at every stage when that State takes action to remove the refugee. This might be even when the refugee has not reached the border of the State and the action is precautionary. Further, it also obligates a State when the refugee comes under their effective control or gets affected by the acts of the officers of that State.[41] In the context of State responsibility, the principle also applies to organs and agents of the State. It also extends to acts done by the State through another State(s).

The principle of *non-refoulement* prohibits actions of State Parties which make refugees go to the "frontiers of territories" where their life or freedom is at risk of persecution. From this, it can be gathered that the principle not only stops States from sending refugees back to their country of origin but anywhere where they might face a risk of persecution. An important aspect related to *non-refoulement* in this regard is the situation where a refugee is being sent to a third country by the sending State Party and whether that would be a violation of *non-refoulement*. Scholars have observed that the Convention imposes an obligation on the States not only with respect to direct action but also indirect action.[42] However, this does not mean that sending refugees to a third country is prohibited. It merely means that the State has to make sure that after sending the refugee to a third country, that country would ensure that the refugee's life or freedom is not at risk.[43] It also demands the assurance of the third country that it would not send the refugee back to their country of origin, thus exposing them to the risk of persecution.[44]

Since *non-refoulement* is a right available to persons whose refugee status is not declared, the exception to its application is narrower than the exceptions available under Article 1F of the Convention. Article 33(2) states that non-refoulment "may not" apply to those persons who have been "convicted by a final judgement" for a "serious crime" in either the country of origin or the place they want to seek refuge in. As opposed to the wording of Article 1F – "shall not", Article 33 gives a choice to the State to decide whether or not to apply the exception. The provision has been drafted keeping in mind the importance of the principle of *non-refoulement* under international law. Article 1F also does not require the "conviction" of the person but only "serious reasons" to believe that such person has committed serious crimes. Whereas, Article 33 requires "conviction" by the apex court of law. Further, the provision says that such a person should be perceived as a threat

[41] ibid.
[42] cf Lauterpacht and Bethlehem (n 35) 122–123.
[43] ibid.
[44] ibid.

to the community or the security of that country.[45] This requirement imposes an additional layer for taking away the protection of *non-refoulement*. A convict of serious crimes does not automatically get excluded, but the State has to have reasons to believe that they pose a threat to the security of the country or community. According to Lauterpacht and Bethlehem, Article 33 has a higher threshold than Article 1F because it requires a future threat, whereas Article 1F works on the basis of past actions. It has been argued that even after the application of Article 33, the excluded person has to be sent to a safe place.[46]

B. Non-member state responsibility with special focus on India

Since the Refugee Convention and Protocol apply only to those persons who satisfy the conditions laid down under Article 1, persons who do not come under its ambit are left excluded. In order to protect refugees not governed by refugee law, *non-refoulement* of refugees, asylum seekers and stateless persons is governed by IHRL. IHRL creates binding obligations for protecting refugees, many of which have a wider application than obligations under international refugee law.

The UDHR is called the foundation of IHRL. Laying down non-derogable human rights itself, the UDHR has also influenced other human rights instruments. The Constitutions of many countries, including India, have been drafted on similar lines as the UDHR. India has ratified the International Covenant on Civil and Political Rights (ICCPR), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Convention on the Rights of the Child (CRC). It has not ratified the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT) but is a signatory. Apart from these instruments, India is also a party to the Geneva Conventions, which form international humanitarian law (IHL). Many obligations under these instruments have now taken the form of customary international law.

IHRL gives rise to certain rights which have to be protected by the States at all cost. These rights being most fundamental, have also been incorporated in the Constitutions of many States, India being one of them. Therefore, while

[45] ibid 129.
[46] ibid 131–134.

interpreting these rights under the domestic law of India, IHRL jurisprudence also helps while dealing with the questions of refugee protection.[47]

(i) Non-Refoulement under International Human Rights Law

While other human rights instruments do not have specific provisions for *non-refoulement*, the CAT under Article 3 specifically prohibits it. It states that the prohibition from torture is absolute and the right against torture is non-derogable. In this respect, no State can send any person to another State where there are "substantial grounds" for believing that they would be subject to torture.[48] The CAT also takes care of situations where persons are sent to a third State by the receiving State.[49] Interpretation of *non-refoulement* under the CAT not only ensure the right against torture but also the right to dignity to persons. It has been observed that such persons, if not being sent to another territory, should also not be detained by the State in question.[50]

Article 6 of the ICCPR ensures the right to life for everyone. It says that no one can be arbitrarily deprived of their life. Article 4 of the ICCPR states that the right to life is a non-derogable right, which sets a higher threshold than being an absolute right. The Human Rights Committee in its General Comment No. 31[51] and 36[52] has interpreted the principle of *non-refoulement* as an extension of the right to life.[53] The Committee observed[54] that it is obligatory for the States to ensure compliance with the Covenant and not to "extradite, deport, expel or otherwise remove" persons from their territory when there are "substantial grounds" to believe that those persons would face a "real risk of irreparable harm" to their right to life and right against torture as a consequence of their removal. Elaborating further,[55] the Committee held that the obligation of *non-refoulement* under the ICCPR is broader than what it is under international refugee law, since

[47] cf Goodwin-Gill (n 18) 11.

[48] Committee against Torture, 'General Comment No. 4' in 'General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22' (9 February 2018).

[49] ibid.

[50] ibid.

[51] Human Rights Committee, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) CCPR/C/21/Rev.1/Add.13.

[52] Human Rights Committee, 'Article 6: Right to Life' (3 September 2019) CCPR/C/GC/36.

[53] Most recently, the Human Rights Committee held that the mental health of a person, including suicidal tendencies, would also be a deciding factor in whether their life would be at risk if sent back to the country of origin, *QA v Sweden*, Human Rights Committee, CCPR/C/127/D/3070/2017 (20 February 2020).

[54] cf HRC (n 51).

[55] cf HRC (n 52).

it also applies to "aliens not entitled to refugee status".[56] It also imposes a duty on the State to take special measures to protect the right to life of displaced persons, asylum seekers, refugees and stateless persons. General Comment No. 20[57] talks about the nature of the obligation of *non-refoulement* and it was observed that States should not impose any exceptions on the application of the principle.

The Constitution of India grants the right to life under Article 21. This right is granted to Indian citizens as well as to foreigners. Recently, in *P Ulaganathan v Government of India*,[58] the Madras High Court held that even refugees and asylum seekers have the right to life under Article 21 of the Constitution. With respect to *non-refoulement*, the Gujarat High Court in *Ktaer Abbas Habib Al Qutaifi v Union of India*[59] had held that *non-refoulement* is "encompassed"[60] in Article 21.

In the context of non-discrimination, the CEDAW under Articles 1 and 2 ensures that State Parties condemn discrimination against women and maintain gender equality. While interpreting these articles in light of Article 14 of the UDHR, Article 3 of the CAT and Article 7 of the ICCPR, the CEDAW (Committee) observed[61] that *non-refoulement* is enshrined in the CEDAW (Convention). It observed that the Refugee Convention does not identify gender as a ground for discrimination under Article 1 or Article 33. The CEDAW obliges States to not engage in any act or practice that would expose women to a "real, personal and foreseeable risk of serious forms of discrimination". The Committee concluded that such risk would mean a threat to the personal integrity, liberty and security of a woman, including the risk of suffering serious forms of discrimination, gender-based persecution or violence. This risk could be inside or outside the territorial boundaries of the sending State Party. The Committee also recommends the States to enact legislations to respect *non-refoulement* as per international law.

On similar lines as that of the CEDAW, the CRC (Committee) interpreted the principle of *non-refoulement* and its scope under the CRC (Convention). It observed that *non-refoulement* forms an element of the right to life under Article 6

[56] *Ioane Teitiota v New Zealand*, Human Rights Committee, CCPR/C/127/D/2728/2016 (7 January 2020).

[57] Human Rights Committee, 'Article 7: Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment' (10 March 1992).

[58] *P Ulaganathan v Government of India* Writ Petition (MD) No 5253 of 2009.

[59] *Ktaer Abbas Habib Al Qutaifi v Union of India* 1999 CriLJ 919.

[60] ibid.

[61] Committee on the Elimination of Discrimination Against Women, 'Gender-related dimensions of refugee status, asylum, nationality and statelessness of women' (5 November 2014) CEDAW/C/GC/32.

and right against torture under Article 37 of the CRC.[62] It further held that no child should be sent back from the border or from within the territory of a State if they face a "real risk of irreparable harm". The Committee also observed that the State could be held responsible for direct as well as indirect actions, and also the acts of non-State actors. This was concluded by the CEDAW also.

Even under international humanitarian law, which applies during an international or non-international armed conflict, the Fourth and Third Geneva Convention create an obligation of *non-refoulement*. While Article 45 of the Fourth Geneva Convention an express provision applying to all protected persons, Article 12 of the Third Geneva Convention applies only to prisoners of war. Under both these Geneva Conventions, the obligation of *non-refoulement* is absolute.[63]

C. *Non-refoulement* as customary international law

Customary international law is a source of international law which makes certain norms binding on all States. These rules are equivalent to traditional rules which survive the test of time and take the form of a custom. The determination of whether a norm has attained the status of a custom is not uniform, although the ICJ has given some clarity through various decisions. Two main requirements to identify a custom are – State practice and *opinion juris*. State practice means that the norm has been accepted by all States i.e. it is universally accepted. *Opinio juris* means that such States have accepted the norm because they consider it to be binding upon them and as a result, comply with it.

Non-refoulement has been identified as a rule of customary international law. It has even been identified as a *jus cogens* norm. However, there is also wide disagreement in considering *non-refoulement* a *jus cogens* norm. Costello and Foster have also concluded that *non-refoulement* is customary international law and that it is also "ripe for recognition as a jus cogens norm".[64] Nevertheless, it is universally

[62] Committee on the Rights of Child, 'Treatment of Unaccompanied and Separated Children Outside their Country of Origin' (1 September 2005) CRC/GC/2005/6.

[63] Jean Pictet (ed), *Commentary IV Geneva Convention relative to the Protection of Civilian Persons in Time of War* (1958) 269.

[64] Cathryn Costello and Michelle Foster, '*Non-refoulement* as Custom and Jus Cogens? Putting the Prohibition to the Test' in Maarten den Heijer and Harmen van der Wilt (eds), *Netherlands Yearbook of International Law 2015* (Asser Press 1988) 323.

accepted as customary international law, and also has links with other customary norms such as prevention from torture.

On the basis of the three elements given by the ICJ in the *North Sea Continental Shelf Case*,[65] Lauterpacht and Bethlehem have concluded that the principle of *non-refoulement* is customary international law.[66] Firstly, the norm creating a character of *non-refoulement* was identified by relying on various conventions and UNHCR Executive Committee conclusions. It was also concluded that all these instruments support each other in the interpretation of the principle.[67] Secondly, the universal character of *non-refoulement* was highlighted. They held that almost all Member States of the UN, including specially affected ones, are parties to various instruments which state the principle of *non-refoulement*.[68] They further observed that States which are not parties to any instrument have not specifically opposed the principle.[69] Lastly, consistent State practice and general recognition were established by heavily relying on the UNHCR Executive Committee Conclusion[70] which not only states that *non-refoulement* is a customary international law norm but also a *jus cogens* norm.[71] It was also noted that many States which have not signed the Refugee Convention or Protocol are in the Executive Council.[72]

While determining the content of the principle, they concluded that in the human rights context, State practice and *opinio juris* would also be of guidance. They linked the 'persecution or risk' element of *non-refoulement* to the customary prohibition of torture and inhumane treatment.[73] They concluded that implications of considering *non-refoulement* a customary norm would be imposing an absolute obligation on the States to respect the principle without any limitation or exception.[74] In cases of a threat to the national security of the receiving State, they

[65] *North Sea Continental Shelf Case (Federal Republic of Germany/Denmark)* (Judgement) [1969] ICJ Rep 3.
[66] cf Lauterpacht and Bethlehem (n 35) 162.
[67] ibid 141–142.
[68] ibid 143–146.
[69] ibid 147.
[70] UNHCR EXCOM Conclusion No 25 (XXXIII) 'General Conclusion on International Protection' (1982).
[71] cf Lauterpacht and Bethlehem (n 35) 141.
[72] ibid 96–98.
[73] ibid 128.
[74] ibid 163.

concluded that the principle can be derogated from only under the due process of law and safe admission to a third State.[75]

Goodwin-Gill has also concluded that *non-refoulement* is customary international law.[76] He clarified that *non-refoulement* is related to the assessment of the risks a person would face if removed from the State.[77] He this not only in respect of persons who come under the 'refugee' definition of the 1951 Convention but also with respect to climate refugees and victims of civil wars.[78] Most countries today are faced with the situation of mass influx of refugees.[79] It is often incorrectly considered that the exceptions to mass influxes can be imposed in situations of mass influx. States do have a binding obligation derived from "conventional and customary international law"[80] of *non-refoulement*, even in situations of mass influx. This has also been asserted by the UNHCR Executive Council in Conclusion No. 22[81] that *non-refoulement* has to be "scrupulously observed" in the cases of mass influx.

V. How India Perceives Non-Refoulement – a Critique

The Refugee Convention was underway at a very crucial time for India – the partition. The official reason as to why India has not signed the Refugee Convention or the Protocol is not known. Nonetheless, scholars have highlighted different plausible reasons – that the Convention did not protect the internally displaced or socially persecuted, it only granted protection against 'State-sponsored persecution'; India considering the partition as an 'internal matter' to avoid the interference of the UNHCR or other international actors; politics during the East-Pakistan war and lack of financial cooperation from UNHCR to manage the Bangladeshi (then East-Pakistan) refugees.[82]

Like most South Asian Countries, India receives a large number of asylum seekers.[83] Being a non-signatory to the Refugee Convention or Protocol, it has

[75] ibid 164.

[76] cf Goodwin-Gill (n 24).

[77] ibid.

[78] ibid.

[79] UNHCR EXCOM Conclusion No 22 (XXXII) 'Protection of Asylum-Seekers in Situations of Large-Scale Influx' (1981).

[80] Guy S. Goodwin-Gill, '*Non-refoulement* and the New Asylum Seekers' in David A. Martin (ed), *The New Asylum Seekers: Refugee Law in the 1980s* (Springer 1988) 106.

[81] ibid 108.

[82] Ritumbra Manuvie, 'Why India is Home to a Million of Refugees but doesn't have a Policy for them' (*The Print*, 27 December 2019) <https://theprint.in/opinion/why-india-is-home-to-millions-of-refugees-but-doesnt-have-a-policy-for-them/341301/> (accessed on 15 August 2020).

[83] Hamsa Vijayaraghavan, 'Gaps in India's Treatment of Refugees and Vulnerable Internal Migrants Are Exposed by the Pandemic' (*Migration Policy Institute*, 10 September 2020) <https://www.migrationpolicy.org/article/gaps-india-refugees-vulnerable-internal-migrants-pandemic> (accessed on 17 November 2020).

always projected the image of a 'good country' which hosts refugees even without signing the Refugee Convention or Protocol. Most recently, India entirely refuted that it has any obligation of *non-refoulement*.[84] In the case of *Indian Union Muslim League v Union of India*[85] which challenges the constitutionality of the CAA, the Indian government in its counter affidavit submitted that *non-refoulement* is not customary international law and neither can its obligation be derived from the UDHR or the ICCPR. Clearly, India is misconceived that it does not need to protect the rights of refugees or uphold its obligation of *non-refoulement*.

As highlighted in the above sections, the Refugee Convention or Protocol are not the only legal instruments which create the obligation of *non-refoulement*. I argue that India has always had the obligation of *non-refoulement* by virtue of the human rights conventions it has signed and ratified, and also under customary international law. This means that although refugee law does not create any binding obligations on India, IHRL and customary international law do. Since the obligation of *non-refoulement* is wider and without any exceptions under IHRL, India, in fact, has more responsibility of *non-refoulement* than it would have had under refugee law.

