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THE POTENTIAL OF INTERNATIONAL RIGHTS-BASED CLIMATE LITIGATION TO ADVANCE HUMAN RIGHTS LAW AND CLIMATE JUSTICE

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In recent years, climate litigation has increasingly incorporated arguments based on human rights law. More recently, this trend has shifted to international and regional human rights bodies such as the European Court of Human Rights and the UN Human Rights Committees. This article examines three contemporary complaints in which groups affected by climate change allege violations of their rights based on states' failures to enact adequate mitigation and adaptation policies. It argues that, while the cases have yet to be decided, they present a number of issues which are in need of clarification and therefore have the potential to advance the application of human rights law to climate change. These issues include questions relating to standing and admissibility, the nature of states' obligations in the context of climate change, and the apportionment of responsibility for cumulative and long-term climate harms. In particular, because the cases include children and Indigenous peoples, they offer an opportunity for judicial interpretation of states' obligations towards groups who have specific experiences of climate change. In this way, they have potential to advance the cause of climate justice, not only for the specific petitioners, but for marginalised groups everywhere.

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I INTRODUCTION

Climate change already affects people's enjoyment of human rights and ability to live with freedom and dignity. Rising temperatures and sea levels, loss of arable land and water supplies, and increasingly frequent and severe weather events threaten lives and livelihoods, interfering with a range of recognised human rights. Climate change also impacts disproportionately on marginalised and vulnerable groups. In many countries, climate policy discussions and decision-making have excluded or overlooked the contributions of these cohorts, including children and young people, Indigenous communities, the elderly and people with disabilities. This compounds the intra and inter-generational injustice of climate change which results because the worst impacts of global

heating will be felt by those who have contributed least to the problem and have the least capacity to adapt, including developing countries and future generations.

The use of litigation to press governments for stronger climate action has grown steadily in recent years, and increasingly incorporates arguments based on human rights law. To date, most human rights-based climate litigation has been pursued within domestic jurisdictions, with landmark cases like *Urgenda v Netherlands* and *Leghari v Pakistan* showing the potential of human rights arguments.[1] More recently, claimants have started to bring cases within international and regional human rights mechanisms for climate change-related harms. For example, well-known climate activist Greta Thunberg is among 16 children who have brought a claim to the Committee on the Rights of the Child against five countries, arguing that their failure to reduce greenhouse gas (GHG) emissions constitutes a breach of obligations under the *Convention on the Rights of the Child* (CRC).[2] Six young people from Portugal are running a similar case in the European Court of Human Rights (ECtHR), this time against 33 European nations for alleged breaches of the *European Convention on Human Rights* (ECHR).[3] In Australia, a group of Torres Strait Islanders have taken a complaint to the United Nations Human Rights Committee (HRC), claiming that Australia's failure to prevent climate harms constitutes a violation of their rights to life, culture, and freedom from interference with private and family life.[4] While these cases are yet to be decided, analysing the strategy and arguments they adopt can enhance our understanding of human rights law and its applicability to climate change, as well as enabling an assessment of the likely success of these cases and those that will inevitably follow.

This analysis can also evaluate the potential of rights-based litigation to contribute to climate justice. Climate justice encompasses a range of considerations but is focused on achieving a fair distribution of the burdens of climate change, including both the harms

[1] *State of the Netherlands v Urgenda Foundation* (Supreme Court of The Netherlands, 19/00135 ECLI:NL:RBDHA:2015:7145, 20 December 2019); *Ashgar Leghari v Federation of Pakistan* (Lahore High Court, 25501/2015, 15 September 2015); Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) *Transnational Environmental Law* 37.
[2] Chiara Sacchi et al, Communication to the Committee on the Rights of the Child in *Sacchi et al v Argentina et al*, 23 December 2019 ('*Sacchi et al (Petition)*'.
[3] *Cláudia Duarte Agostinho and others v Portugal and 32 other States (Application)* Eur Court of HR App No 39371/20 (2020) ('*Duarte Agostinho et al*').
[4] Marian Faa, 'Torres Strait 8 Could Set "global Precedent" with United Nations Human Rights Fight Linked to Climate Change', *ABC News* (Web Page, 30 September 2020) <https://www.abc.net.au/news/2020-09-30/torres-strait-islanders-fight-government-over-climate-change/12714644>.

caused by a heating planet and the responsibility for addressing those harms.[5] Climate justice is an appropriate concept to use when examining the outcomes of rights-based climate litigation because of the intrinsic links between human rights, equality and justice.

At the same time, it is acknowledged that human rights law is limited by its anthropocentric framing and, on its own, cannot address the true nature of environmental harm caused by climate change. For legal responses to climate change to be comprehensive and effective they need to include other, more ecocentric approaches which recognise the complexity of environmental systems, biodiversity, and planetary boundaries. Emerging fields such as Earth system law and the rights of nature are therefore important complements to human rights-based approaches.[6] However, human rights law is increasingly engaging with climate change and this article aims to contribute to a better understanding of the potential of rights-based strategies.

This article provides a brief overview of three cases currently before international and regional human rights bodies. It identifies a number of issues which affect human rights law's ability to support stronger climate action and contribute to climate justice. These include issues relating to the nature of states' obligations, responsibility for anticipated or future harms, and the circumstances in which affected individuals and groups can seek to enforce their rights. The article argues that the cases have potential to clarify and develop key legal norms and to make a meaningful contribution to climate justice for vulnerable and marginalised groups.

II OVERVIEW OF CASES

Recent cases like *Urgenda* and *Leghari* have demonstrated the potential of human rights arguments in climate litigation, with national courts finding that governments must take stronger action on climate change in order to comply with their human rights obligations.[7]

[5] See, Simon Caney, 'Climate Justice', *The Stanford Encyclopedia of Philosophy* (Web Page, 2020) <https://plato.stanford.edu/archives/sum2020/entries/justice-climate>; Rowena Maguire and Bridget Lewis, 'The influence of justice theories on international climate policies and measures' (2012) 8(1) *Macquarie Journal of International and Comparative Environmental Law* 16-35.

[6] See eg Louis J Kotzé and Rakhyun E Kim, 'Earth system law: The juridical dimensions of earth system governance' (2019) 1 *Earth System Governance* 1; David Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World* (ECW Press, 2017).

[7] For analysis of the trend of human rights-based climate litigation, see Peel and Osofsky (n 1). A useful database of relevant jurisprudence can be found at the Sabin Center for Climate Change Law's *Climate Case Chart*, <http://climatecasechart.com/climate-change-litigation/>.

More recently, this trend of rights-based climate litigation has spread to international and regional human rights bodies such as the European Court of Human Rights (ECtHR) and the United Nations human rights committees. These cases are significant not only because they bring rights-based climate litigation to the international domain, but also because they advance the rights of two groups whose interests are often overlooked in climate policy despite their particular vulnerabilities to climate change, namely, Indigenous people and children. This section will provide a brief overview of three current cases, highlighting the significant characteristics which make them of interest for the future of human rights-based approaches to climate change.

A *Sacchi et al v Argentina et al*

In 2019, a group of 16 children brought communication to the Committee on the Rights of the Child against Argentina, Brazil, France, Germany, and Turkey.[8] The communication is advanced under the *Third Optional Protocol to the Convention on the Rights of the Child*, which establishes a procedure for complaints to the Committee.[9] Among the petitioners is Greta Thunberg, the young Swedish climate activist known for inspiring the 'Fridays for Future' school strikes and for her strong advocacy within international climate forums. Altogether, the petitioners come from 12 countries.[10]

The case is significant because the children are mostly seeking to enforce their rights against governments other than their own. They argue that the five states have continued to allow GHG emissions despite knowing that the consequences will be felt beyond their territories and into the future. The foreseeability of these future and transnational consequences, they argue, is sufficient basis to establish human rights obligations owed towards the children.[11]

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[8] *Sacchi et al (Petition)*.
[9] *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, opened for signature 19 December 2011, entered into force 14 April 2014 ('*Optional Protocol to CRC*').
[10] Argentina, Brazil, France, Germany, India, Marshall Islands, Nigeria, Palau, South Africa, Sweden, Tunisia, and USA.
[11] *Sacchi et al (Petition)*, para 242, citing Committee on the Rights of the Child, *General Comment No 16: State Obligations Regarding the Impact of the Business Sector on Children's Rights*, UN Doc CRC/C/GC/16 (17 April 2013) ('*CRC GC16*'); Human Rights Committee, *General Comment No 36: Article 6 (the Right to Life)*, UN Doc CCPR/C/GC/36 (30 October 2018) ('*HRC GC36*'); Committee on the Elimination of Discrimination Against Women et al, 'Joint Statement on Human Rights and Climate Change' (16 September 2019) ('*UN Committees Joint Statement*'); *Andreou v Turkey* (2010) Eur Court HR App No 45653/99 (27 January 2010).

In their petition, the children argue that the respondent states have violated their rights to life, health, and culture by failing to take adequate action to prevent climate change.[12] A range of specific harms are alleged, reflecting the diversity among the children's own lives and living environments.[13] For instance, petitioners Carl (from Alaska) and Ellen-Anne (from Sweden) argue that their rights to continue their traditional Indigenous cultural practices such as hunting, fishing, and reindeer herding have been violated.[14] Petitioners David, Litokne, and Ranton from the Marshall Islands point to the impact of ocean warming on traditional fishing practices and the threats posed by rising sea levels and storm surges.[15] Several other specific threats to life and health are also mentioned, including increased risk of disease linked to rising temperatures and poor air quality,[16] threats to life associated with storms, floods and bushfires,[17] and the emotional stress and anxiety that children are experiencing as a consequence of the climate emergency.[18]

In advancing these arguments, the petition relies on the fact that all respondent states are parties to the *Paris Agreement*, and have therefore already made some commitment to addressing climate change. The *Paris Agreement* sets out a collective ambition to keep global warming to 'well below 2°C', and ideally below 1.5°C.[19] While this target is not strictly binding on individual states, they do submit Nationally Determined Contributions (NDC) which are intended to be implemented through appropriate domestic strategies.[20] The petition argues that states' failures to reduce GHG emissions in line with their NDC's can amount to a breach of human rights law where the resulting climate change impacts on the enjoyment of human rights.[21]

[12] *Convention on the Rights of the Child 1989*, opened for signature 20 November 1989, 3 UNTS 1577 (entered into force 2 September 1990), arts 6, 24 and 30 ('*CRC*').
[13] *Sacchi et al (Petition)*, Appendices.
[14] Ibid, paras 135–150; Stacey Lee, 'Sacchi v. Argentina: Fighting for Indigenous Children's Climate Rights', *UCLA Law Review* (Web Page, 27 March 2020) <https://www.uclalawreview.org/sacchi-v-argentina-fighting-for-indigenous-childrens-climate-rights/>.
[15] *Sacchi et al (Petition)* 121–129.
[16] Ibid paras 112–114, 130–133.
[17] Ibid paras 102–120.
[18] Ibid paras 159–166.
[19] *Paris Agreement*, opened for signature 12 December 2015, entered into force 4 November 2016, art 2 (1)(a).
[20] Ibid art 4.
[21] *Sacchi et al (Petition)* paras 15, 171–176.

B *Duarte Agostinho and Others v Portugal and Others*

At the same time that the *Sacchi* case is proceeding in the UN committee system, another group of young people are pursuing a case in the ECtHR.[22] Claudia Duarte Agostinho is a young Portuguese woman who, along with five of her peers aged between 8 and 21 years, is bringing a case against 33 European nations.[23] The respondents are accused of breaching the young petitioners' human rights through their collective failure to take the necessary steps to prevent climate change.

In particular, the petition focuses on the devastating bushfires which occurred in Portugal in 2017 and the physical and emotional damage they caused to the young applicants. It is alleged that these impacts constitute a breach of the ECHR, specifically Article 2 (the right to life), Article 8 (respect for private and family life) and Article 14 (freedom from discrimination).[24] The petition also refers to the future effects of climate change, arguing that the states are obliged to do more to prevent these harms from materialising.