As compared to the Refugee Convention and Protocol, IHRL has a wider definition of 'refugees' and 'persecution'. While the Refugee Convention definition is restricted to Article 1, IHRL jurisprudence has evolved. This is because, under the Convention, there is no provision for the establishment of a body empowered to decide individual cases. The Convention in that sense is a rigid document, the only change made is the Protocol. UNHCR is also merely a body more focused on policy framing, refugee assistance and giving recommendations, it has no adjudicatory power.[86] IHRL however, has multiple committees constituted which are tasked with the interpretation of the law.[87] Ever since the committees were formed, the jurisprudence revolving *non-refoulement* has substantially changed for good. Most recently, the Human Rights Committee while dealing with the asylum

[84] *Indian Union Muslim League v Union of India* Writ Petition (Civil) No 1470 of 2019 (Supreme Court of India).

[85] ibid.

[86] cf Goodwin-Gill (n 18) 40–41.

[87] While Article 28 of the ICCPR established the Human Rights Committee, Article 17 of the CEDAW establishes the Committee on the Elimination of Discrimination against Women. Further, Article 43 of the CRC establishes the Committee on the Rights of the Child.

request of a citizen of Kiribati, a small pacific island seriously impacted by climate change, held that persons facing the risks of climate change are refugees indeed.[88]

Further, IHRL grants protection in a very layered manner. This means that it distinguishes between multiple categories of persons who need extra protection by virtue of them being vulnerable persons. Women, children and disabled persons come under this category. As highlighted by the CEDAW (Committee), the Refugee Convention does not consider persecution risks related to gender.[89] In contrast to this, the CEDAW (Convention) and the CRC (Convention) provide layered protection, specific to the categories of persons.

Lastly, *non-refoulement* under customary international law is heavily influenced by IHRL interpretation. It creates a very broad and absolutely binding obligation on all the States. In the near future, this obligation would become absolutely non-derogatory since *non-refoulement* is on the verge of being identified as *jus cogens*.[90]

VI. Conclusion

Even without specific provisions on refugees or *non-refoulement*, Indian courts have been assessing individual asylum applications. From correctly recognizing *non-refoulement* a part of the right to life under Article 21 of the Constitution, to applying the principle to protect persons from persecution,[91] Indian courts have been using the current legal framework to its best ability. However, reliance on this framework is not enough. It is not enough to deal with the situations of mass influx, and more importantly, it is not enough to meet India's obligation of *non-refoulment* to the fullest.

It may be argued that with the passing of laws like CAA, India is granting citizenship to refugees and is doing more than what it is obliged to. However, the crucial aspect of *non-refoulement* is that it has little to do with citizenship. *Non-refoulement* deals with coming up with ways to protect persons from persecution or related risks to their lives. This includes permanent as well as temporary legal arrangements. The fact that India has thousands of refugee camps but no legal framework to ensure certainty and protection of refugees violates its obligation of *non-refoulement*. This, unfortunately, is the case not only with India but most South Asian countries. There is a dire need of a domestic, regional as well as an effective international legal framework specifically aimed at *non-refoulement*. Shared

[88] cf Teitiota v New Zealand (n 56).

[89] cf CEDAW (n 61).

[90] cf Costello and Foster (n 64).

[91] Dr Malvika Karlekar v Union of India Writ Petition (Criminal) No 583 of 1992 (Supreme Court of India).

responsibility of States to protect refugees in today's turbulent world regime is the need of the hour while the recognition of *non-refoulement* as *jus cogens* is necessary. Until then, States must individually respect the principle and apply it as obligated under refugee law, IHRL and customary international law.

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Ong Ming Johnson: A Calibrated Approach to (Un)transformative Constitutionalism by the Singapore High Court

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I. Introduction

In recent times, there has been increased questioning of anti-homosexuality provisions present in statute books of former British colonies, including in Singapore. This has led to a series of challenges in Singapore with respect to constitutionality of Section 377A of of the Singapore Penal Code 1871 including in the case of Ong Ming Johnson v Attorney General.[1] The High Court of the Republic of Singapore ("Singapore High Court") (the lower division of the Supreme Court of Singapore) in the case of Ong Ming Johnson rejected the constitutional challenge to Section 377A, which criminalizes 'gross indecency' between men. The decision is the second in recent times where the judiciary in Singapore has refused to strike down Section 377A, a colonial era law, amongst others as being violative of right to equality and right to freedom of expression.[2] The objective of this article is to

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1 *Ong Ming Johnson v Attorney General* [2020] SGHC 63.

2 The Court of Appeal, the highest court in Singapore had in *Lim Meng Suang v Kenneth Che Mun-Leon* [2014] SCGA 53 previously considered a challenge to the vires of Section 377A of the Singapore Penal Code and turned it down.

bring forth the fallacies present in the judgment on constitutionality of Section 377A, which prima facie seems discriminatory.

We seek to analyze the issues in the parochial approach applied by the Singapore High Court in cases concerning fundamental right of speech and expression as well as right to equality. The Judiciary by refusing to adopt tests such as the proportionality test to examine the constitutional validity of a provision refuses to fully accept its duty under the Constitution of Singapore which is to act as the guardian of the Constitution and act against the exercise of unbridled power by the legislature.

We have divided this article into four parts. After this introductory portion in Part I, in Part II we set the context by discussing the background of Section 377A and the powers of judicial review that are vested with the Judiciary as per the Constitution. Post this, in Part III, we critique the judgement in Ong Ming Johnson on five broad grounds viz.: (a) narrow interpretation of the right to freedom of speech and expression, (b) use of public morality as a shield and ignoring constitutional morality; (c) non-engagement with arguments on disparate impact of Section 377A; (d) extending the presumption of constitutionality to a pre-constitutional provision affecting fundamental rights, and (e) applying traditional classification test to examine the vires of the provision with respect to the right to equality which has several limitations. In Part IV of the article, we provide the concluding remarks emerging out of the analysis made in the other parts of the article.

II. Section 377A of the Singapore Penal Code: Origins And Concerns

A. The imposition of victorian morality: a historical backdrop of section 377A in Singapore

In order to understand the origin of Section 377A, it is important to trace the origins of anti-homosexuality laws in Britain, which exported the same to the Straits Settlements.[3] In 1885, a member of the British Parliament, Henry Labouchere, introduced the Criminal Law Amendment Act, 1885 in the Parliament (commonly known as the Labouchere Amendment). This act outlawed any act of gross indecency, including any sexual act, between men, whether in

[3] Human Rights Watch, "This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism" in Corinne Lennox and Matthew Waites (eds), *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth* (University of London Press 2013); The Straits Settlement was a former administrative unit of the British Crown comprising of Singapore, Penang, Malacca and Dinding.

public or private.[4] The provision also provided punishment for an attempt to commit such gross indecency.[5] However, despite imposing a stringent punishment for the offence, the provision did not contain any definition for the term 'gross indecency'. Thus, there was uncertainty as to its application and scope.[6] The Labouchere Amendment provided the basis for introduction of similar provisions in British colonies, including Section 377A to the Penal Code in the then British colony of Singapore.[7]

Section 377A which was introduced in 1938 by the Legislative Council of the Straits Settlements, reads as follows:

"377A. Any male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years."[8]

The objective of introducing Section 377A seems to have stemmed from the need to outlaw all acts of gross indecency between male persons, as this was not explicitly covered by the already existing Section 377 of the Singapore Penal Code which only criminalised 'carnal intercourse against the order of nature' between individuals.[9] These two provisions had the combined effect of imposing the British Parliament's moral judgement of 'correct' sexual conduct on the subjects of the

[4] Criminal Law Amendment Act 1885, s 11.

[5] Section 11 of the Criminal Law Amendment Act provided that: "Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour."

[6] Chan Sek Keong, "Equal Justice Under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773, 781.

[7] Human Rights Watch (n 3).

[8] Section 377A was introduced in the Singapore Penal Code vide Section 7 of Penal Code (Amendment) Ordinance 1938.

[9] The Objects and Reasons of the 1938 Bill stated that the provision "*makes punishable acts of gross decency between male persons which do not amount to an unnatural offence within the meaning of section 377 of the Code*". The essence of Section 377 of the Singapore Penal Code was that whoever, whether male or female, engages in sexual acts which did not lead towards procreation, including anal sex, bestiality etc. were punishable under the Section 377. Section 377 of the Singapore Penal Code was repealed vide Penal Code (Amendment) Act 2007, s 70. Section 377A of the Singapore Penal Code as opposed to erstwhile Section 377 penalized acts of "gross indecency" between male persons only. This in essence criminalized all acts, including non-penetrative sexual acts between male persons. Whereas Section 377 was gender neutral, Section 377A specifically targets males.

Straight Settlements, without taking into account the factor of consent as a suitable defence to the persons engaging in sexual practices of the supposed 'wrong kind'.

B. Judicial review in Singapore

Article 93 of the Constitution of the Republic of Singapore, 1965 ("the Constitution") provides that judicial power in Singapore shall be vested in the Supreme Court and courts subordinate to the Supreme Court.[10] The Constitution also provides that the Supreme Court shall consist of the Court of Appeal and the High Court.[11] Therefore, the Court of Appeal of Singapore is the country's highest appellate court and is vested with the power to conclusively determine disputes relating to the interpretation of the Constitution. Article 4 of the Constitution provides that any law enacted by the Legislature which is inconsistent with the Constitution shall be void.[12]

Accordingly, the Supreme Court of Singapore has ruled that the legal model of the State is based on the supremacy of the Constitution and that the courts in Singapore have the power to declare a legislative action to be null and void if it transgresses the text of the Constitution.[13] However, in practical terms, successful challenges to legislative provisions remain few and far between due to the heavy onus of proof that the petitioners have faced while challenging a provision for being unconstitutional before the Supreme Court.[14] The Judiciary has been reticent in its approach while expanding the scope of the traditional classification test to test the legitimacy of actions undertaken by the Legislature.[15]

The Supreme Court has been overly cautious in determining constitutional issues concerning social morality.[16] In the previous challenge to Section 377A before the Court of Appeal, the Court did not shy away from stating the same in

[10] Article 93 of the Constitution of Republic of Singapore states: "**93.** The judicial power of Singapore shall be vested in a Supreme Court and in such subordinate courts as may be provided by any written law for the time being in force."

[11] Constitution of Republic of Singapore, A 94.

[12] Article 4 of the Constitution of Republic of Singapore provides for the Supremacy of the Constitution and states the following: "This Constitution is the supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."

[13] *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] SGHC 163.

[14] Jack Tsen-Ta Lee, "According to the Spirit and not to the Letter: Proportionality and the Singapore Constitution" (2014) 8(3) Vienna Journal on International Constitutional Law 276, 279.

[15] ibid 301.

[16] The High Court of Singapore even in the previous challenge to Section 377A of the Penal Code in *Lim Meng Suang v Attorney General* [2015] 1 SLR 26 refrained from testing the constitutional validity of the provision stating that it was "an issue of morality and societal values" and that in such cases the Parliament is the best judge of such controversial issues.

as many words. The Court of Appeal in Lim Meng Suang held that where issues of social morality are concerned, the court would adopt a calibrated approach to judicial review in favour of elected persons who represent the interest and will of the people.[17]

While it is important for the Judiciary to refrain from usurping the power of the Legislative wing of the State and imposing its own wisdom over legislative wisdom, heed must be simultaneously given to the fact that the Judiciary is the guardian of the Constitution, with the ultimate responsibility of interpreting the same. Accordingly, it cannot shirk away from its duty to test the social morals of the society against the ethos envisaged by and in the Constitution.[18] Taking a limited approach while testing the provisions enacted by the Legislature against the Constitution can affect the rights of persons (and in some cases only citizens) in an extremely detrimental and damaging manner. Such an approach will effectively result in the non-fulfilment of the aspirations and goals envisaged under the Constitution such as that of equality in all facets of life, resulting in the same remaining a distant dream.

III. Ong Ming Johnson: A Parochial and Formulaic Approach towards Fundamental Rights

A. Problems with using public morality as a shield in fundamental rights cases

It was argued on behalf of the State in Ong Ming Johnson v. Attorney General that Section 377A safeguards and reflects social morality when it prosecutes acts of gross indecency between males.[19] It was further argued that it is not for the courts to determine public morality, which is the domain of the legislature, comprised of elected representatives.[20] The High Court agreed with the aforesaid arguments and held that Section 377A serves the purpose of showing moral disapproval of society towards male homosexual acts.[21] The court used public morality as a shield and stated that the legislature being comprised of

[17] *Lim Meng Suang v Attorney General* [2015] 1 SLR 26. See Jack Tsen-Ta Lee, 'The limits of liberty: The crime of male same-sex conduct and the rights to life and personal liberty in Singapore: Lim Meng Suang v Attorney-General' [2015] 1 SLR 26 (2016) Hong Kong Law Journal 46(1), 49, 59.

[18] Jaclyn L Neo and Yvonne C L Lee, "Constitutional supremacy: Still a little dicey" in Li-ann Thio and Kevin YL Tan (eds), *Evolution of a Revolution: Forty years of the Singapore Constitution* (Routledge Cavendish 2009) 177.

[19] *Ong Ming Johnson* (n 1) [158].

[20] ibid.

[21] ibid.

elected representatives is the best judge of public morality. Accordingly, the courts refused to strike down Section 377A.[22]

There is no gainsaying that courts cannot estop the legislature from giving effect to what its understanding of morality is, through law.[23] In fact, legal systems especially criminal ones are based partially on the State's conception of public morality.[24] Therefore, public morality can be a legitimate purpose under Article 12 of the Singapore Constitution. However, it is pertinent to note that for public morality to be a legitimate purpose, it must not be in violation of constitutional morality.[25] Constitutional morality means that while framing laws, the governments must ensure that fundamental values on which constitutional guarantees are based are not violated.[26] This is in contrast with public morality which is the morality of the majority of the population, and is not only subjective but also constantly shifting.[27] Therefore, it can be stated that while morality of the majority population can be basis of a law, however, the same will have to give way to the fundamental values of the constitution.[28] This position is followed in jurisdictions respecting constitutional supremacy,[29] and thus Singapore being one such jurisdiction has no reason to differ and it must also test its laws on the touchstone of constitutional morality instead of merely using public morality as a shield.

Accordingly, in the instant case the Singapore High Court was required to not defer to public morality but to test the law based on public morality against constitutional morality. This is where we believe the Singapore High Court judgement falls short. The approach of the Singapore High Court bears resemblance with the approach of the Indian Supreme Court in Koushal v. Naz Foundation, wherein it had a similar issue before it and used public morality as shield to justify continuance of Section 377 of the Indian Penal Code.[30] However, the judgement in Koushal was set aside subsequently in the case of Navtej Johar.[31] A perusal at the Indian Supreme Court's approach in Navtej Johar dealing with a

22 *Ong Ming Johnson* (n 1).

23 Gautam Bhatia, *The Transformative Constitution* (Harper Collins 2019) 116.

24 Gautam Bhatia, 'India's attorney general is wrong. Constitutional morality is not a 'dangerous weapon', (*Scroll*, 21 December 2018) <https://scroll.in/article/905858/indias-attorney-general-is-wrong-constitutional-morality-is-not-a-dangerous-weapon> accessed on June 26, 2020.

25 Constitution of Republic of Singapore (n 11); *Manoj Narula v Union of India*, (2014) 9 SCC 1; *Naz Foundation v. Government of NCT of Delhi*, 2009 (111) DRJ 1.

26 Bhatia (n 24); *R v CM*, 1995 CanLII 8924 (Can. O.N. C.A.).

27 Bhatia (n 24).

28 Bhatia (n 23), 116.

29 *R v CM* (n 26); Bhatia (n 24); *Manoj Narula* (n 25); *Naz Foundation v Government of NCT of Delhi*, 2009 (111) DRJ 1.

30 *Suresh Kumar Koushal v Naz Foundation*, (2014) 1 SCC 1.

31 *Navtej Singh Johar v Union of India*, (2018) 10 SCC 1.

similar matter will highlight the shortfall in the approach followed in Koushal and Ong Ming. In Navtej Johar, the Indian Supreme Court when deciding a challenge against a similar provision criminalizing homosexuality, after testing the law on the touchstone of constitutional morality partially struck it down.[32] The court noted that a law in contravention with constitutional morality cannot be valid. It stated that the law was perpetuating inequality against a class of its population (homosexuals) on the basis of their intrinsic characteristics (sexual identity/orientation) which related to their personal autonomy.[33] Further, the court stated that the very purpose of such law was against constitutional morality's requirement of inclusivity.[34] It derived this requirement of inclusivity from various provisions under the Indian Constitution such as freedom of speech, assembly and association, and freedom of religion.[35] We believe that in the context of Singapore, if the High Court had tested the law on the basis of constitutional morality's requirement of inclusivity/ diversity, their conclusion would have been similar to the Indian Supreme Court in Navtej. This is because similar provisions whose foundational principles are inclusivity/diversity are part of the Singapore Constitution as well, such as freedom of speech, assembly and association, and freedom of religion.[36]

B. Freedom of speech and expression in Singapore: a parochial view

The High Court in Ong Ming Johnson has narrowly interpreted Article 14(1)(a) of the Constitution to state that freedom of expression under the Constitution only means freedom to express verbally.[37] Even from a prima facie

[32] ibid [645].

[33] We are assuming homosexuality to be an intrinsic characteristic which the Singapore High Court has said is not established beyond reasonable doubt based on perfunctory look at the evidence. The standard used by Singapore Hight Court seems to be beyond reasonable doubt as it states that till homosexuality is not proven to be intrinsic through cogent scientific evidence, it is not an intrinsic feature. However, we believe that since personal freedom of various individuals is dependent on such a test, more importance needed to be given to scientific evidence and/or expert evidence. Further, the burden on the claimant should have been lower and the standard of review of the claims made by the State must have been higher. Reference for this should have been made to *Navtej Johar.*

[34] *Navtej* (n 31) [640.3.7]–[640.3.8].

[35] ibid [640].

[36] Constitution of Republic of Singapore, A 9, 12 and 15.

[37] The Singapore High Court while using marginal note to Article 14 as a tool of interpretation, has in a convoluted manner stated there is no mention made of freedom of expression as a freedom of expression as a free standing right. Therefore, it interpreted it to mean that freedom of expression would relate to or fall within the right to freedom of speech i.e. verbal communication of an idea, opinion or belief. The High Court also used *ejusdem generis* as a canon of statutory interpretation to rule that the ordinary meaning of the term "expression" when read together with the term "speech" would mean some form of verbal communication.

reading of Article 14, it will be clear to any reader that the same could not have been envisaged by the drafters of the Constitution.

In order to better understand the approach used by the Singapore High Court, it is important to appreciate the dynamics of a nation like Singapore. It is a closely knit political society which regards the interests of the community above those of an individual. This has enabled the flourishment of the current-day scenario where the right to freedom of speech and expression is limited.[38] The idea disseminated through the government machinery has always been that granting unbridled political rights is antithetical to stable and orderly growth of the country.[39] This view is aided by the availability of various grounds in Article 14(2)(a) of the Constitution through which Legislature may restrict the fundamental right of speech and expression.[40] The Judiciary in Singapore, on a prima facie reading of the provision, is not expected to look into the reasonableness of the restriction. In fact, the actions of the Legislature are supreme, even when enacting laws restricting the core fundamental rights under Article 14. Be that as it may, we opine that the problem of restricted fundamental freedoms does not arise not from the Legislature's wide power of placing restrictions, but rather, it arises from the approach taken by the Judiciary. The Judiciary, by keeping in line with the views of the Executive, has exacerbated the effects of the limitations placed on the right to freedom of speech and expression.

The fundamental right to freedom of speech and expression in Singapore is similar to the right envisaged in the Constitutions of India and Malaysia.[41]

[38] Li-ann Thio, "Singapore: Regulating political speech and the commitment "to build a democratic society", 1(3) International Journal of Constitutional Law 516.

[39] Li-ann Thio, "The virtual and the real: Article 14, Political Speech and the calibrated management of deliberative democracy in Singapore" Singapore Journal of Legal Studies 25, 26.

[40] Article 14(1)(a) of the Constitution of Republic of Singapore provides to every citizen the right to freedom of speech and expression. However, under Article 14(2)(a) of the Constitution, the Parliament has been given the power to impose restrictions on right to freedom of speech of expression where it is considered necessary or expedient in the interest of the (i) security of Singapore, (ii) friendly relations with other countries, (iii) public order, (iv) morality, (v) privileges of Parliament and to provide against (vi) contempt of court (vii) defamation and (viii) incitement to any offence.; The use of the term 'restriction' in Article 14(2) instead of 'reasonable restriction' as seen in Article 19 of the Constitution of India makes clear the desire of the drafters to limit the judicial review into the exercise of power by the Legislature.

[41] The right to freedom of speech and expression under the Indian Constitution is similar to the right to freedom of speech and expression provided for under the Constitutions of Republic of Singapore and Malaysia. However, under Article 19(2) of the Indian Constitution, only reasonable restrictions can be imposed by the Legislature on the enjoyment of the right whereas under the Constitutions of both Singapore and Malaysia, the requirement of reasonableness is not explicitly provided.

Therefore, the interpretation of this right in the two countries could help further understand the shortcomings of the interpretation given by the Courts in Singapore.

Article 19(1)(a) of the Constitution of India, much similar to Article 14 of the Singapore Constitution guarantees to each citizen the right to freedom of speech and expression.[42] The Judiciary in India as compared to Judiciary in Singapore has given an expansive meaning to the right to freedom of speech and expression under Article 19(1)(a) by stating that it does not only include the rights explicitly mentioned in the provision but also other rights which might be implied from the provision.[43] Unlike the Singapore Judiciary, which has stated that expression is a subset of speech, the Supreme Court of India has construed it broadly to further the constitutional goal of providing certain basic rights to every citizen which help develop his complete personality.[44] In People's Union for Civil Liberties,[45] the Supreme Court of India held that:

> "Freedom of expression, as contemplated by Article 19(1)(a) which in many respects overlaps and coincides with freedom of speech, has manifold meanings. It need not and ought not to be confined to expressing something in words orally or in writing.
>
> …..
>
> Even a manifestation of an emotion, feeling etc. without words would amount to expression.
>
> ……
>
> Communication of emotion and display of talent through music, painting etc. is also a sort of expression."

The interpretation of the Supreme Court of India is in complete contrast with the myopic interpretation given by the High Court of Singapore, which has the potential of stifling the rights of its citizens. Even with respect to the judicial review of legislations imposing restrictions on the right to freedom of speech and

[42] Article 19(1)(a) of the Constitution of India states that: "19. (1) All citizens shall have the right to (a) freedom of speech and expression."

[43] *IR Coelho v State of Tamil Nadu,* AIR 2007 SC 861. The Supreme Court of India has ruled that freedom of press, even though not provided for separately and specifically under the Constitution of India is covered under freedom of speech and expression.

[44] Durga Das Basu, *Commentary on the Constitution of India,* vol 3 (Lexis Nexis 2014).

[45] *People's Union for Civil Liberties and another v Union of India and another*, (2009) 4 SCC 399.

expression under Article 19(2) of the Indian Constitution, the Supreme Courts of the two countries have taken similar approaches but have reached different ends.

In India, much like Singapore, a legislation restricting a right under Article 19 of Constitution of India is presumed to be constitutional. However, once a person alleging a violation of their right to freedom of speech and expression is able to prove that there has been a prima facie violation of their right by enactment of such legislation, then the onus shifts and the burden lies on the State to conclusively prove that the legislation is within the mandated constitutional scheme.[46] This is different from the position of law in Singapore where the Judiciary seems to put a great degree of burden on the Petitioner to prove the unconstitutionality of a provision. The approach of the Supreme Court of India as opposed to the approach adopted by the High Court of Singapore ensures that a delicate and nuanced balance between the right to freedom of speech and expression of a citizen and the right of the state to inter alia to ensure public order, decency and morality is achieved and maintained.

In similar vein, we explore Article 10 of the Federal Constitution of Malaysia, 1957 on which Article 14 of the Constitution of Singapore is based,[47] provides that every citizen has the right to freedom of speech and expression.[48] The right to freedom of speech and expression under Article 10 has been construed in Malaysia in Ooi Kee Saik[49] wherein it has been held that:

"the right of freedom of speech is simply the right which everyone has to say, write or publish what he pleases so long as he does not commit a breach of the law."

Even in Malaysia, freedom of speech and expression is construed wider than the meaning adopted by the High Court of Singapore.

In this light of this and at the very minimum, any meaningful interpretation of the freedom of speech and expression must include both verbal and non-verbal activity. Both India and Malaysia, have given a wider interpretation to the right in order to enable the citizens to meaningfully develop their social consciousness. Accordingly, the interpretation given by the Singapore Judiciary to the right to freedom of speech and expression leaves much to be desired. It also leaves a number of questions in the minds of its citizens as according to the interpretation given in Ong Ming Johnson any non-verbal expression including right to express inter alia through photographs, facial expressions etc. is not protected under Article 14 of

[46] Basu (n 44).

[47] Report of the Constitutional Commission, Republic of Singapore (1966) [37].

[48] Article 10(1)(a) of the Federal Constitution of Malaysia provides that: "10. (1) Subject to Clauses (2), (3) and (4) - (a) every citizen has the right to freedom of speech and expression".

[49] *Public Prosecutor v Ooi Kee Saik & Ors* [1971] 2 MLJ 108.

the Constitution. In our opinion, it is a decision that has tilted the balance in the favour of the Legislature. The effect of the judgement in Ong Ming Johnson is such that for violation of a non-verbal right a citizen can no more approach the Constitutional Courts in Singapore.

C. Ignoring indirect discrimination as "extra-legal": lack of judicial engagement

The Singapore High Court noted that anti-discrimination/ equality provision viz. Article 12 of the Singapore Constitution is based on Article 14 of the Indian Constitution.[50] The court also noted that in the Indian context, while dealing with a case under Articles 14 and 15 of the Constitution, the Supreme Court in *Anuj Garg v Hotel Association of India & Ors*[51] observed that legislation must not only be scrutinised for its aims or objectives (direct discrimination) but also for the impact or the effect it has (indirect discrimination).[52] This decision was quoted and affirmed by the Indian Supreme Court in the case of Navtej Johar. Similar is the position in other countries such as United States and United Kingdom where courts or legislature view both direct as well as indirect discrimination as antithetical to equality.[53] In United States, disparate impact was discussed in the case of *Griggs v Duke Power Co* wherein it was stated that not only overt/direct discrimination but also discrimination in operation or effect is proscribed.[54] In United Kingdom, indirect discrimination has been defined separately in the Equality Act of 2010.[55]

In this context, when arguments were made by the petitioners in the instant case that even though Section 377A may not discriminate directly against male homosexuals, it affects them disproportionately and indirectly as it criminalises something that is integral to their identity (sexual orientation).[56] The Singapore High Court instead of assessing this argument on the basis of the Indian as well as United States decisions cited, relied on the decision in Lim Meng Suang CA.[57] Citing this earlier decision, it held that Singapore courts ought not take into account

[50] *Ong Ming Johnson* (n 1) [218].

[51] (2008) 3 SCC 1.

[52] *Ong Ming Johnson* (n 1) [18].

[53] Dhruva Gandhi, 'Rethinking "Manifest Arbitrariness" in Article 14: Part II – Disparate Impact and Indirect Discrimination' (*The Indian Constitutional Law And Philosophy Blog*, 21 May 2020) <https://indconlawphil.wordpress.com/2020/05/21/guest-post-rethinking-manifest-arbitrariness-in-article-14-part-ii-disparate-impact-and-indirect-discrimination/> accessed on 21 June 2020.

[54] *Griggs v Duke Power Co*, 401 US 424.

[55] *See* Equality Act 2010; Gandhi (n 53).

[56] *Ong Ming Johnson* (n 1) [219].

[57] *Ong Ming Johnson* (n 1) [221]–[223].

"extra legal arguments" regardless of how valid they may seem.[58] It is peritnent to note that neither the earlier decision in Lim Meng Suang CA nor this decision highlights how arguing that a facially neutral provision in effect disproprionately affects a particular class is extra legal or why arguments which have a bearing on how law operates ought not be considered. The court also failed in engaging with Navtej Johar wherein disparate impact of a similar provision was considered and the impugned provision was partially struck down. If not the other cases, the court had an obligation to at least consider, distinguish or highlight why it begs to differ with Navtej Johar. This is because Article 14 of the Indian Constitution is very similar to Article 12 of the Singapore Constitution and the petitioners specifically relied on the Navtej Johar case. By failing to do so and by ignoring disparate impact of the provision we believe the Singapore High Court failed in its constitutional duty to act as a protector of fundamental rights of its citizens.[59]

D. Presumption of constitutionality: does it extend to pre-constitutional provisions?

The Singapore High Court in Ong Ming Johnson v. Attorney General observed that presumption of constitutionality operates as much for pre-constitutional laws as it does for the post constitutional ones.[60] It also noted that Section 377A was extensively debated in the Singapore Parliament and the Parliament chose not to repeal it.[61] The High Court also observed that the presumption of constitutionality is not unique to Singapore and cited the case of Nand Kishore v. State of Punjab where the Indian Supreme Court had observed that "there is always a presumption of constitutionality in favour of the law…"[62] However, the High Court conveniently ignored the observations of the Indian Supreme Court in *Navtej Johar*.

In Navtej Johar, Justice Nariman observed that pre-constitutional provisions are not worthy of presumption of constitutionality.[63] The basis for the observation was that presumption of constitutionality of a provision is based on the fact that Parliament not only understands the needs of its people (is representative)

[58] *Ong Ming Johnson* (n 1) [223].

[59] This is also linked to deferring to Parliament and following a liberal judicial review standard which are discussed in Part I of this paper.

[60] *Ong Ming Johnson* (n 1) [152].

[61] *Ong Ming Johnson* (n 1) [152].

[62] (1995) 6 SCC 614.

[63] *Navtej Singh Johar* (n 31) [360].

but also understands the constitutional limitations for framing of laws.[64] In this regard, it must be noted that with regards laws such as Section 377A which affect fundamental rights of citizens, presumption of constitutionality is particularly problematic.[65] This is because first, those whose fundamental rights are affected had no say in drafting of those laws and now that those laws are in place, they have the burden of mobilising resources to ensure that the Parliament repeals those laws.[66] This "double-burden" is unacceptable and cannot be validated by way of a generic constitutional provision which is only a barrier to treating such laws as void and not for removal of presumption of constitutionality.[67]

As shown in Part II of this paper, Section 377A is a colonial era provision imposing Victorian morality. Despite this being the case, the High Court applies "presumption of constitutionality". We believe that this approach of the court is incorrect as Section 377A affects fundamental rights of male homosexuals and being pre-constitutional provision cannot be granted presumption of constitutionality on account of unacceptable "double-burden" highlighted above. However, the High Court without any engagement with this question, presumes it to be constitutional which is problematic as it reduces the threshold for scrutiny and puts an unreal excessive burden on the petitioners challenging the law. Therefore, we believe that presumption must have no role in cases of discriminatory or differential treatment on the basis of race, sex or sexual orientation and it must give way to proportionality analysis. This position has also found favour with courts in several commonwealth nations[68] and it is time for Singapore courts to follow and truly act as the protector of fundamental rights.[69] Further, even if the Singapore courts do not do away with the presumption completely, it should ask the applicant to prima facie make out

64 *Navtej Singh Johar* (n 31) 361; See Tarunabh Khaitan, 'On the presumption of constitutionality for pre-constitutional laws' (*The Indian Constitutional Law And Philosophy Blog*, 11 July 2018) <https://indconlawphil.wordpress.com/2018/07/11/guest-post-on-the-presumption-of-constitutionality-for-pre-constitutional-laws/> accessed on 21 June 2020.

65 Gautam Bhatia, '*Is there an Interpretive Methodology for Construing Colonial-era Statutes?*' (*The Indian Constitutional Law And Philosophy Blog*, October 10 2013) < https://indconlawphil.wordpress.com/2013/10/10/is-there-an-interpretive-methodology-for-construing-colonial-era-statutes/> accessed on 21 June 2020. Bhatia notes that this blanket observation by Justice Nariman may be problematic and only the pre-constitutional laws which affect fundamental rights are not worthy of presumption of constitutionality. He notes that those laws which do not affect any particular group or has no bearing on fundamental rights may be treated differently and may be granted protection by virtue of constitutional provision mandating continuance of pre-constitutional laws.

66 ibid.

67 Bhatia (n 65).

68 *Navtej* (n 31) [360]; Bhatia (n 65).

69 Constitution of Republic of Singapore, A 4 and 162.

the grounds for review and then should ask the government to independently prove constitutionality of the impugned provision.