As in *Sacchi,* the applicants argue that states' obligations under the ECHR ought to be interpreted having regard to the *Paris Agreement*.[25] They also rely heavily on the precautionary principle, arguing that it should inform the Court's interpretation of the respondents' obligations.[26] The precautionary principle is commonly defined to require that, where there is a threat of serious and irreparable environmental harm, states cannot use the lack of scientific certainty as a reason not to take reasonable precautions.[27] Its status in international law is somewhat unsettled, but the core component of a precautionary approach in the face of environmental risk is well-accepted.[28]

The case is the first climate change claim to come before the ECtHR and is also noteworthy for naming so many states as respondents. The Court's ruling is greatly anticipated as the

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[22] *Duarte Agostinho et al.*
[23] Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom.
[24] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS No 005 (entered into force 3 September 1953) ('*ECHR*').
[25] *Duarte Agostinho et al*, paras 20, 30–31.
[26] Ibid, para 8 of Annex to Application.
[27] United Nations Environment Programme, *Rio Declaration on Environment and Development*, Rio de Janeiro, UN Doc A/Conf.151/26 (14 June 1992), Principle 15.
[28] Patricia Birnie et al, *International Law and the Environment* (3rd ed, Oxford University Press, 2009) 159-164.

first opportunity to clarify the application of the ECHR to climate change and to address the various issues discussed below.

C *Torres Strait Islanders v Australia*

The third case considered here is a complaint by a group of Torres Strait Islanders against Australia in the Human Rights Committee (HRC). The HRC oversees the *International Covenant on Civil and Political Rights* (ICCPR), and the petitioners argue that Australia has breached their rights to life (Article 6), culture (Article 27) and private and family life (Article 17). It is alleged that Australia has failed to protect these rights both by failing to make adequate cuts to emissions and by failing to take necessary adaptation measures, such as funding the installation of seawalls. Climate change is already affecting the Torres Strait, with sea-level rise and storm surges causing saltwater inundation of important cultural sites, while ocean warming causes acidification and other detrimental impacts on marine health.

In response, the Australian government has called for the case to be rejected because it relates to future impacts, not present harms. Lawyers representing the government have further stated that Australia is not legally responsible for any impact on Torres Strait Islanders' human rights because Australia is not the sole or main contributor to global GHG emissions.[29]

The communication has attracted considerable attention as the first case before the HRC challenging a state's mitigation and adaptation action under the ICCPR. The current and former Special Rapporteurs for Human Rights and the Environment, David Boyd and John Knox, have submitted an amicus curiae brief supporting the Torres Strait Islanders' claim, underlining the international significance of the complaint. The case represents an important opportunity for the HRC to clarify the application of international human rights law to climate change and, if successful, could open the way for similar claims from other affected groups in the future.

[29] Katharine Murphy, 'Australia Asks UN to Dismiss Torres Strait Islanders' Claim Climate Change Affects Their Human Rights', *The Guardian* (online, 14 August 2020) <http://www.theguardian.com/australia-news/2020/aug/14/australia-asks-un-to-dismiss-torres-strait-islanders-claim-climate-change-affects-their-human-rights>; Darby Ingram, 'Torres Strait Eight Backed by UN Human Rights Experts', *National Indigenous Times* (18 December 2020) 8 <https://nit.com.au/torres-strait-eight-backed-by-un-human-rights-experts/>.

III CONTRIBUTION TO HUMAN RIGHTS-BASED APPROACHES TO CLIMATE CHANGE

While the cases are yet to be decided it is possible to analyse them in the context of other jurisprudence and scholarship to identify issues which the Court and committees will need to address. This indicates areas where the cases have potential to clarify and even advance the state of the law. It also enables an evaluation of the potential these cases have to address climate injustice facing marginalised and vulnerable groups. A number of issues and potential contributions are discussed below, ranging from legal technicalities of standing, admissibility and responsibility through to more substantive questions about the nature of states' obligations.

A *Requirements for a Case to Proceed*

The three cases raise fundamental questions concerning standing and admissibility of climate change claims within international and regional human rights frameworks. Three key threshold issues will need to be satisfied for the cases to proceed. These issues come into focus in these cases because of the global and long-term nature of climate change, which challenges the territorial and temporal constraints of the human rights frameworks. First, the applicants will need to have standing as 'victims' to bring their claims. Secondly, they will need to be able to show that they have exhausted their options for a domestic remedy or make a case for a waiver of that requirement. And thirdly, for the *Sacchi* and *Duarte Agostinho* cases specifically, the respondent states must owe obligations extending beyond their territorial limits to establish an enforceable relationship between the parties.

1 *Standing*

Within human rights frameworks, standing to bring a claim normally depends on the applicant having suffered an injury. In previous cases, the HRC has explained that for a person to bring a communication for an alleged violation of an ICCPR right, they 'must show either that an act or an omission of a State party has already adversely affected his or her enjoyment of such right, or that such effect is imminent'.[30] The ECtHR uses a similar

[30] Human Rights Committee, *Views: Communication No 429/1990*, 4th sess, UN Doc CCPR/C/47/D/429/1990 (8 April 1993) (*E.W. et al v The Netherlands*); see also Human Rights Committee, *Views: Communication No 1400/2005*, 85th sess, UN Doc CCPR/C/85/D/1400/2005 (31 October 2005) (*Beydon v. France*); Human Rights Committee, *Views: Communication No 1440/2005*, 87th sess, UN Doc CCPR/C/87/D/1440/2005 (12 July 2006) (*Aalbersberg et al v The Netherlands*).

test for admissibility, requiring that the applicant faces a 'serious, specific and imminent danger' which triggers a duty to prevent harm.[31]

The three cases all attempt to some degree to claim for anticipated harms caused by global heating and for states' failures to take appropriate steps to prevent those harms. If their cases were limited to those future harms, then the applicants might find it challenging to establish that they have standing. However, in all three cases the applicants can present evidence of climate harms already occurring. The *Duarte Agostinho* case is perhaps the most powerful example, as it points to the physical and emotional harms caused by recent bushfires in Portugal and cites evidence that these were caused at least in part by global heating.[32] The *Sacchi* petition details experiences that the young claimants have already had of melting sea-ice, floods, droughts and rising sea levels.[33] The Torres Strait petition is not publicly available at the time of writing, but in media interviews the claimants share their experience of saltwater inundation of their lands and important cultural sites, and the link between these impacts and climate change has been recognised in scientific studies (going against the Australian government's claim that the case is purely related to future harms).[34] These claims show that climate change is no longer just a future problem, and legal claims can be firmly based on harms already experienced.

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[31] *Balmer-Schafroth and others v Switzerland* (1996) Eur Court HR App No 22110/93 (26 August 1996); See also *Fadeyeva v Russia* (2005) Eur Court HR App No 55723/00 (9 July 2005) *Kolyadenko and others v Russia* (2012) Eur Court HR App Nos 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05 (9 July 2012); Ole W Pedersen, 'The European Court of Human Rights and International Environmental Law' in John H Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (Cambridge University Press, 2018) 86; Ole W Pedersen, *European Court of Human Rights and Environmental Rights* (Edward Elgar Publishing Limited, 2019); Natalia Kobylarz, 'The European Court of Human Rights: An Underrated Forum for Environmental Litigation' in Helle Tegner Anker and Birgitte Egelund Olsen (eds) *Sustainable Management of Natural Resources: Legal Instruments and Approaches* (Intersentia, 2018) 99.

[32] *Duarte Agostinho et al*, paras 16–22; Marco Turco et al, 'Climate Drivers of the 2017 Devastating Fires in Portugal' (2019) 9(1) *Scientific Reports* 13886.

[33] *Sacchi et al (Petition)*, paras 102–150.

[34] Natalie Ahmat and Yessie Mosby, 'A Group of Torres Strait Islanders Have Wrapped up Their Landmark Fight against What They Say Is the Federal Government's in Action on Climate Change', *Informit* (Web Page, 2 October 2020) <http://search.informit.org/doi/abs/10.3316/TVNEWS.TSM202010020010>; Hannah Cross, 'Scott Morrison Rejects Torres Strait Islanders' Invitation to See Disastrous Effects of Climate Change', *National Indigenous Times* (22 November 2019) <https://nit.com.au/scott-morrison-rejects-torres-strait-islanders-invitation-to-see-disastrous-effects-of-climate-change/>; Katharine Murphy, 'Torres Strait Islanders Take Climate Change Complaint to the United Nations', *The Guardian* (Web Page, 12 May 2019) <http://www.theguardian.com/australia-news/2019/may/13/torres-strait-islanders-take-climate-change-complaint-to-the-united-nations>. See also Reisinger, A and RL Kitchen, 'Australasia', in Christopher Field et al. (eds), *Climate Change 2014: Impacts, Adaptation and Vulnerability. Part B: Regional Aspects. Working Group II Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC, 2014); Donna Green et al, 'An Assessment of Climate

That being said, climate harms are expected to worsen into the future and the cases also encompass anticipated harms. Even if GHG's are rapidly reduced, global heating will continue on current trajectories for some time, due to the long-term effects of carbon already in the atmosphere.[35] This creates injustice for future generations, who will bear the brunt of our current policies, but obviously lack the ability to enforce their own rights or advocate for their own interests. While none of the current cases directly claim on behalf of future generations, this has been a feature of some previous climate litigation.[36] In these cases, specific rules of standing have enabled representative claims to proceed seeking protection of future generations' interests, even where the individuals affected and specific impacts are unknown. Given the seriousness of predicted climate change impacts, it is foreseeable that new cases might seek to include future human rights harms, but currently dedicated rules and processes to enable representative claims are lacking at the international level. The way that the Court and committees deal with standing, and in particular any comments made in relation to future harm, may give some indication of whether a claim on behalf of future generations might be possible. Failing this, the cases should at least help clarify when anticipated harms will be actionable.

2 *Exhaustion of Domestic Remedies*

Both the United Nations and European human rights systems require applicants to pursue domestic avenues before a claim will be admitted at the international level. Alternatively, they must obtain a waiver on the basis that a suitable domestic remedy is not available or would be unreasonably burdensome to pursue.[37] The young claimants in both *Sacchi* and *Duarte Agostinho* make similar arguments in seeking such a waiver. They argue that the principle of sovereign state immunity would prevent them from bringing a case against the respondent governments in the courts of another state, while the cost and

Change Impacts and Adaptation for the Torres Strait Islands, Australia' (2010) 102(3) *Climatic Change* 405.

[35] Thorsten Mauritsen and Robert Pincus, 'Committed Warming Inferred from Observations' (2017) 7(9) *Nature Climate Change* 652; Myles Allen et al, *Intergovernmental Panel on Climate Change Special Report on Global Warming of 1.5oC: Summary for Policymakers* (Intergovernmental Panel on Climate Change, 6 October 2018), A2.

[36] *Minors Oposa v Secretary of the Department of Environment and Natural Resources* (1994) 33 ILM 173; *Future Generations v Colombia* [2018] Supreme Court of Colombia, Case No 11001-22-03-000-2018-00319–01 (5 April 2018).