E. Need to adopt the proportionality standard and replace traditional classification test

The High Court held that in respect of Article 12 of the Constitution, law must have some intelligible differentia and that differentia must have rational nexus with the object sought to be achieved by the law.[70] With regards differentia, the court noted that Section 377A has a clear differentia as it is only aimed at homosexual acts between men as against homosexual acts between females or heterosexual acts.[71] In this regard the court noted that the Singaporean law in certain respect treated men and women differently[72] and there was no change in societal disapproval towards male homosexual acts as opposed female homosexual acts, therefore Section 377A was justified.[73] Accordingly, the court concluded that the differentia which Section 377A seeks to create is not unreasonable. The court with regards the rational nexus, stated that the object of Section 377A was to preserve public morality and the differentia seeks to achieve that by criminalizing homosexual conduct between males.[74] Further, the court stated that as this provision has been validly enacted and the Parliament has not deemed fit to repeal the same, it must be presumed to be constitutional unless proved otherwise.[75] Accordingly, the court stated that it is not for the court to test the legitimacy of the object as by doing that it would be acting as a mini-legislature.[76]

While the court concluded as above, it acknowledged that the reasonable classification test has its limitations and operates only as a threshold level of inquiry.[77] However, apart from this acknowledgment, the court made no effort to evolve either a new standard of inquiry or to follow another standard evolved in jurisdictions with similar equality provisions. The court did not even appropriately

[70] *Ong Ming Johnson* (n 1) [170].

[71] *Ong Ming Johnson* (n 1) [171].

[72] The court failed to observe that gender-based differentiation to provide favorable treatment to women is justified on account of historical oppression and it does not in any way imply that all differentiations based on gender will be justified as per the equality provisions of the Singapore Constitution.

[73] *Ong Ming Johnson* (n 1) [172].

[74] ibid [189].

[75] Discussed in the earlier part of the paper.

[76] *Ong Ming Johnson* (n 1) [207].

[77] ibid [210]–[211]. Bhatia (n 23) 104; Joseph Tussman and Jacobus tenBroek, '*The Equal Protection of Laws*' (1949) 37(3) The California Law Review 341. Asia-Pacific Journal on Human Rights and The Law.

analyse whether the flaws in this test makes it inappropriate for cases involving fundamental rights and more specifically equality and personal autonomy. It is pertinent to note that courts in several jurisdictions including India[78] and Hong Kong[79] when faced with similar issues, where a law targeted vulnerable section of its population, have moved from the traditional classification test to deeper scrutiny review involving the proportionality test.[80] For instance, the Delhi High Court in the Naz Foundation (similar approach is followed by the Indian Supreme Court in Navtej Johar) observed that the restrictions imposed by the state's (impugned) measure must not only be legitimate and relevant but must also be proportionate to the state interest.[81] The reason for such change in approach was that such laws affect personal autonomy of individuals, which is extremely important as it forms the basis of the anti-discrimination and equality provisions of the Constitution.[82] Therefore, traditional review which is extremely deferential towards the State, has a low threshold for inquiry. It does not account for the fact that equality by its nature excludes certain legislative classifications (colour, birth, creed, etc) and legislative purposes (hostile, discriminatory) cannot appropriately help courts in protecting fundamental rights and/or in assessing violation of fundamental rights.[83]

Despite this evolution in several jurisdictions, the Singapore court ignored the doctrine of proportionality and observed that "these limitations do not necessarily justify addition of a proportionality limb to the reasonable classification test".[84]

[78] Bhatia (n 22) 105; *Navtej* (n 31); Jack Tsen-Ta Lee, 'Equality and Singapore's First Constitutional Challenges to the Criminalization of Male Homosexual Conduct' (2015) Asia-Pacific Journal on Human Rights and The Law 16(1-2), 150–185.

[79] *Hysan Development Co Ltd and Others v Town Planning Board* (FACV 21/2015).

[80] See Jack Tsen-Ta Lee (n 78); In *Navtej*, the Indian Supreme Court was extremely critical of the traditional classification test and observed that it "elevates form over substance". The observation of J. Chandrachud in this regard is as follows: "*Equating the content of equality with the reasonableness of a classification on which* a law is based advances the cause of legal formalism. *The problem with the classification test is that what constitutes a reasonable classification is reduced to a mere formula: the quest for an intelligible differentia and the rational nexus to the object sought to be achieved. In doing so,* the test of classification risks elevating form over substance. *The danger inherent in legal formalism lies in its inability to lay threadbare the values which guide the process of judging constitutional rights.*" Further, Justice Chandrachud notes that Article 14 of the Indian has an edifice over which the same is built. He observes that the quest of the provision is equal and fair treatment of individuals in all spheres and facets.

[81] *Navtej Singh Johar* (n 31).

[82] Tarunabh Khaitan, 'Beyond Reasonableness - A Rigorous Standard of Review for Article 15 Infringement' Journal of The Indian Law Institute 50(2) 177–208; While sexual orientation may not be one of the listed grounds in the provision prohibiting discrimination, the courts have justified using this scriter standard in such cases, as "sexual oritentation" is analogous to grounds on which the Constitution specifically prohibits differential treatment (Constitution of Republic of Singapore, A 12(2)).

[83] Bhatia (n 23) 105.

[84] *Ong Ming Johnson* (n 1) [211].

Further, it observed that proportionality ought not to be taken as an approach in equal protection clause cases as that would lead to reviewing the legitimacy of aims and objectives of the statues.[85] We believe that the court abdicated its constitutional responsibility of judicial review by stating that it is not for courts to review legitimacy of statutory objects, without mentioning any reason for the same. This is especially the case when Article 162 of the Singapore Constitution envisages bringing pre-constitutional laws in conformity with the Constitution by suitable exceptions, modifications, etc.[86] Thus by sticking to a formula based approach to equality, the Singapore High Court failed to act as the guardian of the Constitution.

IV. Conclusion

In this paper we have argued that the Singapore High Court has failed in its duty to act as a guardian of the constitutional provisions by upholding Section 377A in Ong Ming Johnson. The judgement echoed the view of the public, as recognized by the legislature, which still wishes to view homosexuality as a criminal offence, much similar to the Victorian times in which the provision was enacted. We highlighted that the approach of the Singapore High Court in Ong Ming Johnson strikes at the very ethos on which the Constitution of Singapore is based. The Singapore High Court followed traditional standard of review which is extremely deferential towards the State, has a low threshold for inquiry, does not account that equality its nature excludes certain legislative classifications (colour, birth, creed, etc) and legislative purposes (hostile, discriminatory), cannot appropriately help courts in assessing violation of fundamental rights. Thus, we have argued that the judiciary in Singapore needs to move away from the highly deferential standard and adopt tests that safeguard the fundamental rights of the people of Singapore in an expansive manner. We believe that Singapore High Court can draw inspiration from the Indian Supreme Court, which while considering a similar constitutional provision criminalizing homosexuality provided a more 'living' interpretation to the fundamental rights. Thus, we have proposed that the Singapore High Court should adopt the test utilized by the Indian Supreme Court viz. deeper scrutiny test involving proportionality analysis to review the legitimacy of statutory provisions.

[85] Refer to Part II (B) of this paper which deals with Judicial Review in Singapore.

[86] Constitution of Republic of Singapore, A 162.

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Revisiting the Potential for Restorative Justice at the International Criminal Court: A Search for Theoretical Justifications of the Practice of ICC

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I. Introduction

The International Criminal Court (ICC) is the only treaty-based, permanent international judicial body that determines individual criminal responsibility for the four international core crimes: genocide, war crimes, crimes against humanity, and the crime of aggression. The United Nations Security Council (UNSC), the Prosecutor of the ICC (Prosecutor) and State Parties to the Rome Statute (State Parties) may trigger the jurisdiction of the ICC with respect to the aforementioned crimes. However, since commencing its judicial functions in 2002, the Court has struggled to establish its legitimacy and credibility as an international system of criminal justice that can hold perpetrators accountable, while also respecting the sovereignty of states, rights of the Accused and adequately rehabilitating victims of such heinous crimes.

During its initial years, an overwhelming majority of situations before the ICC were from the African continent. However, gone are the days when the Court's 'international' relevance and character were questioned. The Court is already conducting investigations into crimes against humanity and war crimes in Eurasia, including Georgia and Afghanistan.[1] Further, a few of the world's most restive situations have been referred to the Court, awaiting the Pre-Trial

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1 International Criminal Court, 'Afghanistan: Situation in the Islamic Republic of Afghanistan' <https://www.icc-cpi.int/afghanistan> (accessed 17 April 2020).

Chamber's authorisation for investigation. These include the situation of political unrest in Venezuela,[2] investigations into potential war crimes by nationals of the United Kingdom in Iraq, during her occupation of the latter between 2003-08,[3] and the crimes committed in the occupied territories of Palestine, including East Jerusalem.[4] Most recently, in November 2019, the Prosecutor of the ICC's request to investigate into the deportation and persecution (among others) of Rohingyas in Bangladesh/Myanmar, was approved.

As the Court transitions into a body that will decide culpability for heinous crimes in conflict zones around the world, its procedures and justice delivery system will rightly become the subject of international scrutiny. Its criminal justice model will not only determine the course and outcome of trials before the Court, but also set precedents for international criminal and humanitarian law. Sensing the pertinence of the same, this paper probes into the criminal justice traditions and models followed by the ICC. It establishes the imperative of following a restorative justice model, and proceeds to examine the feasibility of the same at the ICC. Pursuantly, this article is divided into five parts. Part II provides a background of the ICC and its criminal process, examining features of the Rome Statute that arguably resemble a restorative justice model. Part III inquires into the theoretical tenets of restorative justice and analyses claims that the ICC represents a sui-generis combination of retributive and restorative justice. Part IV makes a case for revisiting some of the foundational principles of the ICC, and suggests ways for the ICC to transition towards a more restorative paradigm. Part V concludes that the justice model of the ICC is better understood from the non-conventional 'punitive victims' rights' model advanced by Professor Roach in 1999, and examines the implications of such a theoretical anchor.

II. A Background of the ICC Criminal Process

The Rome Statute of the International Criminal Court (Rome Statute) was ratified in 1998, and came into force in 2002.[5] It established the International Criminal Court, which is the only permanent adjudicatory body for trying international core crimes.[6] The permanent nature of the ICC distinguishes it

2 International Criminal Court, 'Preliminary Examination: Venezuela I' <https://www.icc-cpi.int/venezuela accessed> (accessed 17 April 2020).

3 International Criminal Court, 'Preliminary Examination: Iraq/UK' <https://www.icc-cpi.int/iraq> (accessed 17 April 2020).

4 International Criminal Court, 'Preliminary Examination: State of Palestine' <https://www.icc-cpi.int/palestine> (accessed 17 April 2020).

5 The Rome Statute was adopted on July 17, 1998, and entered into force on July 1, 2002.

6 There are four such international core crimes provided under the Rome Statute, namely, Genocide (Article 6), Crimes against humanity (Article 7), War crimes (Article 8), and the Crime of Aggression (Article 8*bis*).

from its predecessor international criminal tribunals, established over the course of history to deal with particular instances of international atrocities.[7] These include the International Military Tribunal, the Nuremberg Military Tribunal (both of which dealt with the crimes committed by officials of Nazi Germany), the International Military Tribunal of the Far East (to prosecute war criminals from Japan), and more recently, the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

While these ad-hoc institutions were either created by the UN (such as the ICTY or the ICTR) or other global alliances (in the case of the IMT and the NMT), the ICC was conceptualised as a trans-national body which would deal with all future incidents of international core crimes across the world.[8] Thus, as an institution, the ICC significantly differs from other international criminal tribunals. For example, the Court has the jurisdiction to take suo-motu cognisance over international crimes. It also emphatically claims to focus on ensuring justice to victims (as opposed to merely punishing offenders).[9] Additionally, it has a complex regime of evidence collection and presentation.

The unique nature of international crimes is reflected in their scale, impact on victim communities, the greater requirement of deterrence, as well as the heightened difficulties in enforcement, among others.[10] Being the result of a long and meticulous drafting process, the Rome Statute came to imbibe several innovative and unprecedented provisions to deal with the multiple repercussions of the commission of an international crime, which are starkly differentiated from an ordinary crime committed in domestic criminal systems.

Among the most important innovations brought about by the Rome Statute, is its inclusion of several victim-centred provisions. This was largely alien to most domestic and international criminal justice systems.[11] Predecessors of the ICC, such as the ICTY and the ICTR, often focused on other apparent goals of the criminal process, such as ensuring a speedy trial, respecting the rights of the

7 International Criminal Court, 'Understanding the International Criminal Court' (2002) <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> (accessed 17 August 2020).

8 Mark Klamberg, *Commentary on the Law of the International Criminal Court* (Torkel Opsahl Academic EPublisher 2017) 5.

9 Richard Goldstone, 'International Criminal Court and Ad-hoc Tribunals' in Sam Daws and Thomas G. Weiss (eds), The Oxford Handbook on the United Nations (Oxford University Press 2008).

10 Otto Triffterer and Kai Ambos, *The Rome Statute of the International Criminal Court: A commentary* (3rd edn, Hart Publishing 2016) 4–5.

11 Gioia Greco, 'Victims' Rights Overview under the ICC Legal Framework: A Jurisprudential Analysis' (2007) 7 International Criminal Law Review 531, 533.

Accused, or facilitating peace and reconciliation, to the exclusion or subordination of the rights of victims.[12]

However, the ICC regime is a remarkable volte face from its predecessors. The Rome Statute designates 'victims' as a specific class and considers them 'participants' to the trial.[13] Thus, various rights are envisaged for victims, including the right to plead before the Court,[14] and the right to submit their observations on an investigation before the Pre-Trial Chamber.[15] Moreover, the ICC is empowered to order the Accused to make reparations (including restitution, compensation and rehabilitation) to victims.[16] Similarly, the Court provides institutional support to victims through the Registry of the Court (Registry). The Registry established the Victims' Trust Fund,[17] which manages and directs reparations towards the victims, and is also the source of all finances pertaining to victim participation.[18] Additionally, the Registry includes the Victims and Witnesses Unit.[19] This Unit facilitates victim participation inter alia by arranging legal representation for victims, ensuring protection of victims as they testify, and managing the Trust fund.[20] These features of the ICC system consolidate the involvement of victims, and ensure the practicability of the various victim-centred provisions of the Rome Statute.

Based on these provisions, the ICC has widely been regarded as an institution that metes out restorative justice. Claims that it brings together retributive and restorative justice in a unique manner have been advanced from within the ICC, as well as by various academicians. According to the former President of the ICC, Judge Sang-Hyun-Song, "ICC is much more than just about punishing the perpetrators. The Rome Statute and the ICC brings retributive and restorative justice together with the prevention of future crimes."[21] Similar statements have

[12] Mariana Pena and Gaelle Carayon, 'Is the ICC Making the most of Victim Participation' (2013) 7(3) International Journal of Transnational Justice 518, 519–520.

[13] The Rome Statute, Article 68. See Ian Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44(6) British Journal of Criminology 967, 972–977.

[14] The Rome Statute, Article 68(3).

[15] The Rome Statute, Article 15(3): "… Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence", read with International Criminal Court, Rules of Procedure and Evidence, Rule 50(3): "… victims may make representations in writing to the Pre-Trial Chamber within such time limit as set forth in the Regulations".

[16] The Rome Statute, Article 75.

[17] The Rome Statute, Article 79.

[18] Anne Dutton and Fionnuala D Ni Aolain, 'Between Reparations and Repair: Assessing the Work of the ICC Trust Fund for Victims Under Its Assistance Mandate' (2019) 19(2) Chicago Journal of International Law 490, 493.

[19] The Rome Statute, Article 44(3).

[20] International Criminal Court, Rules of Procedure and Evidence, Rule 17 (Functions of the Unit).