[37] *ECHR*, art 35(1); *Optional Protocol to CRC*, art 7(e); *First Optional Protocol to the International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), arts 2 and 5.

impracticalities of litigating in the multiple respondents' own jurisdictions would be prohibitive.[38] The Portuguese petitioners also point to the urgency of the climate crisis, arguing there is no time to pursue domestic cases if the worst impacts are to be avoided.[39] A positive disposition to these arguments might be inferred from the fact that in November 2020 the ECtHR accepted the applicants' request to have the case urgently heard and asked the respondents to respond to the claim by the end of February 2021.[40]

The Torres Strait Islander petitioners face a similar hurdle in the HRC. No attempt has been made to resolve the matter through formal legal channels at the domestic level, which may prove a challenge to the admissibility of the case. More detail of the parties' arguments is not publicly available at the time of writing, but it is anticipated that the petitioners will argue that no suitable avenue for redress is available in Australia. As Cullen explains, climate action involves countless administrative and legislative actions under a broader governmental policy, so judicial and merits reviews of individual decisions may prove inadequate to address the problem.[41] A complaint to the Australian Human Rights Commission could be attempted, but it lacks the ability to issue a binding remedy.[42]

These cases have potential to provide useful insight into how strictly the Court and committees view the requirement to exhaust local remedies in the context of climate change. The complex nature of climate change and the urgent need to take action to avoid catastrophic impacts, coupled with the political realities of climate policy in many countries, may well lead to a finding that domestic avenues do not offer a reasonable prospect of a suitable remedy. How the Court and committees deal with this issue may

[38] *Sacchi et al (Petition)*, paras 312–318; *Duarte Agostinho*, paras 32 and 35-40 of Annex to Application; See comments of Annalisa Savaresi reported in Chloé Farand, 'Six Portuguese Youth File "unprecedented" Climate Lawsuit against 33 Countries', *Climate Home News* (3 September 2020) <https://www.climatechangenews.com/2020/09/03/six-portuguese-youth-file-unprecedented-climate-lawsuit-33-countries/>; Ole W Pedersen, 'The European Convention of Human Rights and Climate Change – Finally!', *EJIL: Talk!* (Web Page, 22 September 2020) <https://www.ejiltalk.org/the-european-convention-of-human-rights-and-climate-change-finally/>.
[39] *Duarte Agostinho et al,* para 32.
[40] *Claudia Duarte Agostinho and others v Portugal and 32 other States (Purpose of the Case and Questions)* Eur Court of HR App No 39371/20 (13 November 2020), 1. At the time of writing the response from the Respondents had not yet been made public.
[41] Miriam Cullen, 'Climate Change and Human Rights: The Torres Strait Islanders' Claim to the UN Human Rights Committee', *Groningen Journal of International Law Blog* (Blog Post, 27 June 2019) <https://grojil.org/2019/06/27/climate-change-and-human-rights-the-torres-strait-islanders-claim-to-the-un-human-rights-committee/>.
[42] *Australian Human Rights Commission Act 1986* (Cth).

also provide some clues as to how they view the relationship between international and domestic law, a question which will be explored in more detail below.

3 *Extraterritorial Obligations*

One aspect of the cases that has generated interest is the way the applicants in *Sacchi* and *Duarte Agostinho* tackle the issue of extraterritorial obligations, given that most of the applicants are not nationals of the respondent states. Under international human rights law, states must respect, protect, and fulfil the rights of people within their jurisdiction, usually interpreted to mean within their territory or under their control.[43] For their claims to be admissible, the applicants must establish that the respondent states owe extraterritorial obligations relating to climate change. To do this, they draw on emerging jurisprudence from other international and regional human rights bodies.

Sacchi in particular relies on a recent Advisory Opinion of the Inter-American Court of Human Rights which considered states' responsibility for human rights breaches flowing from transboundary environmental harm. The Court held that when a state exercises effective control over environmentally harmful activities, its jurisdiction extends to include any foreseeable consequences of those activities, even if they occur in another state's territory.[44] Applying this approach, the *Sacchi* petition argues that, because the children are impacted by the foreseeable consequences of the respondents' failure to cut emissions, they fall within their jurisdiction for the purposes of establishing human rights obligations.[45] They emphasise the fact that the respondents have control to stop GHG emissions but allow them to continue, despite knowing that they will directly affect people outside their territories.[46] Similarly, the European case argues that the respondent states, through their various climate policies, exercise significant control over the petitioners'

[43] *ECHR*, art 1; *CRC*, art 2; ICCPR, art 2.
[44] Inter-American Court of Human Rights, *Environment and Human Rights: Advisory Opinion Requested by the Republic of Colombia*, Case No OC-23/17 (15 November 2017) (Official summary issued by the Inter-American Court) <http://www.corteidh.or.cr/docs/opiniones/resumen_seriea_23_eng.pdf>, paras 102, 104 ('*IACtHR Ad Op*'); *Sacchi et al (Petition)*, para 248. See also Christopher Campbell-Duruflé and Sumudu Anopama Atapattu, 'The Inter-American Court's Environment and Human Rights Advisory Opinion: Implications for International Climate Law' (2018) 8(3–4) *Climate Law* 321; Angeliki Papantoniou, 'Advisory Opinion on the Environment and Human Rights' (2018) 112(3) *American Society of International Law* 460. A similar approach to extraterritorial obligations was endorsed by the joint statement of UN Human Rights Committees on Human Rights and Climate Change (n 11).
[45] *Sacchi et al (Petition)* para 242-252.
[46] IACtHR Ad Op (n 44) paras 102, 104; *Sacchi et al (Petition)*, para 248.

interests in circumstances where their own state (Portugal) has a limited ability to protect them.[47]

Establishing extraterritorial duties has long been thought to be a significant challenge for human rights-based climate litigation.[48] Should the ECtHR or the Committee on the Rights of the Child endorse the Inter-American approach, it would open up potential for a much wider range of claims within international frameworks, not just in relation to climate change but in any situation where states' transboundary activities affect human rights. For climate change particularly, it could significantly enhance the potential for human rights law to contribute to climate justice.

B *Nature of States' Obligations*

The three human rights-based climate cases could also advance the law by clarifying the substance and scope of states' obligations, thereby enhancing the contribution of human rights law to climate justice. For instance, the cases are likely to shed light on whether human rights law obliges states to take mitigation as well as adaptation action. As Peel and Osofsky have explained, climate litigation has tended to be more successful when it has targeted adaptation action, rather than mitigation, as it can be easier to demonstrate a state's failure to implement adaptation measures needed to prevent harm. This avoids the more complex task of analysing and evaluating domestic emissions reduction policies.[49] Adaptation is emphasised in the Torres Strait complaint which, as well as pointing to Australia's failure to cut emissions, alleges that Australia has failed to protect communities and cultural sites from rising sea levels. *Sacchi* and *Duarte Agostinho* focus on states' inadequate emissions policies, raising the question of whether states' obligation to protect human rights includes a duty to cut emissions, or just to safeguard against the impacts of those emissions. The cases therefore offer a useful opportunity for judicial

[47] *Duarte Agostinho et al,* paras 18-21, citing *Andreou v Turkey* and *Kovačić et al v Slovenia* (2008) Eur Court HR App Nos 44574/98, 45133/98 and 48316/99 (3 October 2008).
[48] Annalisa Savaresi and Juan Auz, 'Climate Change Litigation and Human Rights: Pushing the Boundaries' (2019) 9(3) *Climate Law* 244, 253–254; Meinhard Doelle, 'Climate Change and Human Rights: The Role of the International Human Rights in Motivating States to Take Climate Change Seriously' (2004) 1(2) *Macquarie Journal of International and Comparative Environmental Law* 179, 195; John Knox, 'Climate Change and Human Rights Law' (2009) 50 *Virginia Journal of International Law* 163, 200; Bridget Lewis, *Environmental Human Rights and Climate Change: Current Status and Future Prospects* (Springer, 2018) 180ff.
[49] Peel and Osofsky (n 1) 63–64.

interpretation of the duty to protect human rights in the context of both mitigation and adaptation.

As noted above, the cases also present a chance to clarify obligations to prevent imminent or future harm, particularly in relation to the right to life, which all three cases invoke. In 2018 the HRC explained in its General Comment 36 that states' duty to respect and ensure the right to life depends on the preservation of the environment, including addressing pollution and climate change.[50] In relation to future harms, the same General Comment explains that states have a duty to protect life from all 'reasonably foreseeable threats'.[51] In 2019, the Committee handed down its opinion in the case of *Teitiota v New Zealand*, which considered the right to life in the context of rising sea levels in Kiribati. In its decision, the Committee confirmed states' obligations to protect against imminent risks to life, but held that an imminent risk 'must be, at least, likely to occur'.[52] While it accepted that rising sea levels may present a threat to life in the future, the Committee determined that this threat was not sufficiently imminent to trigger a duty to protect, having regard to both the timeframe over which it will occur and the opportunities that exist for adaptation or amelioration of harm.[53] This leaves some ambiguity regarding the exact nature of states' obligations with respect to the right to life and when the Committee will decide it has been violated. The *Teitiota* decision suggests a violation will only occur where the threat is imminent, and not just reasonably foreseeable. Clarification and elaboration on this point, particularly from the HRC in the Torres Strait claim, would be most welcome.

The cases also offer a chance for more detail on the obligations owed to groups with particular vulnerabilities to climate change, most notably children and Indigenous people. Children are especially vulnerable to the effects of climate change, both because of their stage of development and their limited agency to change their circumstances.[54] They are

[50] HRC GC36 (n 11) para 62.
[51] Ibid para 18.
[52] Human Rights Committee, *Views: Communication No* 2728/2016 UN Doc CCPR/C/127/D/2728/2016 (24 October 2019), para 9.5 (*Ioane Teitiota v. New Zealand*).
[53] Ibid paras 9.11-9.12.
[54] John Knox, *Report on the Relationship between Children's Rights and the Environment.* Report to the Human Rights Council, UN Doc A/HRC/37/58 (24 January 2018) 7-8 ('*Children's Rights Report*'); Human Rights Council, *Resolution 35/20 on Human Rights and Climate Change*, UN Doc A/HRC/RES/35/20 (22 June 2017) 4–7; 'Unless We Act Now: The Impact of Climate Change on Children', *UNICEF* (Web Page, 2015) <https://www.unicef.org/publications/index_86337.html>; Elizabeth D Gibbons, 'Climate Change, Children's Rights, and the Pursuit of Intergenerational Climate Justice' (2014) 16(1) *Health and Human*

also at increased risk of child labour and early marriage where climate change exacerbates existing tensions and socio-economic inequalities.[55] Despite these particular impacts, children are frequently absent from discussions and decisions about climate policy.[56] The *Sacchi* and *Duarte Agostinho* cases are a valuable chance for greater clarity regarding states' duties towards children and the need to include their voices in decisions which affect them.

Both *Sacchi* and the Torres Strait cases claim for violations of cultural rights of Indigenous people. These claims may have a strong chance of success, since the importance of protecting traditional lands and cultural practices has long been recognised as part of the right to culture within international human rights law.[57] The link between land and culture is also a fundamental principle within the *United Nations Declaration on the Rights of Indigenous Peoples* and has been upheld on a number of occasions by the Inter-American Court and Commission of Human Rights.[58] Success on these grounds would be an important step in reinforcing the need for states to take positive measures to protect Indigenous communities from the effects of climate change, not only through adaptation measures but also through cutting GHG emissions.

Finally, the cases could clarify the relationship between human rights and other bodies of law. Both the *Sacchi* and *Duarte Agostinho* cases argue that states' human rights obligations should be interpreted with regard to international environmental and climate law. In particular, they suggest that the relevant standards for performance of human rights duties should be informed by the precautionary principle and by the overarching obligation in the *Paris Agreement* to keep global temperature increases to 'well-below

Rights 19, 21; Karen Makuch, 'Environmental Rights of Children' in Michael Faure (ed), *Elgar Encyclopaedia of Environmental Rights* (Edward Elgar Publishing Limited, 2019) 386, 388, 390, 396.

[55] Office of the High Commissioner for Human Rights, *Analytical Study on the Relationship between Climate Change and the Full and Effective Enjoyment of the Rights of the Child*. Report to the Human Rights Council, UN Doc A/HRC/35/15 (4 May 2017), 7; Knox, 'Children's Rights Report' (n 54), 7.

[56] Karin Arts, 'Children's Rights and Climate Change' in Claire Fenton-Glynn (ed), *Children's Rights and Sustainable Development* (Cambridge University Press, 1st ed, 2019) 216, 232; Gibbons (n 54) 23.

[57] See, eg, Human Rights Committee, *General Comment No 23: Article 27 (Rights of Minorities)* UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994).

[58] *United Nations Declaration on the Rights of Indigenous Peoples*, adopted by General Assembly Resolution 61/295, 61st sess, UN Doc A/RES/61/295 (2 October 2007), art 26; *Yanomami Indians v Brazil*, Inter-American Court of Human Rights, Case No 7615, OEA/Ser.L/V/II.66 Doc 10 rev 1 (1985); *Mayagna (Sumo) Awas Tingni Community v Nicaragua (Merits, reparations and costs)* Inter-American Court of Human Rights (2001) (Ser C) No 79; *Maya Indigenous Community of the Toledo District v Belize* (Inter-American Commission of Human Rights) Case 12.053, Report 40/04, OEA/Ser.L/V/II.122 Doc 5 rev 1, 727 (2004); *Saramaka People v Suriname (Preliminary Objections, Merits, Reparations and Costs)* Inter-American Court of Human Rights (2007) Ser C No 172.

2ºC'. The cases therefore represent an important opportunity for international bodies to comment on the integration of human rights and environmental principles and could lead to important advancements in norm-integration in the future.

C *Reviewing Domestic Climate Policy*

A number of domestic cases have found states' climate policies to be incompatible with human rights principles, but the three cases discussed here are among the first to ask an international or regional body to make such an assessment. In the past, these bodies have only been willing to pass judgment on states' domestic policies in limited circumstances and have typically extended a considerable degree of discretion to states in determining their own national priorities. They have recognised that states face a range of competing demands, including different human rights objectives, and have deferred to states' own judgment about how to balance these as long as the impact on human rights is not disproportionate.[59]

This issue is likely to be most acute in the *Duarte Agostinho* case, given the ECtHR's well-known doctrine of the margin of appreciation. Under this approach, states are afforded a wide degree of discretion to devise their own policies and the Court will generally not find a violation of the ECHR unless domestic law has not been followed or the negative impact on human rights clearly cannot be justified by other legitimate aims.[60] Given the highly political nature of climate policies in many states, and the wide range of economic, social and legal factors at play, it is uncertain how far international committees and courts will be willing to delve into the specifics of these policies, especially in the children's cases which name multiple respondents. Nonetheless, climate change, perhaps more than any other issue, shows the serious global consequences that domestic policies can have on human rights. As the bodies with primary responsibility for promoting and enforcing human rights internationally, the Court and committees may seize this opportunity to

[59] Andrew Legg, *The Margin of Appreciation in International Human Rights Law* (Oxford University Press, 2012) 38-66; Hana Müllerová, 'Environment Playing Short-Handed: Margin of Appreciation in Environmental Jurisprudence of the European Court of Human Rights' (2015) 24(1) *Review of European, Comparative & International Environmental Law* 83.

[60] *Handyside v the United Kingdom* (1976) Eur Court HR App No. 5493/72 (7 December 1976); *Hatton and Others v the United Kingdom* (2003) Eur Court HR App No 36022/97(8 July 2003); Müllerová (n 59); Dean Spielmann, 'Allowing the Right Margin: The European Court of Human Rights and The National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (2012) 14 *Cambridge Yearbook of European Legal Studies* 381.

take a more deliberate look behind the veil of state sovereignty and examine the impact of state climate policies.

D *Responsibility for Cumulative Harms*

A final area where the cases could advance both human rights law and climate justice is through clarifying the apportionment of responsibility for climate-related harms. In previous litigation, states have argued that their own emissions represented just a 'drop in the ocean' and, consequently, they could not be held responsible for the impacts of climate change. As noted above, this argument has been put forward by Australia's lawyers in response to the Torres Strait complaint. In the early days of climate litigation, it was thought that the cumulative effects of GHG emissions, coupled with the timeframe over which climate harms materialise, would indeed create barriers for establishing state responsibility.[61]

Since that time, however, both our understanding of climate science and legal attitudes towards causation and responsibility have advanced considerably.[62] In recent domestic cases, courts have rejected the 'drop in the ocean' argument, recognising instead that every contribution to global heating matters and cannot be excused simply because 'other states do it too'.[63] Rejecting a 'but for' understanding of causation, the *Duarte Agostinho* application argues that states should be held responsible when they fail to do their fair share in tackling climate change, and rely on climate change data to identify what a 'fair share' ought to look like.[64]

These cases are the first opportunity for international human rights bodies to confirm their view on responsibility for climate harms. An approach based on shared responsibility could be useful for future cases relating to climate change or other cumulative harms. The invitation to integrate climate science and concepts of a 'fair share'

[61] Office of the High Commissioner for Human Rights, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights*, UN Doc A/HRC/10/61 (15 January 2009); Ole Pedersen, 'Climate Change and Human Rights: Amicable or Arrested Development?' (2010) 1(2) *Journal of Human Rights and the Environment* 236, 246; Doelle (n 48) 213–214.
[62] *UN Committees Joint Statement* (n 11); Sophie Marjanac and Lindene Patton, 'Extreme Weather Event Attribution Science and Climate Change Litigation: An Essential Step in the Causal Chain?' (2018) 36(3) *Journal of Energy & Natural Resources Law* 265.
[63] *Urgenda (Supreme Court)*; *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7.
[64] *Duarte Agostinho* et al, paras 29-30 of Annex.

into the interpretation of both obligations and responsibility has potential to shape the future of rights-based climate litigation in both international and domestic forums.

IV CONCLUSION

The cases discussed above have already generated a great deal of interest owing to their potential to advance human rights-based approaches to climate change in a number of important ways. Our understanding of climate change has evolved quickly, and the opportunity now exists for international bodies to confirm the applicability of human rights obligations to states' climate policies. The cases raise issues in terms of the admissibility of claims, the nature of states' obligations, and the role of international bodies in evaluating local policies which contribute to a truly global problem. Even if the cases are unsuccessful, they provide an important opportunity to clarify these issues. More importantly, the cases raise the voices of some of the most marginalised groups in climate policy-making – specifically children and Indigenous communities – and make visible the very real and present impacts of climate change which they experience.

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PARENTS…NEXT: THE ONGOING NEOLIBERALISING OF AUSTRALIAN SOCIAL SECURITY

LYDIA HAMER AND KIERAN TRANTER*

This article argues that ParentsNext has a detrimental impact on women with children. Through outsourcing, penalising of non-compliance and its one-size-fits-all approach, the program continues the neoliberalist agenda in Australian social security. Women with young children are 'next'. ParentsNext's true purpose is ideological; its actual effect is to punish and harm vulnerable women and children by subjecting them to the whims of private providers and the data-producing requirements of the social security machine without any substantive attempt to overcome structure barriers to achieving economic security.

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CONTENTS

I INTRODUCTION

ParentsNext is a compulsory pre-employment program for select 'Parenting Payment' recipients. ParentsNext is obstinately aimed at building a recipient's work skills to increase workforce participation by parents with young children. This article argues that ParentsNext fails to achieve its objectives, and in doing so, is having a detrimental impact on recipients. The evidence-base for this argument is drawn from a critical analysis of the ParentsNext policies, official website and evaluation reports, material generated by the Senate Inquiry into ParentsNext and media reporting. The article is segmented into three sections. The first section introduces the ParentsNext program, setting out its structure and eligibility requirements. The second section looks at the features of neoliberalism in Australian social security policy. The third section argues that the ParentsNext program reflects these neoliberal features through the incorporation of private entities, the Targeted Compliance Framework ('TCF') and the disregard for structural factors affecting recipients. As such, the proposed conclusion is that the ParentsNext program is causing further harm to vulnerable women and children.

II PARENTSNEXT

ParentsNext is an intensive intervention program targeted at parents with children under six years of age. Formal policy documents suggest that it was introduced to address gender gaps in workforce participation, concerns about 'jobless families', specific

concerns about life opportunities for young and First Nation parents, and the cost to the social security system stemming from 'disadvantaged' parents.[1] It makes social security payments conditional in undertaking identified activities specifically, it 'aims to increase female participation in the workforce'[2] with women making up 96% of the program's recipients.[3] Further, ParentsNext was also introduced with the aim of meeting the 2008 'Closing the Gap' target of 'halving the gap in employment outcomes between Indigenous and non-Indigenous Australians by 2018'.[4] As of 31 December 2019, 20% of ParentsNext recipients identify as First Nation.[5] While formally framed as directed to 'parents', substantively, the program targets mothers with a special focus on First Nation mothers.[6]

Before being launched nationally on 1 July 2018,[7] ParentsNext underwent a trial period. Pilot programs were conducted across ten local government areas between 4 April 2016 and 30 June 2018.[8] The ParentsNext Evaluation Report documented that the 'success' of the pilot was used in justifying the program's national expansion.[9] It assessed the 'early impact'[10] of the ParentsNext pilot program and concluded that the program 'helped to increase the labour market attachment of parents with young children'[11] and can assist in reducing 'welfare dependency and long-term unemployment'.[12] However, the Report

[1] Department of Jobs and Small Business, *ParentsNext Evaluation Report* (Report, 13 September 2018) 16-20.
[2] Explanatory Statement, Social Security (Parenting Payment participation requirements – classes of persons) Instrument 2018 (No. 1) (Cth) ('Explanatory Statement, Parenting Payment Instrument 2018 (No. 1)').
[3] Ibid.
[4] Ibid.
[5] Department of Jobs and Small Business, *Explainer: ParentsNext* (Web Page, 16 January 2019) <https://www.jobs.gov.au/newsroom/explainer-parentsnext> ('*Explainer: ParentsNext*').
[6] That targeting of First Nations mothers was the basis on which Djirra, a First Nations' organisation in Victoria supporting First Nations survivors of family and domestic violence, reported ParentsNext to the UN Human Rights Council; 'Discriminatory program making life harder for Aboriginal mums must be scrapped, UN told', *Human Rights Law Centre* (Web Page, 25 March 2021) <https://www.hrlc.org.au/news/2019/7/2/discriminatory-program-making-life-harder-for-aboriginal-mums>.
[7] Minister for Jobs and Innovation (Cth), *Social Security (Parenting Payment participation requirements – classes of persons) Instrument 2018 (No. 1)* (28 February 2018) s 2.
[8] Explanatory Statement, Parenting Payment Instrument 2018 (No. 1) (n 2); Australian Human Rights Commission, Submission No 16 to Senate Community Affairs and References Committee, *Inquiry into ParentsNext, Including its Trial and Subsequent Broader Rollout* (1 February 2019) 7.
[9] Department of Jobs and Small Business, *ParentsNext Evaluation Report* (Report, 13 September 2018).
[10] Ibid 11.
[11] Ibid 50.
[12] Ibid.

did not provide a comparison between a recipient's position 'before and after the trial',[13] and it also failed to establish a 'causal link' between a reduction in welfare dependency and participating in ParentsNext.[14] Also, the Report was only released after the program's national expansion.[15] These criticisms hint at ParentsNext being something other than an evidence-based reform.[16]

In the national ParentsNext program, recipients are compelled to engage if they have received 'Parenting Payment' and been without employment for at least six months, and if their youngest child is either eight (if single) or six (if partnered).[17] 'Parenting Payment' is broadly the current manifestation of the single mother's pension.