[21] Judge Sang-Hyun-Song's address to the 7th Consultative Assembly of Parliamentarians for the ICC, at Rome; see Press Release, 'ICC President tells World Parliamentary Conference "ICC brings retributive and restorative justice together with the prevention of future crimes"' (*International Criminal Court*, 11 December 2012) <https://www.icc-cpi.int/Pages/item.aspx?name=pr860> (accessed 2 November 2020).

been made by other ICC officials in press releases, as well as by judges in the course of their verdicts. For instance, in his dissenting opinion in the case Prosecutor v Uhuru Kenyatta, it was observed by Judge Eboe-Osuji that "…the Rome Statute in its principles is in step with developments in the relevant spheres of international law that now lay a great store in ensuring that restorative justice (to the victims) is given just as much scope as punitive justice."[22] From the observation of Judge Eboe-Osuji and Judge Sang-Hyung Song, it emerges that as a court, the ICC certainly desires a restorative justice model, to benefit the victims of crimes tried before it. Ensuring the latter has often been highlighted as the primary mandate of the ICC.[23]

III. Unifying Restorative and Retributive Justice: A *Sui-Generis* Model?

This section explores such claims about the practice of the ICC in light of established conceptions of restorative justice models. It seeks to examine whether, in light of its adversarial procedures, trials at the ICC can be said to effect restorative justice, or at least a unique combination of retributive and restorative justice.

A. Theorising restorative justice

While the term 'restorative justice' was arguably coined by the English scholar Albert Eglash in 1959,[24] there is ample historical evidence of the existence of practices that are today encapsulated by the term.[25] It is believed by several scholars that in dealing with crimes, ancient communities focused much more on reparation than on punishing the offender.[26] Over time, however, the Westphalian State began to play a much more important role in conflict resolution: crimes began to be seen as a violation of the order of the State, rather than harms caused

[22] Opinion of the current president Judge Eboe Osuji, in *Prosecutor v Uhuru Mugai Kenyatta* (Trial Chamber) (Dissenting Opinion of Judge Eboe-Osuji) [2013] ICC-01/09-02/11-863-Anx-Corr [61].

[23] The first prosecutor of the ICC Luis Moreno-Ocampo once famously declared, "I am a prosecutor. My mandate is justice; justice for the victims"; see International Criminal Court, 'ICC Prosecutor visits Egypt and Saudi Arabia' ICC-CPI-20080509-MA13 (9 May 2008) <https://www.icc-cpi.int/Pages/item.aspx?name=press+release+media+advisory+icc+prosecutor+vists+-Egypt+and+Saudi+arabia> (accessed 2 November 2020); Claire Garbett, 'From Passive Objects to Active Agents: A Comparative Study of Conceptions of Victim Identifies at the ICTY and ICC' (2016) 15(1) Journal of Human Rights 40, 44.

[24] Albert Eglash, 'Creative Restitution: Its Roots in Psychiatry, Religion and Law' (1959) 10(2) British Journal of Delinquency 114, 117–118.

[25] ibid.

[26] Daniel W Van Ness and Karen Heetderks Strong, *Restoring Justice: An Introduction to Restorative Justice* (4th edn, Anderson Publishing 2010) 6–9; A reason for this could be the necessity of such communities to stick together and avoid outcasts, given their minimal numbers and the constant threat of inter-community conflicts.

to the victims.[27] Thus, the primary mode of dealing with crime was the imposition of punishment, as opposed to alleviating the harms suffered by victims.

It was only in the 1970s that the concept of restorative justice evolved as an alternative model to the conventional retributive models of criminal justice. This was significantly due to the rise of victim's rights movements across the western world, which primarily advocated for greater recognition of victims in the criminal process.[28] Soon, several scholars began to articulate the concept of restorative justice with far greater precision (than in the early 1960s) as a potential solution to the concerns flagged by various victims' movements.[29]

There is no single accepted definition of 'restorative justice', and various proponents have emphasised on different features they consider essential to this concept. Howard Zehr is considered one of its most influential pioneers. In his book Changing Lenses published in 1990, he defined restorative justice as "one that views crime as a violation of people and relationships, which in turn leads to obligations to remedy the harm and views justice as a process in which all parties search for reparative, reconciling, and reassuring solutions."[30] Other scholars who have offered notable definitions of restorative justice are Daniel Van Ness & Karen Heetderks Strong,[31] John Braithwaite,[32] and perhaps most importantly, Lode Walgrave.

Walgrave's conceptualisation of restorative justice has been regarded as foundational and relied upon by scholars such as Zehr, and Van Ness and Strong in evaluating various criminal justice systems.[33] Walgrave defines restorative justice as an "option on doing justice after the occurrence of an offense that is primarily oriented towards repairing the individual, relational and social harm

[27] Lode Walgrave, 'Restorative Justice: An Alternative for Responding to Crime' in Shlomo Giora Shoham, Ori Beck, and Martin Kett (eds), *International Handbook of Criminology and Penal Justice* (Taylor & Francis Group 2008) 613–689.

[28] Van Ness and Strong (n 26) 124.

[29] See John Braithwaite, 'Restorative Justice' in Michael Torny (ed) *The Handbook of Crime and Punishment* (Oxford University Press 1998); Howard Zehr, 'Justice Paradigm Shift? Values and Visions in the Reform Process' (1994) 12(3) Mediation Quarterly 207, 210.

[30] Howard Zehr, *Changing Lenses: A new Focus for Crime and Justice* (Herald Press 1990) 63–82.

[31] Van Ness and Strong (n 26) 42; also see Gerry Johnstone and Daniel W. Van Ness, 'The Meaning of Restorative Justice', in Gerry Johnstone and Daniel W. Van Ness (eds), *Handbook of Restorative Justice* (Willan Publishing 2006) 9–15. Gerry Johnstone and Van Ness suggest that while restorative justice is a complex idea whose meaning continues to evolve with new discoveries, any definition of the phrase must incorporate three concepts: *first*, the 'encounter' conception, that allows the stakeholders (victims, offender and other interested parties) to freely speak and decide what to do in a relatively informal environment; *second*, the 'reparative' principle, which seeks to address the harm caused by the crime, and provide redressal to victims, and perhaps, communities and offenders as well, and *third*, the 'transformation' conception, which is a broad concept, that seeks to address not only harm caused to individual, but also structural issues of injustice such as racism, sexism, etc, since each of these affect an individual's ability to participate in the society in whole.

[32] Braithwaite (n 29).

[33] Howard Zehr (n 30); Van Ness and Heetderks Strong (n 26). See also Braithwaite (n 29).

that is caused by that offence."[34] Therefore, the most important features of restorative justice comprise a focus on the harm suffered, centrality of the victim as a stakeholder, acceptance of (and emphasis on) factual guilt (as opposed to legal guilt), involvement of communities, and the absence of punishments as the ends of the justice process.[35]

B. Anchoring the ICC justice model

This section seeks to examine the conventions of the ICC to understand its criminal justice model. Two essential characteristics of the ICC justice system come in conflict with the requirements of a restorative justice model. First, the nature of proceedings at the ICC is strictly adversarial, and emphasises on 'legal guilt', i.e., establishing guilt through a lawful trial, as opposed to factual admissions of guilt. Second, the imposition of adequate punishment is one of the foundational objectives of the ICC. The Preamble of the Rome Statute reads, "[The State Parties are] determined to put an end to impunity for the perpetrators of these crimes and thus, to contribute to the prevention of such crimes," referring to the international core crimes.[36] Thus understood, the fact that perpetrators of the highest degree of crimes get away without any sanctions, is arguably the raison d'ètre of the ICC.

The deviance between the restorative justice model and the objectives of the ICC conclusively establishes that practices at the ICC are not exclusively aligned with the restorative justice model. This invites inquiry into more nuanced claims of comprehending the ICC system as a model that uniquely consolidates retributive and restorative justice models.[37] The next section examines whether such claims accurately capture the ICC model or represent a more superficial 'commodification' of the idea of restorative justice.

C. Commodification of restorative justice

Commodification is the process whereby a particular thing or an idea is only seen as a commodity which can be transacted in the market.[38] Thus commodified, the 'object' loses all other characteristics of itself, except the ones required in a particular transaction. The revolutionary work on this phenomenon carried out by

[34] Walgrave (n 27) 621.

[35] Walgrave (n 27) 620–624.

[36] The Rome Statute, Preamble; Triffterer and Ambos (n 10) 10.

[37] (n 21–23). See also Sara Kendall, 'Restorative Justice at the International Criminal Court' (2018) 70(2) Revista Española de Derecho Internacional 217, 219.

[38] The concept was first applied in a legal sense by Prof Taft in Lee Taft, 'Apology Subverted: The Commodification of Apology' (2000) 109(5) Yale Law Journal 1135, 1147.

Lee Taft was published in a paper in 2000 in the Yale Law Journal.[39] Therein, he dealt with the relevance of an 'apology' in the criminal process. He contended that the immense healing power of an apology would be greatly diminished if it were to become a matter of course in criminal trials. This is because as soon as an apology assumes the character of a legal imposition, it loses its 'moral force'. He considered this as commodification of apologies, limiting their purpose to placating victims or redeeming oneself in the public eye.[40]

The idea of commodification in relation to restorative justice was popularised by Jac Armstrong.[41] He condemned efforts to reconcile retributive and restorative justice paradigms, which he referred to as 'retributive-restorative justice'. Such an idea of justice, he contended, would be a superficial amalgamation of arbitrarily chosen values of both the models, owing to the fundamentally irreconcilable objectives of the two models. For example, one of the fundamental features of restorative justice is that the severity of sanctions must depend on victim satisfaction.[42] Whereas, aimed to restore the primacy of rules and norms, retributivism's central premise is that punishment must depend on the gravity of the offence.[43] Thus, he theorised that a 'retributive-restorative justice' is in essence a commodification of the latter, where conflicting values of restorative justice are discarded to achieve a reconciliation. The following paragraphs will contextualise this fallacy of retributive-restorative justice at the ICC.

D. Deprioritised victim-centrism

At the outset, it must be noted that although the Rome Statute attempts to ensure victim satisfaction,[44] its justice model, as noted above, explicitly recognises ending impunity of perpetrators as a fundamental goal. However, even attempts at victim satisfaction, through participation and reparation, do not truly effect the values and goals of restorative justice. This is due to three reasons.

First, victims of crimes being tried by the ICC are considered 'participants', and not 'parties' to the trial, the latter being a designation reserved for the

[39] ibid.

[40] Taft (n 38) 1157: "When the performer of apology is protected from the consequences of the performance through carefully crafted statements and legislative directives, the moral thrust of apology is lost. The potential for meaningful healing through apologetic discourse is lost when the moral component of the syllogistic process in which apology is situated is erased for strategic reasons."

[41] Jac Armstrong, 'Rethinking the restorative–retributive dichotomy: is reconciliation possible?' (2014) 17(3) Contemporary Justice Review: Issues in Criminal, Social, and Restorative Justice 362, 367–372.

[42] ibid 363, 371.

[43] Armstrong (n 41) 371.

[44] (n 13–20).

Prosecutor and the Accused. This has a significant bearing on the rights of the victims within the trial. For example, the victims have no locus standi to institute proceedings at the ICC.[45] They are involved in the process only once an Accused has been charged with a specific crime,[46] and the Prosecutor recognises them as participants.[47] Similarly, even during the trial, the Court has the discretion to determine the manner of victim participation.[48] To illustrate, in the case of Prosecutor v Lubanga,[49] while the child soldiers who were recruited by the Accused were legally represented as victims, none of the numerous persons who suffered harm at the hands of the child soldiers were recognised as victims.[50] Thus, the involvement of victims is subordinated to the requirements of the trial, the actions of the Prosecutor, and the discretion of the court itself. This lack of agency with the victims undermines the ethos of restorative justice.

Second, victims do not participate directly in the proceedings or come face to face with the Accused.[51] Rather, their participation is representational in nature, wherein a counsel for the victims is appointed by the Court, and only a few victims actually manage to present evidence. For example, in the case of Prosecutor v

[45] Article 13 of the Rome Statute (Exercise of Jurisdiction) provides the ways by which the ICC's jurisdiction may be triggered: "The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15".

[46] Sara Kendall and Sarah Nouwen, 'Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood' (2013) 76(3&4) Law and Contemporary Problems 235, 256.

[47] ibid 244.

[48] The Rome Statute, Article 68(3): "*Where the personal interests of the victims are affected*, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence" (emphasis added); Thus, the *locus standi* for the victims' participation is established upon a finding by the Court to the effect that their personal interests are affected.

[49] *Prosecutor v Thomas Lubanga Dyilo* (Pre-Trial Chamber I) (Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v Thomas Lubanga Dyilo) [2006] ICC-01/04-01/06.

[50] *Prosecutor v Lubanga* (Appeals Chamber) (Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008) [2008] ICC-01/04-01/06-1432 [40]–[66].

[51] Claire Garbett, 'The International Criminal Court and Restorative Justice: Victims, participation, and the processes of Justice' (2017) 5(2) Restorative Justice 198, 213.

Jean-Pierre Bemba Gombo[52] (Bemba), from a total of 5,229 participating victims, only two were allowed to present evidence before the Court.[53] Thus, it is inevitable that a large number of victims and a diversity of interests get excluded as a result of the lack of adequate representation. To further this point, consider the very first situation addressed by the ICC: that of Northern Uganda. Not only did the Court recognise very few persons as victims, it also completely disregarded the views of several victims who were against proceedings at the ICC.[54] These victims believed it would come in the way of peace and reconciliation proceedings. However, unfortunately, and in abject disregard of restorative principles, only the victims in favour of the ICC proceedings were recognised as participants.[55]

Finally, apart from the possibility of compensation orders,[56] there exist no other means for the Court to effect restorative justice. There is no direct engagement, formal or informal, between the Accused and the victims, and community engagement in trials at the ICC is conspicuous by its absence. Most importantly, the trial concludes with the pronouncement of the punishment and there are no provisions for securing rehabilitation of the Accused.[57] This conflicts with a significant goal of restorative justice, that is, repairing social bonds,[58] and ensuring reintegration of offenders in the society, as whole, contributing, and productive members.[59]

Hence, in-spite of the numerous provisions to facilitate victim participation, victims do not occupy a central position in the ICC justice system. Viewed in the backdrop of several other features of the ICC that are antithetical to the restorative justice system, it is inaccurate to call the ICC system a restorative justice system. In fact, such claims,[60] premised solely on certain victim-centric provisions critiqued above, would clearly amount to 'commodification' of restorative justice. Nonetheless, such superficial claims aimed at distinguishing the ICC as a body that truly effects complete justice and victim satisfaction continue to be advanced

52 *Prosecutor v Jean-Pierre Bemba Gombo* (Trial Chamber III) (Judgment pursuant to Article 74 of the Statute) [2016] ICC-01/05-01/08-3343.

53 *Prosecutor v Jean-Pierre Bemba Gombo* (n 52) [24].

54 Kendall and Nouwen (n 46) 242.

55 See *Prosecutor v Kony, Otti, Odhiambo & Ongwen* (Pre-Trial Chamber II) (Observations on Behalf of Victims Pursuant to Article 19(1) of the Rome Statute with 55 Public Annexes and 45 Redacted Annexes) [2008] ICC-02/04-01/05.

56 The Rome Statute, Article 75.

57 Garbett (n 51) 210–212.

58 Armstrong (n 41) 371.

59 Van Ness and Strong (n 26) 103.

60 Claims referred to in the text earlier, such as the statements of Judge Sang-Hyun Song, and Judge Eboe-Osuji, among others (n 21–23).

by various personnel related to the ICC, perhaps to increase the legitimacy of the institution.[61]

IV. Restorative Justice for International Crimes: desirability and practicability

The concept of restorative justice began gaining foothold in domestic jurisdictions as a model to deal with minor or less serious offences.[62] It did not gain prominence as an appropriate jurisprudential concept for international crimes, as it was considered inadequate to address the gravity of such crimes. This section claims that restorative justice is normatively aligned with the goals of all criminal justice systems, especially those dealing with serious crimes. However, it notes the limitations of the ICC in achieving absolute and unqualified restorative justice. Thus, it suggests realignment of existing practices and infrastructure of the ICC to realise restorative traditions as far as possible.

A. Revisiting non-impunity

Crime prevention through deterrence, lowering offender recidivism, accounting for victims' interests and enhancing their faith in the process, and punishment for violation of the law, are some of the most important goals of the criminal justice process.[63] Through various studies conducted on the effects of restorative justice, it is well-established that this form of justice can better serve each of these goals.[64] As a matter of fact, recidivism reduces with community reintegration,[65] and victims who participate in supervised 'encounters' with the offenders feel an enhanced sense of satisfaction from the system.[66] Thus, except for considering punishment as an end, which is conceptually misplaced within restorative justice,[67] such a model is significantly more desirable for the achievement of the different goals of the criminal process.