As of 29 June 2018, 2.1% of the Australian population (18-64) received 'Parenting Payment'.[18] It is paid to recipients who are principal carers of a child under eight if single, and under six if partnered. Strict income and assets tests apply to the family unit which affect the eligibility for 'Parenting Payment'. As of March 2021, single recipients with principal responsibility for one child only received the full payment if they had a fortnightly income of less than $192. For partnered recipients with one child, the threshold was $212.[19] The payment received is reduced by 40 cents for every dollar of income over the gross income limit.[20] Payments will be cut-off for single recipients with income exceeding $2,238.60 gross a fortnight.[21] The cut-off point increases by $24.60 per

[13] Australian Human Rights Commission, Submission No 16 to Senate Community Affairs and References Committee, *Inquiry into ParentsNext, Including its Trial and Subsequent Broader Rollout* (1 February 2019) 24 ('Australian Human Rights Commission').
[14] Ibid 25.
[15] Centre for Excellence in Child and Family Welfare, Submission No 23 to Senate Community Affairs and References Committee, *Inquiry into ParentsNext, including its trial and subsequent broader rollout* (February 2019) 6 ('Centre for Excellence in Child and Family Welfare').
[16] The ParentsNext evaluation report was not the only recent social security evaluation report that has been criticised for a lack of rigour and convincingness yet still used to justify rolling out of the program. See Janet Hunt, 'The uses and abuses of evaluation: The cashless debit card story' (2020) 39(1) *Social Alternatives* 20-7.
[17] Senate Community Affairs and References Committee, Commonwealth of Australia, *Inquiry into ParentsNext, Including its Trial and Subsequent Broader Rollout* (Report, March 2019) 4 ('*Senate Inquiry into ParentsNext*').
[18] 'Unemployment and parenting income support payments; Snapshot 11 September 2019', *Australian Institute for Health and Welfare* (Web Page, 24 March 2021) <https://www.aihw.gov.au/reports/australias-welfare/unemployment-and-parenting-income-support-payments>.
[19] 'Income and Assets Test', *Services Australia* (Web Page, 28 August 2020) <https://www.servicesaustralia.gov.au/individuals/services/centrelink/parenting-payment/how-much-you-can-get/income-and-assets-tests>.
[20] Ibid.
[21] Ibid.

child for recipients with more than one child. Overall, in a national context of average fortnightly wages of $1713.90,[22] the program is immediately targeting extremely economically vulnerable mothers. This targeting is further focused through use of the Intensive Stream or Targeted Stream, which is assessed using the Job Seeker Classification Instrument questionnaire.[23] If a recipient is identified within a stream, participation is compulsory.

To be allocated in the Intensive Stream, recipients must reside in an Intensive Stream location, have a child at least five years or six months of age, and be either an early school leaver or deemed highly disadvantaged.[24] Locations were selected to ensure First Nation recipients comprise the majority of the Intensive Stream.[25] If this criteria is not met, recipients will be allocated into the Targeted Stream if residing in a Targeted Stream location and either an early school leaver with their youngest child being at least one year old, deemed highly disadvantaged with a child at least three years of age or deemed to be a 'jobless family' with the youngest child being at least five years old.[26]

If identified as a compulsory ParentsNext recipient, recipients must attend appointments and enter a participation plan focusing on 'parenting, pre-employment and employment goals' with their allocated 'ParentsNext provider'.[27] The ParentsNext providers are private for-profit or not-for-profit agencies that were successful in a tender process with the Department of Education, Skills and Employment to provide the services. The current tenders were from 2018 to 2021.[28] The providers are central to the working of ParentsNext. The activities a recipient must undertake in their participation plan is determined by the ParentsNext provider.[29] In addition, the providers have primary responsibility for surveillance of recipients' compliance with participation plans. For

[22]Australian Bureau of Statistics, *Average Weekly Earnings, Australia* (Catalogue No 6302.0, 31 August 2020) <https://www.abs.gov.au/statistics/labour/earnings-and-work-hours/average-weekly-earnings-australia/latest-release>.
[23] Explanatory Statement, Parenting Payment Instrument 2018 (No. 1) (n 2); *Senate Inquiry into ParentsNext* (n 18) 58.
[24] *Senate Inquiry into ParentsNext* (n 17) 4.
[25] Ibid; *Explainer: ParentsNext* (n 5).
[26] *Senate Inquiry into ParentsNext* (n 17) 5.
[27] Australian Human Rights Commission (n 13) 6.
[28] 'AusTender: Contract Notice View - CN3512364', *Australian Government* (Web Page, 31 August 2020) <https://www.tenders.gov.au/Cn/Show/?Id=74e570d7-e5bf-0aa4-7de4-843b1104330f>.
[29] Good Shepherd Australia New Zealand, Submission No 15 to Senate Community Affairs and References Committee, *Inquiry into ParentsNext, including its trial and subsequent broader rollout* (February 2019) 18 ('Good Shepherd Australia New Zealand').

example, recipients face suspension of their 'Parenting Payment' for non-compliance,[30] and recipients must reconnect with providers to have their 'Parenting Payment' reinstated.[31] Persistent non-compliance with participation plans or reporting requirements can result in a reduction or cancellation of a recipient's 'Parenting Payment'.[32]

The features of ParentsNext — enhanced obligations, involvement of private entities in setting and policing obligations and a regime of cutting payments if the private provider deems the obligations are not meet — manifest a pattern in Australian social policy reform over the past 30 years. Identified as having its origins in neoliberalism, a succession of reforms has made social security in Australia conditional and punitive.

III NEOLIBERALISING OF AUSTRALIAN SOCIAL SECURITY

Since the late 1980's, neoliberalism has become the driving ethos behind successive reforms to the Australian social security system.[33] The hallmarks of neoliberalism are the privatisation of public services, deregulation and the prioritisation of a 'free market economy'.[34] Through neoliberalism, social security recipients are viewed as creators of their own misfortunes,[35] identified as having 'defects of…character'[36] which have contributed to a lack of individual responsibility to engage in the labour market.[37] Neoliberalism-derived policies aim to address 'welfare dependency' through the transformation of recipients from the 'undeserving poor'[38] into entrepreneurial market competitors.[39] For the Australian social security system, this has involved increased

[30] *Senate Inquiry into ParentsNext* (n 17) 5.
[31] Australian Human Rights Commission (n 13) 9.
[32] *Senate Inquiry into ParentsNext* (n 17) 5.
[33] Carol Ey, 'Social Security Payments for the Unemployed, the Sick and those in Special Circumstances, 1942 to 2012: A Chronology' (Background Note, Parliamentary Library, Parliament of Australia, 4 December 2012) 3.
[34] Chris Cunneen, 'Surveillance, Stigma, Removal: Indigenous Child Welfare and Juvenile Justice in the Age of Neoliberalism' (2016) 19(1) *Australian Indigenous Law Review* 32, 32.
[35] Greg Marston, Sally Cowling and Shelley Bielefeld, 'Tensions and contradictions in Australian social policy reform: Compulsory Income Management and the National Disability Insurance Scheme' (2016) 51(4) *Australian Journal of Social Issues* 399, 402.
[36] Ibid.
[37] Cunneen (n 34) 33.
[38] Marston, Cowling and Bielefeld (n 35) 409.
[39] Cunneen (n 34) 33.

conditionality of payments, enhancement of compliance regimes and the privatisation of employment services.[40]

It is often recognised that the beginning of neoliberalism's influence on Australian social security was the 'Active Employment Strategy' in 1988 under the Hawke-Keating Labor Governments.[41] In order to receive unemployment benefits, recipients had to satisfy an activity test by participating in employment skills programs to improve 'job-readiness'.[42] Although the requirements of the activities test seem modest compared with more recent expectations, it introduced two central neoliberal conceptions into Australian social security. The first was conditionality, being that benefits were not a right, but conditional on workforce engagement by recipients. The second was that unemployment was the responsibility of the recipient as an individual to address.[43] The next milestone along this trajectory was the Howard Liberal Government's 'mutual obligation' reforms in 1997, which increased the intensity of the activity test,[44] introduced the 'Dole Diary' and the 'Work for the Dole' program,[45] that connected payment of benefits to attending and participating in work placements.[46]

Parallel with the increase in activities and reporting was the introduction of more targeted compliance and surveillance regimes. The 'breach regime', introduced in the late 1990s, provided a stepped penalty process that would see payments reduced and suspended for non-compliance with the increased obligations.[47] In addition, surveillance of recipients was expanded, which ranged from increases in 'tip-off' mechanisms, use of private investigators to report on recipients and the adoption of successive generations

[40] Gráinne McKeever and Tamara Walsh, 'The Moral Hazard of Conditionality: Restoring The Integrity of Social Security Law' (2020) 55(1) *Australian Journal of Social Issues* 73.
[41] Ey (n 33) 3.
[42] Philip Mendes, *Empowerment and Control in the Australian Welfare State: A Critical Analysis of Australian Social Policy since 1972* (Routledge, London) 105.
[43] Mitchell Dean, 'Governing the Unemployed Self in an Active Society'' (1995) 24(4) (4) *Economy and Society* 559.
[44] Mendes (n 42) 145.
[45] Ey (n 33) 4.
[46] Simon Schooneveldt and John Tomlinson, 'Does Receiving a Breach Penalty from Centrelink Coerce Unemployed People to Comply with the Government's Wishes?' in Ellen Carlson (ed), *The Path to Full Employment: 4th Path to Full Employment Conference and 9th National Conference on Unemployment,* (4-6 December 2002, The University of Newcastle, Australia) 179, 180.
[47] Lyndal Sleep, 'Pulling up their Breaches: an Analysis of Centrelink Breach Numbers and Formal Appeal Rates' (2002) 6(2) *Journal of Economic and Social Policy* 68.

of data-matching and data-sharing technologies.[48] The later cumulating with the now discredited 'Robodebt' program which compared Australian Taxation Office data with a recipient's social security declarations, resulting in automatic 'Show Cause' notices.[49] Like the enhanced activities and obligations requirements, these have continued notwithstanding many studies that have identified that punitive approaches are 'counterproductive' and do not 'result in the desired behavioural change' in recipients.[50] In this context, enhanced obligations enforced through punitive measures reflect neoliberalism in regarding exclusion from the workforce as due to personal faults with the recipient.[51]

This was also seen directly with the privatisation of the Commonwealth Employment Service ('CES') in 1998.[52] The CES was superseded by the Job Network, now known as 'Jobactive', comprising of private for-profit and not-for-profit organisations.[53] The privatisation of CES was justified on the belief that private companies are more efficient and cost-effective than government-run services.[54] The current 'Jobactive' system has been identified as ineffective,[55] with many critics having identified that transferring

[48] Paul Henman, 'Targeted! Population Segmentation, Electronic Surveillance and Governing the Unemployed in Australia' (2004) 19(2) *International Sociology* 173; Lyndal Sleep and Kieran Tranter, 'The Visiocracy of the Social Security Mobile App in Australia' (2017) 30(3) *International Journal for the Semiotics of Law* 495; Kieran Tranter, 'The Car as Avatar in Social Security Decisions' (2014) 27(4) *International Journal for the Semiotics of Law* 713.
[49] Paul Henman, 'The Computer Says 'DEBT': Towards a Critical Sociology of Algorithms and Algorithmic Governance' (2017) 43 *Data for Policy*; Terry Carney, 'Social Security law: Bringing Robo-Debts Before the Law: Why It's Time to Right a Legal Wrong' (2019) (58) *Law Society of NSW Journal* 68; Terry Carney, 'Robo-Debt Illegality: The Seven Veils of Failed Guarantees of the Rule of Law?' (2019) 44(1) *Alternative Law Journal* 4.
[50] Australian Human Rights Commission (n 13) 23.
[51] Marston, Cowling and Bielefeld (n 35) 412; National Council of Single Mothers and their Children, *ParentsNext: Help or Hinderance?* (Report, June 2019) 16.
[52] Matthew Thomas, 'A Review of Developments in the Job Network' (Research Paper No 15, Parliament of Australia, 24 December 2007).
[53] David Kemp, 'New Job Network to replace the CES [Commonwealth Employment Service]' (Press Release, Minister for Employment, Education, Training and Youth Affairs, 26 February 1998).
[54] Terry Carney and Gaby Ramia, 'Welfare Support and 'Sanctions for Non-Compliance' in a Recessionary World Labour Market: Post-Neoliberalism or Not?' (2010) 2(1) *International Journal of Social Security and Workers Compensation* 29.
[55] Senate Education and Employment References Committee, Parliament of Australia, *Inquiry into the appropriateness and effectiveness of the objectives, design, implementation and evaluation of Jobactive* (Report, February 2019) 116.

responsibility to profit-driven private providers weakens government accountability and transparency and exposes recipients to the exercise of unfettered discretion.[56]

These changes are predominately applied to recipients of unemployment payments,[57] however, the Howard Liberal Government's 2006 'Welfare to Work' policy widened the focus to include individuals in receipt of 'Parenting Payment'.[58] The effect of this change was to compel recipients into the unemployment payment stream without any specific sense of the recipients' support, care responsibilities or capacity to engage in the labour market. 'Welfare to Work' has been criticised as having a significant negative impact on the health and life opportunities of vulnerable women and children.[59] Further, the 'Robodebt' program showed that the intensive surveillance and compliance checking applied to recipients on all types of payments, including the Aged Pension and Disability Support Pension.

A final example of the extent of neoliberalism's influence on Australian social security are the income management programs first introduced in 2007.[60] The emerged 'BasicsCard' system is highly paternalistic and, emanating from an assumption that recipients are unable to be self-sufficient and responsible, it provides hard limits on the type of retailers and goods that payments can be spent on.[61] The effect of the 'BasicsCard' has been significant, especially on First Nations peoples and communities where it was first trialled and experienced as another tool of the settler state to survey, discipline, and displace First Nations people.[62]

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[56] Sarah Parker Harris et al, 'Human Rights and Neoliberalism in Australian Welfare to Work Policy: Experiences and Perceptions of People with Disabilities and Disability Stakeholders' (2014) 34(4) *Disability Studies Quarterly* <https://dsq-sds.org/article/view/3992>; Carney and Ramia (n 54) 41.
[57] Marston, Cowling and Bielefeld (n 35) 412.
[58] Sarah Parker Harris et al, 'Human Rights and Neoliberalism in Australian Welfare to Work Policy: Experiences and Perceptions of People with Disabilities and Disability Stakeholders' (2014) 34(4) *Disability Studies Quarterly* <https://dsq-sds.org/article/view/3992>; Ey (n 33) 4.
[59] Teresa Grahame and Greg Marston, 'Welfare-To-Work Policies and the Experience of Employed Single Mothers on Income Support in Australia: Where are the Benefits?' (2012) 65(1) *Australian Social Work* 73; Kay Cook et al, 'The Quality of Life of Single Mothers Making the Transition from Welfare To Work' (2009) 49(6-7) *Women and Health* 475.
[60] Luke Buckmaster, Carol Ey and Michael Klapdor, 'Income Management: An Overview' (Background Note, Parliamentary Library, Parliament of Australia, 21 June 2012) 10; Mike Dee, 'Welfare Surveillance, Income Management and New Paternalism in Australia' (2013) 11(3) *Surveillance & Society* 272, 279.
[61] Mike Dee, 'Welfare Surveillance, Income Management and New Paternalism in Australia' (2013) 11(3) *Surveillance & Society* 272, 277.
[62] Cameo Dalley, 'The "White Card" is Grey: Surveiliance, Endurance and the Cashless Debit Card' (2020) 55(1) *Australian Journal of Social Issues* 51; Eve Vincent, Francis Markham and Elise Klein, '"Moved on"?

In short, the social security agenda in Australia has been influenced by neoliberalist values and principles for several decades, evident through increased conditionality compliance and surveillance mechanisms and the privatisation of services.[63] What has emerged is a social security regime where support from the State is conditional, subject to complex requirements that are enforced through intense surveillance and compliance apparatuses. It is a regime that is focused on ideological messaging about the normality of economic engagement and employment to address 'dependency.' However, in doing so, what is projected is that the recipient is responsible for their predicament and needs disciplining and correction through forced activities — set and policed by private providers — to become better competitors in the job market.[64] Further, these changes have not been siloed within the unemployment area but influenced how programs are designed and implemented on other recipient groups. ParentsNext continues along this trajectory; women with young children are 'next'.

IV NEOLIBERALISM IN PARENTSNEXT

The very inclusion of 'next' in the policy title 'ParentsNext' is revealing. The 'next' suggests transformation and change. In the COVID-19 pandemic, the question asked was 'what is next?'. 'Next generation' technologies promise improvements over existing ones. There is a strong Darwinian suggestion tied up in the concept of 'next' and 'next generations' of success through better adaptability to the environment. Indeed, tropes associated with social Darwinism, such as competition and survival, infuse neoliberalist discourses. Ultimately, the inclusion of 'next' in ParentsNext does not hide its agenda. It directly invokes the perspective that recipient parents need to change … need to become next. In doing so, its neoliberalist orientation is strongly hinted. However, its neoliberal features, that is, the use of private providers, the TCF and inadequate consideration of the barriers to participation, is harmful to these women.

An Exploratory Study of the Cashless Debit Card and Indigenous Mobility' (2020) 55(1) *Australian Journal of Social Issues* 27.

[63] David R Taylor, Matthew Gray and David Stanton, 'New Conditionality in Australian Social Security Policy' (2016) 51(1) *Australian Journal of Social Issues* 3.

[64] Terry Carney, 'Neoliberal welfare reform and 'rights' compliance under Australian social security law' (2006) 12(1) *Australian Journal of Human Rights* 223, 229.

A *Use of Private Service Providers*

Central to ParentsNext has been the preference for private providers for program delivery. Experience with the 'Jobactive' network has shown that the incorporation of private providers into the administration of social security provides opportunities for misconduct and diminishes government accountability and transparency.[65] The Senate inquiry has reported instances of 'concerning and inappropriate behaviour'[66] by providers.

First, there are concerns in how providers are developing participation plans.[67] Once selected, recipients must enter into a participation plan after discussing their goals and selecting their approved activities with their ParentsNext provider.[68] The official website discusses this process as participatory between recipient and provider, with language like 'choose' and 'agree' suggesting that recipients are proactive agents in the planning process.[69] Further, recipients have ten days to consider whether they wish to agree to the proposed participation plan.[70] There are documented circumstances where providers had not given recipients their ten-day consideration period and rather placed them under considerable pressure to sign the plan immediately.[71] The Senate inquiry noted that participants are aware of the provider's power to affect their 'Parenting Payment' by reporting non-compliance to the administering department, Services Australia, and that this knowledge creates pressure to agree to participation plans.[72]

Second, there is evidence that the activities providers have included in plans are often irrelevant and failed to consider a recipient's circumstances or goals.[73] In the context of

[65] Carney and Ramia (n 54) 29.
[66] *Senate Inquiry into ParentsNext* (n 17) 64.
[67] Ibid.
[68] Department of Jobs and Small Business, Submission No 67 to Senate Community Affairs and References Committee, *Inquiry into ParentsNext, Including its Trial and Subsequent Broader Rollout* (2019) 6 ('Department of Jobs and Small Business').
[69] Department of Education, Skills and Employment, *ParentsNext* (Web Page 10 September 2020) <https://www.employment.gov.au/parentsnext>.
[70] Department of Jobs and Small Business (n 68) 6.
[71] National Council of Single Mothers and their Children and Council of Single Mothers and their Children, *ParentsNext Survey* (Submission No 20, 1 February 2019) 6 ('NCSMC/CSMC *ParentsNext Survey*').
[72] *Senate Inquiry into ParentsNext* (n 17) 65.
[73] Ibid 65-66; Rebecca Williamson, 'Turning local libraries, pools and playgroups into sites of surveillance – ParentsNext goes too far', *The Conversation* (online, 18 June 2019) <https://theconversation.com/turning-local-libraries-pools-and-playgroups-into-sites-of-surveillance-parentsnext-goes-too-far-117978>.

the 'Jobactive' network, recipients interviewed by O'Halloran, Farnworth and Thomacos said:

> When asked about the services that were provided, participants' responses typically ranged from laughter to anger. Every group specifically identified and discussed the predominance of a focus on compliance, which was to the detriment of a focus on employment. Several participants said that pointless appointments not only did not assist them to find a job but that they were specifically designed to trip them up in order to lose benefit.[74]

Many of the 'Jobactive' providers were successful in winning ParentsNext tenders. A particular concern has been imposing activities related to parenting, requiring recipients to attend playgroups, library sessions or swimming lessons with their children.[75] A survey found that 78% of ParentsNext recipients 'agree that ParentsNext has not introduced their child to new activities as they were already attending or planned to attend' that activity.[76] Compelling recipients to engage in parenting activities seems inconsistent with the stated purpose of achieving education and employment goals 'for the parent'.[77] Rather, the providers seem to be rolling out ParentsNext as a form of 'policing of [recipients'] parenting practices'.[78]

Third, there are reported instances of providers acting illegally, especially when dealing with recipients' personal information under the *Privacy Act 1988* (Cth) ('the *Act*').[79] Upon entering into a participation plan with a provider, recipients may, but are not required to, sign a privacy waiver, giving consent to providers to collect and disclose personal information to external parties.[80] However, there are reports that recipients are not being made aware of their rights under the *Act* to not agree to the waiver, with some providers telling recipients that the waiver is mandatory.[81] The power to disclose personal

[74] David O'Halloran, Louise Farnworth and Nikos Thomacos, 'Australian Employment Services: Help or Hindrance in the Achievement of Mutual Obligation?' (2019) *Australian Journal of Social Issues* 492, 499.
[75] Rebecca Williamson, 'Turning local libraries, pools and playgroups into sites of surveillance – ParentsNext goes too far', *The Conversation* (online, 18 June 2019) <https://theconversation.com/turning-local-libraries-pools-and-playgroups-into-sites-of-surveillance-parentsnext-goes-too-far-117978>.
[76] NCSMC/CSMC *ParentsNext Survey* (n 71) 10.
[77] Explanatory Statement, Parenting Payment Instrument 2018 (No. 1) (n 2).
[78] Williamson (n 73).
[79] *Senate Inquiry into ParentsNext* (n 17) 67.
[80] Department of Jobs and Small Business (n 68) 8; *Senate Inquiry into ParentsNext* (n 17) 67.
[81] *Senate Inquiry into ParentsNext* (n 17) 67; NCSMC/CSMC *ParentsNext Survey* (n 71) 16; Good Shepherd Australia New Zealand (n 29) 30.

information without informed consent raises serious privacy and safety concerns, particularly for victims of family and domestic violence.[82]

Fourth, there is considerable discretion in how providers respond to a suggestion that a participation plan obligation has not been meet.[83] There is no guidance on how a provider should respond to alleged noncompliance and whether a recipient has a justifiable excuse. This creates the circumstance where recipients in similar situations could be treated differently depending on the predictions of their specific provider. This is significant as the provider has the authority to issue demerit points for non-compliance.[84] Providers register demerit points directly into Services Australia's IT system. Once in the system, the accumulation of demerit points can lead to a reduction or cancellation of a recipient's 'Parenting Payment'.[85] Further, Services Australia has gone on the record to claim that 'it has no power to change or remove demerits'.[86] Recipients do not have a formal review process around the issuing of demerits, and complaints to Services Australia about a demerit are redirected to the provider.[87] This lack of oversight of the demerits system is reflective of the limited avenues for recipients to lodge complaints over provider conduct generally. Recipients are encouraged to address concerns directly with their provider and, failing that, recipients can lodge a complaint through the Department of Education, Skills and Employment.[88] However, the Senate inquiry identified issues with this review process due to the significant power imbalance in the provider-recipient relationship and accepted that recipients often failed to report misconduct to the Department, fearing reprisals from their provider.[89]

Finally, the ParentsNext program also provides financial incentives for provider misconduct. There seems little to prevent providers from 'double dipping' into the $350 million ParentsNext budget by making recipients complete courses run by that

[82] *Senate Inquiry into ParentsNext* (n 17) 67; Good Shepherd Australia New Zealand (n 29) 30.
[83] Australian Human Rights Commission (n 13) 28.
[84] Ibid.
[85] *Senate Inquiry into ParentsNext* (n 17) 6.
[86] 'Demerits and penalties for not meeting mutual obligation requirements', *Services Australia* (Web Page, 2 April 2020) <https://www.servicesaustralia.gov.au/individuals/topics/demerits-and-penalties-not-meeting-mutual-obligation-requirements/44416>; Australian Human Rights Commission (n 13) 28.
[87] Australian Human Rights Commission (n 13) 28.
[88] Department of Education, Skills and Employment, *ParentsNext Complaints, Compliments and Suggestions* (Web Page, 17 June 2020) <https://www.employment.gov.au/complaints-compliments-and-suggestions-0>.
[89] *Senate Inquiry into ParentsNext* (n 17) 69.

provider,[90] regardless of whether it aligns with a recipient's goals.[91] Providers also receive $600 per recipient they retain every six months.[92] This creates an incentive to keep recipients in a limbo of activities, rather than supporting them to transition to the paid workforce.