However, it is worth questioning our assumptions on the utility of punishment in the criminal process. Lack of adequate rehabilitation, and the

61 Luke Moffett, *Justice for Victims Before the International Criminal Court* (Routledge 2014) 41.

62 Jim Dignan, 'Restorative Justice and the law: The case for an Integrated, Systemic Approach' in Lode Walgrave (ed) *Restorative Justice and the Law* (Willan Publishing 2002) 175–176.

63 See Zvi D Gabbay, 'Justification for Restorative Justice: A Theoretical Justification for the use of Restorative Justice Practices' (2005) 2005(2) Journal of Dispute Resolution 349.

64 See Ministry of Justice (United Kingdom) 'Restorative Justice Action plan for the Criminal Justice System for the Period to March 2018: Report on Progress' (February 2017) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/596354/rj-action-plan-to-march-2018.pdf> (accessed 17 August 2020). See Gabbay (n 63) 359–371. See also Van Ness and Strong (n 26) 5354.

65 Van Ness and Strong (n 26) 112.

66 Van Ness and Strong (n 26) 78.

67 See text accompanying (n 33–36).

ostracisation of perpetrators undermine important goals of the criminal justice system, such as crime prevention and reducing recidivism.[68] Additionally, a harsh punishment does not necessarily result in victim satisfaction or increase victim confidence.[69] It is now widely accepted that there is a greater need to account for the interests of victims of serious international crimes, particularly because of the extraordinary psychological damage suffered by them.[70] Due to its victim-centrism, restorative justice is the most appropriate jurisprudential approach to remedy these harms. Thus, as a Court trying the most serious crimes of international concern, rooting its mandate in restorative justice will greatly improve the impact of outcomes of the ICC, and arguably realise complete justice. However, there are procedural, infrastructural, and legislative barriers to effecting restorative justice at an international scale, particularly, at the ICC.

B. Scale, spatial and principled constraints

Restorative justice requires that the peculiar interests of each victim group be considered. This tailor-made approach is particularly difficult for the ICC due to three reasons. First, large number of victims are involved in the cases before the ICC (which crossed 5,000 in the Bemba case[71]). However, as a judicial body, the Court is required to follow a consistent approach to the cases and remedies before it.[72] Clearly, in such circumstances, it would be near impossible for the ICC to actually account for individual concerns and provide individualised remedies. Second, the ICC is based in the Hague, in Netherlands, spatially distant from the situations adjudicated before the Court. For example, most of the cases before the Court concerned situations from the African continent. This spatial distance, accompanied with the lack of experts from the conflict situations, ensures that localised justice focusing on community engagement remains an impossibility for the ICC.[73] Third, so long as the ICC considers ending the impunity of perpetrators one of its primary objectives, there will be a principled divergence between the ICC's model and the restorative model of justice. The principled divergence assumes importance since it manifests in the absence certain procedures that are

[68] Gwen Robinson and Joanna Shapland, 'Reducing Recidivism: A Task for Restorative Justice' (2007) 48(3) British Journal of Criminology 337, 339; Walgrave (n 27) 635; Van Ness and Strong (n 26) 101.

[69] Gabbay (n 63); Walgrave (n 27) 624.

[70] Moffet (n 61) 41.

[71] *Prosecutor v Jean-Pierre Bemba Gombo* (Trial Chamber III) (Judgment pursuant to Article 74 of the Statute) [2016] ICC-01/05-01/08-3343.

[72] Dragana Radosavljevic, 'Restorative Justice under the ICC Penalty Regime' (2008) 7(2) The Law and Practice of International Courts and Tribunals 235, 235, 247.

[73] Monica Adami, 'International Judicial Bodies: Is Restorative Justice the means to end the Peace v. Justice Dilemma' (*LSE International Development*, 15 December 2017) < https://blogs.lse.ac.uk/internationaldevelopment/2017/12/15/international-judicial-bodies-is-restorative-justice-the-means-to-end-the-peace-v-justice-dilemma/> (accessed 12 August 2020).

crucial to restorative justice, including acceptance of guilt, voluntary participation of the accused, and rehabilitation of convicts.

C. Reimagining justice at the ICC

Having examined the shortfalls and contradictions per restorative justice in the ICC's current paradigm, what is the way forward for the Court? At the outset, it must be realised that given the numerous adversarial features of the ICC, a shift towards restorative justice can only be achieved to a limited extent. However, the ICC must consciously refrain from certain practices that risk commodifying restorative justice at the Court.

First, being an institution based in the Hague and having little direct exposure to the situations it seeks to remedy, the ICC must be more cognisant of its limits. As outlined by Phil Clark in his book Distant Justice, the ICC has often sought to monopolise situations of mass atrocities without considering the ramifications of the same.[74] For example, in the case of war crimes in Uganda involving child soldiers, national amnesty proceedings were underway in an attempt to fix responsibility and aid the transition process. However, the issuance of arrest warrants against major actors in the atrocities (who were issued amnesty) significantly complicated the situation, and precluded various remedial options at the national level.[75] The ICC must realise that proceedings before national administrative and fact-finding bodies may be much more effective at ensuring peace and justice. To that end, the ICC must only seek to complement, and not substitute, these processes.[76] The success of the Truth and Reconciliation Commissions (TRCs) in South Africa and Sierra Leone testifies to the effectiveness of decentralised measures in ensuring justice.[77]

Second, following the precedent of the TRCs, the ICC must reimagine its role. Currently, the Court is oriented towards ascertaining guilt. However, the ends of justice would be far better served if it sought to bring out the truth, and ascertain the causes of mass atrocities.[78] For this, the ICC will have to contemplate victim-centric alternative structures to its current punitive adversarial system. Further, the ICC must seek to use its victim-oriented features towards facilitating

[74] Phil Clark, Distant Justice: The Impact of the International Criminal Court on African Politics (Cambridge University Press 2018) 230–267.

[75] ibid.

[76] This is partly captured in Article 17 of the Rome Statute, which states the principle of complementarity, that is, the ICC's jurisdiction must complement proceedings in national courts.

[77] Clark (n 74).

[78] Westen K. Shilaho, 'The International Criminal Court and the African Union: Is the ICC a Bulwark against Impunity or an Imperial Trojan Horse?' (2018) 18(1) African Journal on Conflict Resolution 119, 142; Clark (n 74) 230–267.

greater dialogue and mediation between the victims and perpetrators. Towards this end, the Court can potentially institutionalise another stage in the proceedings, between Investigation and Pre-Trial proceedings.[79] At this stage, the Court should undertake judicially-supervised negotiations between the victims' counsels and the Accused. In this facilitative role, the ICC will not only accommodate genuine victim-centrism, but also open up the Court's human and material infrastructure to the possibility of innovative remedies that may be arrived at by the principal stakeholders in international crimes - the victims and the perpetrators. However, the ICC's role as an international judicial institution, bound by the various provisions of the Rome Statute that are geared to the adversarial system, will prove an obstacle in this regard.

Finally, the ICC must significantly develop and bolster the 'Assistance Mandate' of the Victims' Trust Fund (Mandate).[80] This is a unique feature of the ICC wherein victims of mass atrocities are accorded physical and psychological rehabilitation, as well as material support.[81] As opposed to reparations which arise only after convictions, this mechanism involves extending help to victims of mass atrocities in any situation under consideration of the ICC. The funds are sourced from donations, and the programmes envisaged go far beyond mere monetary compensation.[82] This is a stand-out programme of the ICC and helps in truly effecting the goals of restorative justice. Therefore, the ICC must expand the operations of the Mandate and make it more accessible to victims across the globe. However, financial limitations may hinder the realisation of such an expansion.[83]

Being the only institution that assesses individual criminal liability at a trans-national level, the ICC is uniquely suited to adapt to and inculcate various rehabilitative and restorative functions. The aforementioned procedures are not exhaustive, but if adopted and reasonably implemented, would go a long way to make the ICC more relevant to her victims. However, ultimately, it is the mandate

[79] See the Rome Statute, Articles 17, 53–76: Once the ICC establishes its jurisdiction under Article 17, a situation is (except where the Prosecutor initiates investigation under Article 15) first, investigated, thereafter, charges are framed and confirmed in the Pre-Trial Chambers, and finally, it proceeds to trial where evidence is appreciated. The trial ends with the pronouncement of the judgment.

[80] Dutton and Aolain (n 18).

[81] International Criminal Court, Rules of Procedure and Evidence, Rule 98.

[82] Dutton and Aolain (n 18) 2, 18.

[83] David Scheffer, 'The Rising Challenge of Funding Victims' Needs at the International Criminal Court' (*Just Security*, 3 December 2018) <https://www.justsecurity.org/61701/rising-challenge-funding-victims-international-criminal-court/> (accessed 13 August 2020).

of the Assembly of State Parties (Assembly)[84] to introduce procedural and infrastructural changes that will facilitate the Court's transition towards restorative justice. Thus, as the legislative body of the ICC, the Assembly must reimagine the role and the manner of ICC's international criminal justice delivery.

V. Theorising the ICC Justice Model: Way Forward

This paper examined the functioning of the ICC to conclude that the Court's justice model is not aligned with principles of restorative justice. However, the Court's practices do not entirely fall under the ambit of retributive justice either. This is evidenced by two phenomena. First, ICC's several victim-based features recognise victims as important stakeholders in the process, in a position to influence the outcome of the trial.[85] Second, ICC's objectives include trying to ensure peace in conflict-hit areas and to mete out complete justice, which goes beyond mere retributive models.[86] This renders the ICC in a theoretical flux and raises certain questions. Which theory of justice does the ICC subscribe to? How can its criminal process be most suitably explained? This paper contends that Professor Kent Roach's punitive victims' rights model most appropriately explains the theoretical orientation of the ICC's practice. Prior to addressing the same, it is necessary to point out the significance of this exercise.

A. Alternative theoretical basis for the ICC's justice model

The practice of the ICC is inundated with theoretical assumptions, pertaining to punishment, the role of victims (as participants as opposed to mere witnesses), and the relationship between international criminal justice and peace.[87] However, as the preceding section highlights, there is a striking lack of a valid theoretical basis that can comprehensively account for the ICC system, while

[84] The Assembly of State Parties, established under Article 112 of the Rome Statute, comprises representatives of States that have ratified the Rome Statute; it is the legislative and management oversight body of the ICC.

[85] The Retributive theory of justice does not generally envisage reparations or compensation as an end to the criminal process, especially not in a manner that involves participation from victims, such as in the case of the ICC (The Rome Statute, Article 75(3)). See Michael Wenzel and others, 'Retributive and Restorative Justice' (2008) 32(5) Law and Human Behaviour 375, 383.

[86] The Rome Statute, Preamble.

[87] Sarah Nouwen, 'International Criminal law: Theory all over the Place' in Anne Orford and Florian Hoffman (eds) *The Oxford Handbook of the Theory of International law* (Oxford University Press 2016).

maintaining its legitimacy. It is this theoretical gap that is sought to be remedied by the application of Roach's punitive victims' rights model.

For long, the criminal process was mostly understood in terms of two dichotomous models, set out by Herbert Packer in 1964.[88] These were the 'crime-control' model and the 'due process' model, both of which are entrenched in criminology theories even today. Over time however, victims' movements began to influence the criminal process significantly and there were numerous criticisms of Packer's two models. It was only in 1999 that alternatives to these two models were offered, through the seminal work published by Kent Roach.[89] He offered two completely novel models of understanding the criminal process in terms of the 'punitive victims' rights model' and the 'non-punitive victims' rights model'. It must be noted that most criminal systems cannot be completely explained or encapsulated within a single model alone. Rather, all systems will be a combination of the abovementioned four models (Roach's victims' rights models and Packer's conventional models), with certain features predominantly resembling one model or the other. The following paragraphs seek to explain the alignment of the ICC criminal justice system to the essential features and values of the 'punitive victims' rights model'.

B. Punitive victims' rights model

According to Professor Roach, the punitive victims' rights model brings together the conventional crime control and due process models,[90] but reinvigorates their premises through a conception based on victims' rights.[91] This system focuses on controlling crime, increasing conviction rates, enacting stricter laws and regimes, and imposing punishments. However, the justification for all of these motivations is not that the law of the State has been broken (unlike in the crime-control model), but that victims and their interests have been affected.[92] In this regard, it was observed by Roach that "the punitive model of victims' rights thus features the new political case in which the rights of victims and potential victims are pitted against the accused's due process rights."[93] Thus, the first essential feature of this model is that the criminal process is seen as one where the victims' rights and interests are asserted against the due process rights of the Accused. This implies a fundamental

[88] See Herbert L Packer, 'Two Models of the Criminal Process' (1964) 113(1) University of Pennsylvania Law Review 1.

[89] Kent Roach, 'Four Models of the Criminal Process' (1999) 89(2) Journal of Criminal law and Criminology 671, 699–713.

[90] Packer (n 88).

[91] Roach (n 89) 700.

[92] Roach (n 89) 701.

[93] Roach (n 89) 700.

shift in the perception of criminal trials, which are no longer envisaged as a contest involving the State and the Accused. Rather, victims displace the State as the primary (and newly prioritised) stakeholders of the trial.

Second, the punitive victims' rights model considers strict penal sanctions as the most adequate response to crimes.[94] This stems out of a belief that punishments are the most effective means to control crime and enhance victim satisfaction. The centrality of punishments in the punitive victims' rights model is self-explanatory: it is termed as a 'punitive' model, in contrast to Roach's 'non-punitive victims' rights model'. Another important feature of the model is that plea-bargaining, and other arrangements (even those involving the victim), are discouraged, since penal law and criminal sanctions are considered the most appropriate responses to crime.[95]

Finally, the punitive victims' rights model envisages that the victims engage and assert their rights within the adversarial system.[96] Thus, while victims are considered the primary stakeholders, they are not attributed a significant degree of agency, especially in determining the response to a crime. It is true that victims' rights are prioritised in this model, and that the criminal system is put under constant scrutiny to make it more viable for victims. However, there is no special accommodation for the peculiar interests of a victim (or for victim satisfaction subsequently), as this model strictly places its faith in the adversarial system by focusing on securing convictions.[97]

C. Placing the ICC justice system within the punitive victims' rights model

As a preliminary point, it may be noted that in-spite of operating within a retributive system with non-impunity as one of its goals, the Rome Statute makes room to account for victims' rights and interests, as addressed in the previous sections. This clearly indicates the importance of victims in the ICC process. However, three traditions of the ICC squarely place its justice system within Professor Roach's punitive victims' rights model.

First, the ICC pits victims' rights against the rights of the Accused. This is done through participation of victims in the trial, wherein they can adduce evidence and make submissions against the Accused. In most trials at the ICC,

[94] Roach (n 89) 706: "In the punitive model of victims' rights, the criminal sanction is the primary response to the widespread suffering and subordination recorded by victimisation studies."

[95] Roach (n 89) 701–702.

[96] See Douglas Evan Beloof, 'The Third Model of Criminal Process: The Victim Participation Model' (1999) 1999 Utah Law Review 289; Roach (n 89) 700.

[97] Beloof (n 96) 313–317; Roach (n 89) 701–706.

victims and the prosecution are on the same page, against the Accused.[98] Thus, the trial resembles Roach's framework of the punitive victims' rights model, where trials are understood as a contest between the victims and the Accused, as opposed the State and the Accused. Moreover, there are numerous provisions in the Rome Statute (highlighted in the previous sections) where a particular course of action is to be undertaken by balancing the interests of victims with the fair-trial rights of the Accused.[99]

Second, punishments are a central feature of the ICC and are believed to ensure justice to victims. Guilty verdicts by the ICC necessarily invite a strict penal sanction. With regard to punishments in his punitive victims' rights model, Roach observed as follows, "[i]n the punitive model of victims' rights, the criminal sanction is the primary response to the widespread suffering and subordination recorded by victimisation studies."[100] Clearly, the centrality of punishments within the ICC resembles Roach's emphasis on punishments in his model.[101] An equally important resemblance with Roach's model lies in the justification for the centrality of punishments. Unlike domestic systems, the imposition of punishments is not premised on the violation of a legal order (international norm, in this case). Rather, as it emerges from the Preamble to the Rome Statute, punishments seek to act as a deterrence against such heinous crimes (thus, prioritising the victims and justifying punishments on the basis of their interests).[102] Additionally, similar to Roach's

98 This is the position emerging from various trials of the ICC. See *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I) (Judgment pursuant to Article 74 of the Statute) [2012] ICC-01/04-01/06 [27]–[30] and [54]–[59]; *Prosecutor v Callixte Mbarushimana* (Pre-Trial Chamber I) (Decision on the confirmation of charges) [2011] ICC-01/04-01/10 [6]–[8] and [11]–[12]; Prosecutor v Germain Katanga (Trial Chamber II) (Judgment pursuant to Article 74 of the Statute) [2014] ICC-01/04-01/07 [1032]–[1034] and [1036]–[1037].