In summary, the role of private providers in ParentsNext seems very similar to the experiences with the 'Jobactive' network.[93] The inclusion of private providers means there is little accountability for decisions made in the daily operation of ParentsNext. It creates a highly asymmetrical relationship where providers can dictate recipients and recipients are forced to comply through fear of losing payment. There is evidence that within a program ostensibly about increasing a recipient's employability, recipients are being made to do token parenting activities. The inclusion of private providers in ParentsNext has little to do about benefiting recipients. It creates an opaque zone where recipients can be intimidated, bullied and have their payments stopped, and where public funds that could support women with young children is redirected to the private sector. This 'reality' of ParentsNext as something that punishes is particularly emphasised in the use of the TCF.

B *The Targeted Compliance Framework*

The TCF sanctions regime was incorporated into the ParentsNext program when it was rolled out nationally.[94] The TCF automatically suspends a recipient's 'Parenting Payment' in specific circumstances: first, if a recipient fails to self-report an attendance online; second, if a provider reports a failure to attend a provider appointment or approved

[90] Graham Matthews, 'Single mother takes action against 'mission impossible'', *Green Left Weekly* (Web Page, 16 April 2019) 8 <https://search.informit.com.au/fullText;dn=334784299412666;res=IELHSS>.
[91] Luke Henriques-Gomes, 'ParentsNext: Providers claim extra funds by signing parents up to their own courses', The Guardian (Web Page, 5 August 2019) <https://www.theguardian.com/australia-news/2019/aug/05/parentsnext-providers-claim-extra-funds-by-signing-parents-up-to-their-own-courses?fbclid=IwAR0tOq4qoaiMqzk2Xegyfi2v-xmPoROIoQ7psRW7H_bILGsAPw3X-kzpdeE>.
[92] Ibid.
[93] Sarah Parker Harris et al, 'Human Rights and Neoliberalism in Australian Welfare to Work Policy: Experiences and Perceptions of People with Disabilities and Disability Stakeholders' (2014) 34(4) *Disability Studies Quarterly* <https://dsq-sds.org/article/view/3992>; Carney and Ramia (n 54) 41.
[94] Department of Jobs and Small Business (n 68) 11.

activities;[95] and third, the TCF records provider demerits and converts demerits into payment suspension when thresholds are reached.[96]

Like Robodebt, the TCF is a blunt tool,[97] it makes an automated decision to suspend payments based solely on limited data.[98] There is no second checking of the data that is provided and there is no consideration that recipients might have access and technical difficulties meeting self-reporting requirements.[99] The detrimental impact that the TCF has on recipients is significant. The average duration of a payment suspension is two days.[100] This can cause an 'immediate crisis'[101] for recipients who rely on the timely delivery of payments.[102] This places vulnerable recipients under significant distress and increases the risk of exposing recipients and their children to homelessness.[103] Forming a 'Sword of Damocles' over recipients, the TCF is a 'flawed motivational tool'[104] and is counterintuitive to increasing participation.[105] Providers have also recognised that the punitive, policing nature of the TCF has had a detrimental impact on establishing 'a positive relationship'[106] with recipients, reducing the effectiveness of alleged aims of the ParentsNext program.

In response to criticism of the TCF in the pilot ParentsNext scheme, the national rollout saw the frequency of reporting requirements reduced.[107] Despite studies attesting to the ineffectiveness of the TCF,[108] it remains.[109] In the TCF, neoliberalism is laid bare. Just

[95] *Senate Inquiry into ParentsNext* (n 17) 55.
[96] Ibid 6.
[97] Lisa Fowkes, 'The Application of Income Support Obligations and Penalties to Remote Indigenous Australians, 2013–2018' (Centre for Aboriginal Economic Policy Research, Australian National University, 2019), 18-19.
[98] Terry Carney, 'Automation in Social Security: Implications for Merits Review?' (2020) 55(3) *Australian Journal of Social Issues* 260, 264.
[99] Mission Australia, Submission No 60 to Senate Community Affairs and References Committee, *Inquiry into ParentsNext, Including its Trial and Subsequent Broader Rollout* (2019) 15 ('Mission Australia').
[100] Ibid 13.
[101] David Tennant and Kelly Bowey, 'The impact of social security reforms on single mothers and their children' (Conference Paper, Australian Social Policy Conference, September 2019) 5.
[102] *Senate Inquiry into ParentsNext* (n 17) 56.
[103] Tennant and Bowey (n 101); Mission Australia (n 99) 14. This could be argued as a breach of Australia's commitment to the *Convention on the Rights of the Child.* Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) Article 26.
[104] Mission Australia (n 99) 14.
[105] Australian Human Rights Commission (n 13) 23.
[106] *Senate Inquiry into ParentsNext* (n 17) 54.
[107] Parliament of Australia, Australian Government response to the Senate Community Affairs References Committee report: ParentsNext, including its trial and subsequent broader rollout (1 August 2019) 4 ('*Australian Government response to the Senate*').
[108] Mission Australia (n 99) 23.
[109] *Australian Government response to the Senate* (n 108) 7.

below the rhetoric of helping and participation is coercion and punishment. The only participation that seems to matter is feeding data into an inflexible, automatic system to maintain payments.[110] The connection between the stated policy goals of supporting parents into the workforce seems to be inverted. Rather, it is about scaring and excluding parents with young children, 96% who are women, out of the social security system. In a context where there is increased awareness of homelessness for women with young children[111] and the need for reliable independent income for women and children to be safe from family and domestic violence,[112] the TCF compounds disadvantage by heightening vulnerability.

C *Inadequate in Addressing Structural Barriers*

In essence, ParentsNext focuses on ensuring recipients are subject to the whims of providers and the data-producing requirements of the TCF within an overarching context of reinforced insecurity.[113] Absent in ParentsNext is the addressing of the structural barriers that recipients have in accessing employment.[114] The main barrier to employment for ParentsNext recipients is caring responsibilities for young children,[115] as recipients face significant difficulties in accessing affordable childcare.[116] Whilst providers can offer some assistance with childcare fees, this assistance is limited to interim, emergency situations and is not provided on a long-term basis.[117] Requiring recipients to comply with ParentsNext requirements without affording flexibility around

[110] Marston, Cowling and Bielefeld (n 36) 412; National Council of Single Mothers and their Children, *ParentsNext: Help or Hinderance?* (Report, June 2019) 16.
[111] Wayne Warburton, Elizabeth Whittaker and Marina Papic 'Homelessness Pathways for Australian Single Mothers and Their Children: An Exploratory Study' (2018) 8(1) *Societies* 16.
[112] Silke Meyer, 'Examining Women's Agency in Managing Intimate Partner Violence and the Related Risk of Homelessness: The Role of Harm Minimisation' (2016) 11(1-2) *Global Public Health* 198; Hannah Gissane and Andrew Merrindahl, 'Homelessness Policy with Women at the Centre: Surveying the Connections Between Housing, Gender, Violence and Money' (2017) 30(6) *Parity* 14; Helena Menih and Catrina Smith, 'Homelessness A Consequence of Abuse of Women in Brisbane, Australia' in K Jaishankar (ed), *Interpersonal Criminology: Revisiting Interpersonal Crimes Victimization* (CRC Press, 2017); Natasha Cortis and Jane Bullen, *Domestic Violence and Women's Economic Security: Building Australia's Capacity for Prevention and Redress* (Australia's National Research Organisation for Women's Safety 2016).
[113] *Senate Inquiry into ParentsNext* (n 18) 44.
[114] Ibid.
[115] Ibid 45; Good Shepherd Australia New Zealand (n 29) 9.
[116] *Senate Inquiry into ParentsNext* (n 17) 45; Centre for Excellence in Child and Family Welfare (n 15) 7.
[117] Mission Australia (n 99) 8.

caring responsibilities is ludicrous if the stated ideas behind the program were genuine.[118]

Recipients surviving family or domestic violence will qualify for an exemption from ParentsNext, granted by Services Australia,[119] however, Services Australia has a problematic legacy in relation to family and domestic violence survivors.[120] There is evidence of Services Australia referring recipients who have disclosed family and domestic violence survivors to ParentsNext providers[121] where they have then been required to seek an exemption from providers,[122] although there is no assurance mechanism that ensures that provider caseworkers have training and experience in recognising at-risk recipients.[123] Even if a survivor is granted an exemption, it is only for 16 weeks.[124]

Further, compelling recipients to attend community-run programs has resulted in the community sector struggling to meet demand.[125] The funding for ParentsNext goes to the providers to tell participants what to do, not to organisations providing employment enhancement opportunities for parents with young children. Recipients in regional communities — which, given the geographical targets of the program, comprise a significant bulk of the ParentsNext cohort — have limited access to community-run services.[126] With many community programs full, recipients are required to travel further to attend the next available service, which adds further time and financial constraints. This has particularly problematic implications for First Nations people in accessing culturally appropriate services, especially in remote areas.[127]

However, these concerns are exactly what neoliberal social security generates. The focus is on the recipient and their personal failings, rather than the structures that form the

[118] Mission Australia (n 99) 8.
[119] *Senate Inquiry into ParentsNext* (n 17) 5.
[120] Lyndal Sleep, 'Domestic Violence, Social Security and the Couple Rule' (Australian National Research Organisation for Womens Safety (ANROWS), 2019); Lyndal Sleep, 'Entrapment and Institutional Collusion: Domestic Violence Police Reports and The 'Couple Rule' in Social Security Law' (2019) 44(1) *Alternative Law Journal* 17.
[121] *Senate Inquiry into ParentsNext* (n 17) 8.
[122] Australian Government, ParentsNext: Exemptions and Suspensions Guideline (Guideline, 12 February 2020) 13 ('ParentsNext: Exemptions and Suspensions Guideline').
[123] *Senate Inquiry into ParentsNext* (n 17) 62.
[124] ParentsNext: Exemptions and Suspensions Guideline (n 122).
[125] Mission Australia (n 99) 8.
[126] Ibid.
[127] Ibid 7; Good Shepherd Australia New Zealand (n 29) 4.

horizon of opportunities for the recipient. Rather than helping parents with their caring responsibilities and providing positive support to increase their economic engagement, ParentsNext just adds to the vulnerability and risks of harm to the women and their children.