99 For example, Article 75(3) of the Rome Statute empowers the ICC to specify reparations to victims, including restitution, compensation and rehabilitation. Similarly, Article 53(2)(c) of the Rome Statute allows the Prosecutor to recommend not proceeding with a situation if prosecuting it is *inter alia* against the interests of the victims.

100 Roach (n 89) 706.

101 While it may be argued that the ICC does order reparations as well, it is subsequent to the pronouncement of a guilty verdict. Coupled with the lack of possibility of any form of reparation other than a monetary payment to certain victims, it only resembles an additional punishment that may be imposed on the Accused. See Kathleen Daly, 'Revisiting the Relationship between Retributive and Restorative Justice' in John Braithwaite and Heather Kristian Strang (eds) *Restorative Justice: Philosophy to Practice* (Ashgate 2000), 33–54, where she argues that retributive punishment can be employed within a restorative justice model. This perspective is evidenced, she claims, through the use of compensation orders within the criminal justice system, consequently eroding the distinction between reparation and punishment. See also Armstrong (n 41) 365.

102 The Rome Statute, Preamble; Ilaria Bottigliero, 'Victims and the International Criminal Court' in David Weisburd and Gerben Bruinsma (eds) *Encyclopedia of Criminology and Criminal Justice* (Springer, New York 2014) 5461–5469.

punitive victims' rights model, there is no possibility of plea bargaining before the ICC. This is possibly because plea bargaining ignores the interests of the victims and is antithetical to the purposes believed to be served by strict criminal sanctions.

Finally, at the ICC, there is no possibility of any engagement, dialogue or an alternate arrangement between the Accused and the victims. As observed in relation to the punitive victims' rights model, there is a characteristic lack of agency afforded to victims; their rights and interests are to be realised within the existing practices and systems of the criminal process. Further, based on the presumption that a strict punishment best serves their interests, no special consideration is given to peculiar needs of the victims. Similarly, in trials before the ICC, the participation of victims is necessarily through the institutionalised adversarial form. Essentially, even if a victim desires otherwise (for example, a settlement, or that the ICC does not involve itself in the matter[103]), it is believed that the ends of justice (for the victim) are best served through a criminal sanction. Therefore, although victims participate in the trial, their participation is not accompanied with requisite agency, resembling an unsaid premise of the punitive victims' rights model.

Hence, the central aspects of the ICC's justice model can largely be explained by Professor Roach's conception of the punitive victims' rights model. Such a theoretical grounding of the ICC is helpful in ascertaining the precise nature of the Court's practices and its considerations for justice. It is also a helpful starting point to consider how the ICC will further its objectives and realise its goals: does the ICC wants to transition to a more restorative paradigm? Or is the current adversarial model sufficient to meet its varied objectives? More importantly, the application of Roach's punitive victims' rights model provides an alternative source of legitimacy for the ICC. Needless (and fallacious) claims about the ICC's alignment with restorative justice aimed at legitimising the Court's stature as the permanent sequitur of international criminal justice can be avoided. Rather, the punitive victims' rights model can sufficiently stake the ICC's legitimacy. This is because, similar to the ICC's objectives, as a system of justice, the punitive victims' rights model prioritises victims' rights, and enforces them through reparations and

[103] See text accompanying (n 54–55), with respect to the ICC Situation in Uganda; Clark (n 74) 230–267.

strict criminal sanctions (which continue to be advocated as the most appropriate way of dealing with egregious crimes and offenders[104]).

VI. Conclusion

The claims that the ICC's justice model is in line with principles of restorative justice are largely based on the provisions of the Rome Statute that focus on victim participation and reparation. However, a closer analysis of the Rome Statute and the practices at the ICC reveal a model quite dissimilar to a restorative paradigm. Due to features such as the centrality of punishments and the adversarial nature of trials, institutionally and procedurally, the ICC resembles a retributive paradigm to a far greater extent. Further, the superficial nature of the victim-based provisions (relative to what is required in a restorative justice system) suggest that the ICC's approach is characteristic of a 'commodified' restorative justice.

However, despite the constraints posed by the scale of international crimes, and the spatial distance between the ICC and the situations before it, the ICC can potentially transition into a more restorative paradigm. Pursuantly, this paper suggests that first, the ICC must adhere to the principles of complementarity and not seek to monopolise over situations of mass atrocities. Regional and national efforts are better-equipped to re-establish stability and realise justice. Second, the ICC should contemplate instituting a judicially-supervised negotiation between the victims and the Accused, before the Pre-Trial proceedings. This will facilitate an indirect encounter between the primary stakeholders of the trial, and make the Court's human and material infrastructure accessible to them. Third, the Registry must bolster the 'Assistance Mandate' of the Victims' Trust Fund, to strengthen the physical, psychological, and material support available to victims of mass atrocities. However, these victim-centric adaptions will require the ICC, as well as the Assembly, to re-imagine some of the most basic features and values of the ICC.

In the meanwhile, this paper seeks to resolve the theoretical flux of the ICC's justice system. It recognises that the unique victim-based features of the Rome Statute fall short of a restorative justice model. However, they certainly bolster the role and position of victims to a far greater extent than retributive

[104] One only needs to look at various domestic jurisdictions and the manner in which restorative justice is applied. Except for a few countries such as Japan and Canada, strict criminal punishments continue to be the most frequent response to crime. Restorative justice and alternatives to punishment are usually employed for juvenile offences or minor crimes. See Gerry Johnstone, 'Restorative Justice for Victims: Inherent Limits?' (2017) 5(3) Restorative Justice 382, 392–393; Donald HJ Hermann, 'Restorative Justice and Retributive Justice: An Opportunity for Cooperation or an Occasion for Conflict in the search for Justice' (2017) 16(1) Seattle Journal for Social Justice 71, 98; Kent Roach, 'Changing Punishment at the turn of the Century: Restorative Justice on the Rise' (2000) 42(3) Canadian Journal of Criminology 249, 276.

paradigms. Thus, ICC's traditions are best anchored in Professor Roach's punitive victims' rights model. Going forward, this theoretical model can better inform stakeholders of the ICC's philosophy of justice, and smoothen efforts to transition to a more restorative paradigm.

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The Faux Pas in Modern Competition Law – Walled Gardens, Data Sharing and Algorithmic Decision Making

Kan Jie Marcus Ho*

I. Introduction

The milieu of the 21st century has triggered a wave of unprecedented changes across traditional market structures, igniting disruption and necessitating evolution in firms big and small.

A brief survey of the current global climate reveals the digital economy largely requiring some form of intervention – lest market abuse arise to the detriment of the modern consumer. In the United States, the Gordian Knot of *walled gardens* in the social media industry has triggered antitrust attention; where 'Google' and 'Facebook', juggernauts of the social media industry, have largely created a confined duopoly system.[1] Indeed, the ability for said companies to access much sought-after consumer data, led to regulation being necessary to prevent market abuse.

Winging this issue to the United Kingdom and the European Union, technological developments have led to a necessary change in regulations – to facilitate innovation, while at the same time to ensure adequate consumer protection. This paper will adopt a two-pronged approach – in the first part, an economics-focused view will be adopted to examine the present digital economy;

* B.A. (Law) (*Cantab*) (Candidate). I am grateful to the anonymous reviewers for their comments on earlier drafts. Any errors remain my own.

[1] Criteo, Digiday, 'Life outside the walled gardens: Greater control, unique data and contextual advertising' (2019) <https://digiday.com/wp-content/uploads/2019/07/Criteo_2019U.pdf> (accessed on 8 June 2020).

and in the second - the current regime in the UK will be analysed from a legal perspective, focusing on how Art 101 TFEU and Chapter I of the UK Competition Act affects firms from a top-down level. The final scope of this argument contrasts the *Bundeskartellamt*'s investigation into Facebook with *AGCM*'s investigation in Italy, fully fleshing out the regulatory dilemmas encountered by competition authorities of the region. In the final analysis, this paper argues that more governmental intervention is required in three sub-areas; namely in (i) data sharing, (ii) self-learning algorithms and finally, (iii) marketplace(s) with walled gardens.

II. The Digital Economy

The G20 defined the digital economy as "a broad range of economic activities that include using digitised information and knowledge as the key factor of production, modern information networks as an important activity space, and effective use of information and communication technology as important drivers of productivity growth and economic structural optimization."[2] In essence, said term refers to daily economic activities stemming from the multifarious online transactions between businesses and consumers, accelerated by the Internet, Artificial Intelligence, Cloud Computing, Fintech and the Internet of Things.

Viewed thus, the digital economy is transforming at an unprecedented rate, with a myriad of new technologies constantly being introduced. 'Adapt or fade' has largely become the mantra of the twenty-first century - over the past decade, companies have been forced to adapt to the ever-changing playing field. Those failing to re-envision their business could lose previously attained competitive advantages and market share. Indeed, Uber, Facebook and Airbnb are but prime examples of how firms have leveraged on the digital economy, by staying ahead of the curve at breakneck speed while displacing traditional companies.[3]

III. Market Failure in the Digital Economy

Market Failure concerns the inefficient distribution of goods and services in the free market. Fundamentally, with the marketplace being driven by demand and supply, a failure to consider all costs and benefits leads to a change in one of the forces, thereby resulting in a divergence from the equilibrium. This article argues

[2] G20 Digital Economy Development and Cooperation Initiative (2016) <https://www.mofa.go.jp/files/000185874.pdf> (accessed on 8 June 2020).

[3] Tom Goodwin, 'The Battle Is For The Customer Interface' (2015) <https://techcrunch.com/2015/03/03/in-the-age-of-disintermediation-the-battle-is-all-for-the-customer-interface/> (accessed on 9 June 2020).

that three main areas of market failure continue to plague the digital economy, leading to opportunities fresh for government intervention.[4]

First, market failure looms large in the domain of collecting and sharing of data. As consumers may not have the technical knowledge to comprehend lengthy terms for access to online services, they may tend to bypass information which could be relevant to their decisions, thereby leading to imperfect information. In addition, asymmetric information may exist when there is a lack of transparency on companies' data security and utilisation of consumer data. The capacity to store data also increases the possibility of data breaches. Cybercrimes emanating from data breaches include identity theft, extortion and financial crime. Further, negative externalities would arise; third party consumers suffer distress for fear of becoming a victim, while businesses may lose the public's trust for being associated with the targeted company.

Second, algorithms may make tacit collusion easier. Algorithms increase transparency in data and enable firms to react to competitors rapidly. Hence, with escalating interdependence on each other's behaviours, firms strategically replicate actions using algorithms and set supra-competitive prices without explicit communication. In an oligopoly, tacit collusion is a crucial problem as prices may reach monopolistic levels. Barriers to entry are further exacerbated by costly machine learning and data-mining software vital to superior predictive algorithms. Smaller firms may not necessarily have the financial capacity to acquire these assets, and without any intervention, a 'David v Goliath' situation could never emerge in the digital economy.

Finally, the increasing emergence of *walled gardens* generates monopolies. A *walled garden* is a corporation which retains user data and information, having no desire to share it. In the advertising technology (Adtech) domain[5], the Facebook-Google duopoly has dominated the market, accounting for almost 59% of digital advertising spending in 2019. Just like algorithms, *walled gardens* could also amplify barriers to entry. Indeed, most walled garden corporations possess dedicated in-house developers to update and debug advanced software and tools. Hence, smaller firms are typically unable to keep up with this inherent advantage, rendering it unsustainable for them to survive in the long run. The domination of user data by walled garden corporations will ultimately inflate the expenses of other advertisers

4 Wolfgang Kerber, 'Digital markets, data and privacy: Competition Law, Consumer Law and Data Protection' (2016) <https://www.econstor.eu/bitstream/10419/144679/1/850599016.pdf> (accessed on 9 June 2020).

5 Natalie Klym and David Clark, 'The Future of the Ad-Supported Internet Ecosystem – Internet Policy Research Initiative', Massachusetts Institute of Technology (2019) <https://internetpolicy.mit.edu/wp-content/uploads/2019/03/publications-ipri-2019-01.pdf> (accessed on 9 June 2020).

and smaller firms in the marketplace, adding costs to society and hence leading to market failure.

The present stance is clear – government intervention is required; lest market failure forces continue to loom amidst the UK Digital Economy. Viewed thus, the current legislative regime governing the UK marketplace will first be analysed, before solutions to tackle market failure be suggested.

IV. Competition Law in the UK

The Competition Act largely forms the framework within the UK, integrating traditional market structures with new industry models ushered in by the digital economy. Yet, in the UK's 2018 *Furman Review*, concerns were expressed by the panel commissioned by the Government in the adequacy of said act to address the economic challenges posed by digital markets.[6] Indeed, the Panel viewed the Competition Act as 'insufficient to address the challenges of the digital market', with said policy reforms being 'slow and unpredictable', as regulators are often plagued with an 'enormous informational disadvantage', as compared to conventional technological companies.

The Furman Panel concluded with six main suggestions – (i) that a pro-competition digital markets unit should be created; (ii) that the Competition and Market Authority ('CMA') should be strengthened with enforcement powers against anti-competitive conduct; (iii) that merger control rules should be adopted to enhance the CMA's ability to challenge mergers detrimental to consumer welfare; (iv) that a formal CMA study be conducted specific to the digital market; (v) that developments relating to self-learning algorithms be conducted; and (vi) that international engagement to increase cross-border cooperation across countries. This paper argues said issue(s) narrows down to three principal areas of concern – the issues associated with (i) data sharing, (ii) self-learning algorithms and, (iii) marketplace(s) with walled gardens. This paper will address each limb part by part, weaving the economic concepts posited in the first part of this Article to determine the optimal level of governmental intervention required in each area.

A. Data sharing

The surge of big data has led to an increased risk of anti-competitive behaviour – particularly in agreements between firms for 'exclusive access' to a

[6] Digital Competition Expert Panel, 'Unlocking Digital Competition, Report of the Digital Competition Expert Panel' (2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf> (accessed on 10 June 2020).

specific data set.[7] Akin to exclusive access to intellectual property rights between firms, exclusive licenses may similarly hamper market efficiency in the digital economy, very much to the detriment of consumers. Such practices may likely breach s 2 of the Competition Act.

The orthodox elements of competition between firms are conventionally based on factors such as price, quality, ability to create consumer loyalty and the like. The milieu of the digital economy has then led to firms competing on the level of privacy protection offered to said consumers as well (cf WhatsApp, Telegram on end-to-end encryption services offered to users). Viewed thus, competitors in this oligopolistic market may agree to reduce the level of protection offered to consumers, enabling them to drive down internal costs.[8] However, this may potentially breach s 2 of the Competition Act, and regulators should remain alert of such situations.

Another issue which relates to data sharing involves agreements between firms to practice price discrimination based on consumer preference. For instance, data on the willingness of consumers to pay for a certain item, or information on the amount of 'clicks' a certain item has, may signal potential future market trends. Should data sets be shared widely between huge oligopolistic firms on the market, this could distort competition and impact consumer welfare. In this light, it is argued that the United Kingdom could draw inspiration from the Competition Commission of Singapore – so long as said data set is (i) historical; (ii) sufficiently aggregated; (iii) cannot be attributed to particular business; (iv) not confidential; and (v) shared with consumers or governmental agencies, data sharing should not be prohibited.[9]

However, Sloan and Quan-Hasse (2016) caution that where said data exceeds the earlier mentioned boundaries, particularly in markets with large oligopolies as opposed to monopolistically competitive industries, a regulator should arm itself

7 Nestor Dutch-Brown, Bertin Martens, Frank Muller-Langer, 'The Economics of Ownership, Access And Trade in Digital Data' (2017) <https://ec.europa.eu/jrc/sites/jrcsh/files/jrc104756.pdf> (accessed on 11 June 2020).

8 Antonio Capobianco, OECD, 'Quality Considerations in Digital Zero-Price markets' (2018) <https://one.oecd.org/document/DAF/COMP(2018)14/en/pdf> (accessed on 12 June 2020).

9 Competition Commission of Singapore, 'CCCS Guidelines on The Section 34 Prohibition 2016', [3.17]–[3.24].

with antitrust alarm bells to prevent any adverse effects on competition in the free market.[10]

B. Self-learning algorithms

Paroche (2019) warns that the increased use of algorithms by large firms could lead to ease of collusion amongst companies.[11] Three main concerns are at play. Firstly, such algorithms could be used for real-time analytics, allowing for collection of prices, decisions and data of competitors; they may be used to detect "intentional deviations from collusion"[12]; and can be used to suggest optimal reactions to changes in competitor behaviours, market conditions, or mistakes.

Picture this – self-learning algorithms, operating unfettered in the free marketplace, may possibly communicate with other separate algorithms used by other independent market operators, where said algorithm(s) may conclude that the best way for profit maximisation would be through colluding with other algorithms by price-fixing. The lack of a human agent in reaching said agreement brings to light questions of liability attribution – indeed, the toolkit offered by the current Competition Act may not be sufficiently robust in handling the myriad of challenges brought forth by the digital economy.

Currently, s 2 will only catch instances where an algorithm is used to facilitate any agreement already breaching said provision; or when said algorithm is used through a 3P intermediary in rigging or fixing prices to the detriment of consumers. As such, self-learning algorithms are not caught under s 2.

C. Marketplaces with walled gardens

The main issue in marketplaces with walled garden stems from the relationship between data held by an organisation and the competitive advantage to which it will ultimately derive. In this situation, the *kind* of data held ought to determine whether said company should be subject to scrutiny. This paper (and the Global Competition Review) believes that in the context of regulating data held in said marketplaces, said data's capability to generate (i) network effects; (ii)

[10] Luke Sloan and Anabel Quan-Hasse, *The SAGE Handbook of Social Media Research Methods* (SAGE Publications Ltd 2017) 156, 160.

[11] Paroche, 'Algorithms in the Spotlight of Antitrust Authorities' (2019) <https://www.lexology.com/library/detail.aspx?g=4bb4088e-ab54-4862-9d73-f83f4f344266> (accessed on 14 June 2020).

[12] DAF/COMP (2017), 20 at [46].

multi-homing properties and (iii) dynamism within marketplace ought to be factors a regulator should account for.[13]

D. Network Effects

Mitomo (2017) posits that network effects are particularly amplified in E-Commerce markets.[14] Network effects involve an economic phenomenon where the value of one product increases through gaining an increasing consumer following in the marketplace.

Bifurcating the abovementioned market into two limbs, the use of data could potentially lead to 'traditional effects', and 'spill-over effects'. For the former, the value of a product largely depends on how many end-users there are on the market. For the latter, an increase in users on one side of the marketplace attracts more sellers (cf digital marketplaces, whereby more downloads attract an increased number of sellers to the marketplace).

Said network effects are responsible for increasing barriers to entry for SMEs; for Stucke and Grunes (2016) posit that if a player is able to harness data to 'tip' the market in favour of a number of suppliers, the leading firm may acquire such dominance, ultimately drowning out competition and preventing small firms from gaining the required quantity and quality of data necessary to achieve any competitive edge.[15]

It is ultimately in the interest of a regulator to find out the minimum efficient scale before the scale is 'tipped' and regulate the marketplace at said point.

E. Multi-Homing

The digital economy introduces 'multi-homing', as Digital marketplaces, compared to the conventional industry, have created marketplaces where 'membership' is required to access said digital services.

Loyalty programs advanced by a myriad of digital companies (cf Cab hailing apps in the UK) shows an array of 'loyalty programs' locking consumers into said service unless a certain amount is spent in a given time. Viewed thus,

[13] GCR Insight (2019) <https://globalcompetitionreview.com/edition/1001419/e-commerce-competition-enforcement-guide-second-edition> (accessed on 15 June 2020).

[14] Hitoshi Mitomo, 'Data Network Effects: Implications For Data Businesses' (2017) <https://www.econstor.eu/bitstream/10419/169484/1/Mitomo.pdf> (accessed on 19 June 2020).

[15] Maurice E. Stucke and Allen P. Grunes, *Big Data and Competition Policy* (Oxford University Press 2016).

switching to a new service requires one to give up on said benefits on another platform, and points towards market power of the digital company in question.

It is in the interest of a regulator to examine the existence of multi-homing in any given digital economy, in order to detect any type of anti-competitive behaviour.

F. Dynamism of Digital Markets

Large oligopolistic firms have huge resources for R & D, allowing smaller firms to be easily edged out. This points back to the Gordian Knot of *walled gardens*, which should not be an issue discounted in the UK. The FCO's investigation into Facebook[16]; the European Commission's raids into alleged agreements by Polish Banks in refusing to provide data to rivals in the Fintech marketplace[17]; alongside Google's walled garden advertising methods[18] are but three instances of this emerging issue.

Furthermore, the merger of walled gardens (cf Google/DoubleClick[19]; Facebook/WhatsApp[20]) still falls outside of the ambit of the CMA. Likewise, in *Asnef-Equifax*, the ECJ opined that privacy concerns arising as a result of the digital economy were outside the scope of powers which a competition authority may interfere in.[21]

Taking stock, the present position appears rigid. Yet, the boundaries may be shifting, particularly following the 2018 *Furman Review*.[22] In fleshing out the future position that English Competition Law should head towards, it would be helpful to study two cases in detail as mentioned earlier in the introduction

[16] Bundeskartellamt (FCO) (2019) <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.pdf?__blob=publicationFile&v=5> (accessed on 20 June 2020).

[17] European Parliament, 'Competition Issues in the Area of Fintech Technology' (2019) <https://www.finextra.com/finextra-downloads/newsdocs/ipol_stu.pdf> (accessed on 21 June 2020).

[18] John Kornfield, 'The Socioeconomic Impact of Internet Tracking' (2020) <https://www.hbs.edu/faculty/Publication%20Files/The%20Socio-economic%20Impact%20of%20Internet%20Tracking_9383a3a2-0299-4489-ad6b-113fb1328acc.pdf> (accessed on 22 June 2020).

[19] Commission of the European Communities, Case No COMP/M.4731 – Google/Doubleclick.

[20] Commission of the European Communities, Case No COMP/M.7217 – Facebook/Whatsapp.

[21] Commission of the European Communities, Case No C-238/05 – Asnef-Equifax.

[22] UK Government, 'CMA Welcomes Furman Review Recommendations' (2019) <https://www.gov.uk/government/news/cma-welcomes-furman-review-recommendations> (accessed on 24 June 2020).

- the *Bundeskartellamt*'s investigation into Facebook with *AGCM*'s investigation in Germany.

V. Germany and Italy's Investigations into Facebook's Abuse of Dominance

A. Bundeskartellamt's investigation

In the *Bundeskartellamt*'s investigation against Facebook Inc. and Facebook Germany GmBH[23], the *Bundeskartellamt* pointed out that Facebook was 'abusing its dominant position in the marketplace, by only allowing use of its social media application conditional on forcing users to surrender any kind of user data given to its platform'.[24] There, the panel established a distinction between the collection and use of data on (i) Facebook; and (ii) 3P websites; concluding that only 3P websites were subjected to an investigation by said panel. In summary, the *Bundeskartellamt* prohibited Facebook from imposing terms on its users which may have the effect of forcing such users to consent to the collection of personal data through 3P applications, and thereafter assigning such information to individual accounts.[25]

Viewed thus, the merging of data between (i) and (ii) will only be possible should said user have given 'voluntary consent'; however, should said element not be present, the *Bundeskartellamt* opined that the data sharing must then be 'substantially restricted'.

The legal basis for this decision in restricting Facebook's ability to share data is interesting, as the Commission choose to prosecute the case through Competition Law, as opposed to consumer protection or data protection law. Indeed, Colangelo and Maggiolino (2018) argue that the latter should have been the unravelling knot in the German Facebook Case.[26] This is because an attack through the fortress of Competition Law requires the Commission to (1) define the relevant market and (2) prove that *Facebook* is indeed abusing a dominant position. The Commission had no choice but to choose this route of attack as it lacked the competence to proceed via consumer protection or data protection law. This is because under German Law, only qualified institutions, associations and chambers of industry

[23] See (n 16).

[24] ibid [1].

[25] Bundeskartellamt (FCO) Facebook Proceedings Paper Background, [2] (2019), <http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2017/Hintergrundpapier_Facebook.pdf?__blob=publicationFile&v=6%20and%20the%20corresponding%20press%20release> (accessed on 25 June 2020).

[26] Maggiolino Colangelo, 'Data Accumulation and the Privacy-Antitrust Interface – Insights from the *Facebook* Case' (2018) <https://www-cdn.law.stanford.edu/wp content/uploads/2018/02/colangelo_maggiolino_wp31.pdf> (accessed on 26 June 2020).

and commerce may enforce such instances in Civil Courts, and the *Bundeskartellamt* does not fall in such a category.

Within its armoury, the Commission then utilised Art 19(1) of *Gesetz gegen Wettbewerbsbeschränkungen* (analogous to Article 102 TFEU). However, this mode of attack does not sit neatly with EU Law. Wiedemann and Botta (2019)[27] posit that pursuant to Article 3(1) Reg. 1/2003, regulators are required to apply Article 101 and 102 when said anti-competitive conduct has an impact on 'intracommunity trade'. Said legislative provision ought to be effective here; for Facebook, Inc. does operate in Europe through its Irish counterpart. Pursuant to Article 3(2) Reg. 1/2003, EU Member States have the option of relying on its National Law should said provision be stricter than Art 101 or 102.

Through contrasting Article 19(1) with Art 20 of *Gesetz gegen Wettbewerbsbeschränkungen*, which prevents the abuse of 'relative' market power, Weidemann and Botta posits that the former is not as strict as the latter, and hence the exception allowed by Article 3(2) Reg. 1/2003 ought not to apply. This case in German Law thus sits uneasily with EU Law, as Article 102(a) should instead have been used as the legal basis for said prosecution. The CJEU has interpreted Article 102(a) to regulate any 'unfair trading practices imposed by dominant firms on consumers', which clearly covers the *Bundeskartellamt Facebook* case.[28]

B. AGCM's investigation

In *AGCM's* investigation of Facebook[29], the AGCM sanctioned Facebook for (i) misleading consumers[30], and for (ii) aggressive consumer practices through encouraging users not to 'block' transfer of their data to 3P applications. Indeed, the default choice for consumers was to opt into said abovementioned transfer of data to 3P intermediaries.

The legal basis for this decision was the *Codice del Consumo*, otherwise the Consumer Protection Code of Italy, which incorporates the Unfair Consumer Practices Directive. This code prevents any 'unfair practice' from being operative in the marketplace. An 'unfair' practice, pursuant to the code, is defined as one

27 Botta Weidermann, 'The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey' (2019) <https://journals.sagepub.com/doi/full/10.1177/0003603X19863590> (accessed on 30 June 2020).

28 See CJEU's interpretation regarding Article 102(a) to cover such instances from Case C-27/76 - *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*; Case C-179/90 - *Merci Convenzionali Porto di Genova SpA v Siderurgica Gabrielli SpA* and Case C-7/82, *esellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v Commission of the European Communities*.

29 *Autorità Garante della Concorrenza e del Mercato*, Facebook Inc Judgment (2018) <https://www.agcm.it/dotcmsdoc/allegati-news/PS11112_scorr_sanz.pdf> (accessed on 30 June 2020).

30 ibid [4].

which is 'contrary to the requirements of professional diligence, which materially distorts the economic behaviour in the marketplace'.[31]

At [56] of the decision, the AGCM posited that the practice of Facebook was contrary to the *Codice*, as Facebook did not 'adequately inform consumers with regard to the extent of their data which was required to access Facebook's networking websites'. In a series of examples listed under Annex I of the Unfair Commercial Practices Directive, the actions of Facebook easily breach the instance where said company describes 'a product as free, but the consumer has to pay anything other than the unavoidable cost of responding to a commercial practice' – here, the users are giving up data, enabling the AGCM to conclude that Facebook has certainly misled its users.

As compared to the *Bundeskartellamt*, the AGCM relied on consumer protection law as opposed to competition law, hence enabling it to sidestep the ambit of Article 102(a) TFEU. This was possible, as the AGCM had the competence under Italian Law to transverse into the field of consumer protection, hence enabling it to route its attack using an easier framework.

C. The lessons for English competition law

The two cases examined reveal a fundamental unease within Competition Law in the EU, which presents important lessons for English Competition Law. As observed, there are a number of different attack routes for regulators in any given unfair practice within the digital economy - the trifurcation of options as seen in *Bundeskartellamt*'s and AGCM's instance are but an instance of the dilemma faced by any regulator. Indeed, a digital company's compliance with one legal regime may not guarantee its compliance with another regime, with this being clearly recognised by the AGCM at [46] in its sanctioning of Facebook.[32]

The Gordian Knot therefore arises – the present lack of harmonisation between several different areas of law inevitably leads to legal uncertainty for business stakeholders, as digital companies may simply end up being sanctioned a myriad of times. Indeed, this has triggered a serious need for the reform of Competition Law in the region, and the European Data Protection Supervisor has called for more co-operation between leaders of various legal regimes.[33] Viewed thus, there is a general sense of confusion for competition authorities which possess competency in more than one legal regime. The question of which area of law

[31] Unfair Commercial Practices Directive, Article 5(2).

[32] (n 29).

[33] European Data Protection Supervisor EDPS Opinion on Coherent Enforcement of fundamental rights in The age of big Data (2016) <https://edps.europa.eu/sites/edp/files/publication/16-09 23_bigdata_opinion_en.pdf> (accessed on 1 July 2020).

to tap upon often becomes an important issue and has evolved into a potential source of legal confusion. For example, the AGCM has often invoked the *Codice* without considering Article 102(a) TFEU, as it often provides for an easier route to sanctioning. One such instance would be in the earlier mentioned *Facebook/Whatsapp* merger case. There, the AGCM followed an established line of decisions under Italian Consumer Law to sanction the merger, and concluded that Whatsapp users 'were misled' by Facebook itself.[34]

A regulator should always seek the route which provides 'deterrence', instead of 'ease of prosecution'. It is hence argued that Competition Law should be the route regulators should transverse to tackle the emerging market failures presented by the digital economy. Under competition law, behavioural commitments can be encouraged; and a competition regime fit to address challenges introduced by the digital economy will create a regulation asymmetry encouraging smaller firms to enter the market, thus preventing monopolistic behaviour. This is the better approach, as compared to Consumer or Data Protection Regimes, as said regimes often impose a burden on smaller firms as well. In the context of English Law then, it is especially relevant to note the conclusion of the *Furman Review*, which argues for a strengthening of present merger control rules currently possessed by the CMA.[35]

VI. Conclusion

The conclusion of the Furman Panel is striking – the present Competition Act in the UK is insufficiently robust to address the challenges of the digital economy. In addition to the six recommendations as offered by the Furman panel, this paper also argues that regulators should take a more interventionist approach in areas of (i) data sharing; (ii) self-learning algorithms; and (iii) marketplaces containing walled gardens, and the normative view as argued in the earlier part of this Article is relevant – indeed, market failure is rampant in the present digital economy. The optimal level of intervention would be for CMA to address *asymmetric information* and privacy protection issues in the area of data sharing; setting key standards on ethical and permitted usage of self-learning algorithms for the second; and weakening barriers to entry, equipping smaller firms with the ability to penetrate said market, largely reanimating a 'David v Goliath' situation in the modern world. This can be done through the harmonisation of different legal regimes and

[34] *Autorità Garante della Concorrenza e del Mercato*, Sanzione da 3 milioni di euro per WhatsApp, ha indotto gli utenti a condividere i loro dati con Facebook (2017) <https://www.agcm.it/dotcmsDOC/allegati-news/CV154_vessestratto_omi.pdf> (accessed on 1 July 2020).

[35] See (n 6).

focusing on Competition Law as the panacea against the emerging monopolistic practices by firms harnessing technology and data.

In the final analysis, the legislative champagne should not be put on ice – CMA should be encouraged to intervene in the aforementioned areas to ensure an open and fair digital marketplace of tomorrow.