V IDEOLOGY AND GHOSTS

In conclusion, ParentsNext is ideological. It is disconnected from the social and economic realities of vulnerable women with children in Australia, and it is only furthering that vulnerability. If it was designed to help, particularly through a co-design or participatory welfare perspective, it would be very different. There would be no TCF and none of the documented power-plays, insecurity and chances of homelessness that it generates.[128] It should be voluntary, allowing recipients to opt-in.[129] There should be clear recognition that providers are affecting the recipient's rights under the *Social Security Act 1991* (Cth) and that decisions by providers should be reviewable through merits review.[130] Recipients should also be afforded further assistance with associated costs such as childcare and transport. If redesigned in consultation with recipients, community stakeholders and First Nations communities,[131] ParentsNext could be a valuable form of support to assist recipients to improve their long-term financial security.[132]

However, as ParentsNext currently stands, it is not. It manifests as if vulnerable women with children are a problem that requires correction through bullying by unaccountable providers, backed up with threats and the taking away of money. In this, there is a misogynist ghost haunting the ParentsNext machine; the pejorative, racist and harmful imagery sourced in neoliberalist discourses from the United States of the 'Welfare Queen'.[133] Only through seeing ParentsNext through this, does its structure and operation

[128] *Senate Inquiry into ParentsNext* (n 17) 78.
[129] Australian Human Rights Commission (n 13) 4.
[130] Ibid 29.
[131] Ibid 5; On co-design in social policy see Emma Blomkamp, 'The Promise of Co-Design for Public Policy' (2018) 77(4) *Australian Journal of Public Administration* 729-743.
[132] National Council of Single Mothers and their Children, *ParentsNext: Help or Hinderance?* (Report, June 2019) 16.
[133] Ange-Marie Hancock, *The Politics of Disgust: The Public Identity of the Welfare Queen* (New York University Press, 2004); Shawn A Cassiman, 'Resisting the Neo-Liberal Poverty Discourse: On Constructing Deadbeat Dads and Welfare Queens' (2008) 2(5) *Sociology Compass* 1690; Michele Estrin Gilman, 'The Return of the Welfare Queen' (2013) 22(2) *American University Journal of Gender, Social Policy and the Law* 247.

make sense. ParentsNext treats vulnerable women as if they are not worthy of respect and support.[134] It projects that to be female, economically vulnerable and responsible for children, is a problem. No real good and no real change could ever come from a policy that has this at its very core. ParentsNext should be ParentsYes. It should leave behind the perverse neoliberal fantasies from last century and the nonsense that shifting public funds to private entities somehow benefits recipients. ParentsYes should be an empowering and community informed program, co-designed with the participation of recipients that lifts vulnerable women and children through affirmation and the proactive addressing of structural barriers; not punishment, but support. Rather than the spectre of the 'Welfare Queen', there should be an absolute recognition that through supporting and empowering women, there can be a better future for the next generation.

[134] Kate Galloway 'Family First' Rhetoric Neglects Single Mothers' (2019) 29(4) *Eureka Street* 44.

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TRANSFORMATIVE CAPACITY BUILDING AROUND A RIGHT TO A HEALTHY ENVIRONMENT: WHAT ROLE FOR 'DIGNITY' AS A HUMAN RIGHTS VALUE?

DR ELAINE WEBSTER AND PROFESSOR ELISA MORGERA*

For decades, scholars have explored the potential merits and risks of a formal, self-standing human right to a healthy environment. While some have advocated this right in a way that may be perceived as too 'thin' to connect to local experiences, others have critiqued it in a way that may be perceived as too disconnected from the benefits of human rights processes. This article discusses ongoing experiences in Scotland, where a new national human rights framework is being developed. Drawing on this experience, we highlight methods of capacity building as a different channel for thinking about the potential merits of new articulations of a right to a healthy environment, and for developing understandings of this right's substance applied to specific contexts. Specifically, we reflect on the potential role of the foundational human rights value of respect for dignity as an anchor in capacity building around the right to a healthy environment. We explore an idea of capacity building which facilitates local-level ownership over international human rights law and underpinning values and is focused on implementation. We suggest that this kind of ethos as part of mutual learning and alliance building should be further explored as a means of creating lasting, positive engagement with a rights-based perspective on environmental protection.

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CONTENTS

I INTRODUCTION

For decades, scholars have explored the potential merits and risks of a formal, self-standing human right to a healthy ('safe'/'clean'/'sound'/'sustainable')[1] environment.[2] Also for decades, the relationship between environmental protection and human rights has evolved through the push and pull of international policy developments.[3] Following decades of international case law on the inter-dependence of human rights and the environment, the former UN Special Rapporteur on Human Rights and the Environment described an international human right to a healthy environment as 'an idea whose time has come'.[4] In parallel, environmental science has increased our knowledge of the current

[1] See the title of the mandate of the UN Special Rapporteur on Human Rights and the Environment at United Nations Human Rights Office of the High Commissioner, *Special Rapporteur on human rights and the environment* (Web Page) <https://www.ohchr.org/en/Issues/environment/SRenvironment/Pages/SRenvironmentIndex.aspx>. In this paper, we use the term 'healthy environment'.

[2] There is a significant body of literature on different aspects of the relationship between human rights and the environment. For examples of recent discussions, see John H Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (Cambridge University Press, 2018), and, for a range of critical perspectives, see Anna Grear and Louis J Kotzé (eds), *Research Handbook on Human Rights and the Environment* (Edward Elgar Publishing, 2015).

[3] John H Knox, 'Human rights, environmental protection, and the sustainable development goals' (2015) 24(3) *Washington International Law Journal* 517 at 519. For a detailed overview, see Ben Boar, 'Environmental principles and the right to a quality environment' in *Elgar Encyclopaedia of Environmental Law* (Edward Elgar Publishing, 2018), Chapter VI.4.

[4] United Nations Human Rights Council, *Report of the Special Rapporteur on the issue of human*

damage and future impacts of environmental degradation. For example, the 2019 *Global Assessment Report on Biodiversity and Ecosystem Services* observes an: '[…] increasingly shared understanding that the human imprint at a global scale has made our social worlds intertwined with the larger Earth biophysical systems and fabric of life.'[5] Environmental science has now been brought even closer to everyday lives as the links between the environment and the health of all forms of life has become more widely discussed and understood in relation to the COVID-19 pandemic.[6]

Against this backdrop, we have aimed to draw insights from different strands of academic scholarship and environmental science while contributing to practical policy development in the field of human rights and environmental protection in our local context in Scotland. While practice-informed policy development has its own drivers and rhythms, a shared aim has been to understand optimal mechanisms for effective and long-lasting progress. In this article, we reflect on how this shared aim has guided one aspect of our current policy work and how it has prompted us to explore the contribution of *capacity building processes* in navigating a range of critical opportunities and concerns from both scholarly and practice-informed perspectives on environmental protection.

In Scotland, the devolved Government established a National Taskforce on Human Rights Leadership (hereafter 'the Taskforce') in 2019 to support the development of new Scottish Parliament legislation to enhance the legal human rights framework. As a part of this process, we have been mandated to consider both the place of environmental protection within the framework and the place of the foundational human rights idea of

rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, UN Doc A/HRC/37/59 (24 January 2018) para. 20. See also *Draft Global Pact for the Environment* ('Every person has the right to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment') at Global Pact for the Environment International Group of Experts for the Pact, *Draft Global Pact for the Environment*, 24 June 2017, Article 1, <https://globalpactenvironment.org/uploads/EN.pdf>. See also United Nations Human Rights Council, *Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc A/73/188 (19 July 2018) para. 39.

[5] Eduardo S Brondizio et al (eds), *Global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (IPBES secretariat: Bonn, 2019) at 6.

[6] Elisa Morgera and Alan Miller, 'COVID-19, Environmental Protection & Human Rights Leadership', *Strathclyde Law School Blog* (Blog Post, 28 May 2020) <https://www.strath.ac.uk/humanities/lawschool/blog/covid-19environmentalprotectionhumanrightsleadership/>.

'human dignity' as the framework's underpinning value. We have done so in our roles as members of an Advisory Group on Human Rights Leadership established in 2018 by First Minister Nicola Sturgeon MSP (Member of the Scottish Parliament and leader of the Scottish Government), the Taskforce (Morgera), and the Academic Advisory Panel to the Taskforce (Webster).[7] A key ambition within the Scottish process is transformative capacity building in support of long-term implementation. In this context, and for the present argument, 'transformative' conveys a form of capacity building that can enable duty bearers to arrive at effective outcomes within a human rights culture. It is capacity building that benefits rights holders because it aims to radically shift from a reactive implementation culture to one in which duty bearers are supported to 'get it right first time'.[8] 'Transformation' is an idea that reflects broader international trends; recently, in the environmental governance context, transformation has been described as 'a fundamental, system-wide change', including re-examination of 'paradigms, goals or values' that can overcome entrenched barriers such as unequal relationships of power, short-term decision making approaches, and lack of policy coherence.[9] This focus on capacity building has been intertwined with our reflections on the most effective shape and substance of both a human right to a healthy environment and the underpinning value of human dignity. This led us to explore how considering approaches to building capacity amongst practitioners could inform the development of the content—not only procedural but also substantive content—of a right to a healthy environment and whether the underpinning idea of human dignity could play a role therein.

We first provide contextual information on the situation in Scotland and the development of discussions around a right to a healthy environment. These discussions have engaged with a range of substantive issues of special policy concern in Scotland, including land reform and health inequalities.[10] We then explore the potential contribution of the idea

[7] Scottish Government, *National Taskforce for Human Rights Leadership* (Web Page) <https://www.gov.scot/groups/national-taskforce-for-human-rights-leadership/>.
[8] Scottish Government, *National Taskforce for Human Rights: Leadership Report* (Report, March 2021) 45 <https://www.gov.scot/publications/national-taskforce-human-rights-leadership-report/documents/>.
[9] *Initial scoping report for Deliverable 1 (c): A thematic assessment of the underlying causes of biodiversity loss and the determinants of transformative change and options for achieving the 2050 Vision for Biodiversity* (Scoping Report, 2020) <https://ipbes.net/sites/default/files/Initial_scoping_transformative_change_assessment_EN.pdf>.
[10] Regarding land reform, Scotland has a particularly high concentration of private land ownership: Rachel Warren et al, 'Attitudes to Land Reform' (Research Paper, Scottish Government, March 2021) 7-8, <https://www.gov.scot/binaries/content/documents/govscot/publications/research-and-

of dignity within capacity building around a right to a healthy environment, articulating opportunities and challenges. We suggest that the idea of dignity, as the core of the value base underpinning international human rights law, could potentially act as an anchor for engagement with the human rights framework, including a right to a healthy environment. We suggest that integrating 'dignity' language in capacity building could support a sense of internationally informed and locally embedded ownership over the proposed right (and legislation as a whole). We pose the question: to what extent can national-level recognition of the right be filled with content by enabling practitioners to engage with international legal materials on the substance of the right, and to further develop its substance within the local context on the basis of experientially known and identifiable understandings of 'dignity'? We use the term 'practitioners' to encompass civil society actors and policy makers working within the environmental governance sector or working across sectors (such as local government bodies as human rights duty-bearers) and concerned with implementation. We suggest that a 'dignity' based approach to reflexive, mutual learning and alliance building has potential to facilitate stakeholder access to, and engagement with, the substantive scope of the right as part of a broader human rights picture, across multi-faceted and interconnected contexts of practice. We conclude that this ethos of capacity building is a useful channel for understanding processes of developing local understandings of human rights law and should be further explored as a means of creating lasting, positive engagement with a rights-based perspective on environmental protection.

II A RIGHT TO A HEALTHY ENVIRONMENT AND HUMAN RIGHTS LEADERSHIP IN SCOTLAND

Although Scotland's autonomy is constrained in some policy areas due to its status as a sub-state nation within the United Kingdom, its autonomy to give effect to existing international law commitments is not *in general* constrained.[11] The current process of

analysis/2021/03/attitudes-land-reform/documents/attitudes-land-reform/attitudes-land-reform/govscot%3Adocument/attitudes-land-reform.pdf>; and regarding health inequalities, Scotland has a lower average life expectancy than other UK nations and other Western European countries: Scottish Government, *Health Improvement* (Web Page) <https://www.gov.scot/policies/health-improvement/>. See penultimate section below for an overview of discussions on environmental issues of concern within the National Taskforce process.

[11] *Scotland Act 1998* (UK), Schedule 5(2)(a) explicitly states that 'observing and implementing international obligations' is not reserved to the United Kingdom Government/Parliament. See also First

human rights renewal in Scotland is Government-mandated and the Taskforce itself is co-chaired by a Scottish Government Minister.[12] It is one example of a progressive approach to human rights policy that has come from the Scottish Government and Parliament.[13] In practice, gaps exist in the effective implementation of human rights laws across a whole range of areas of peoples' lives.[14]

Scottish policy on environmental protection has been progressive in several ways—for example, as seen in early climate change legislation (2009) and ambitious targets in newer legislation[15]—but there is undoubtedly much progress that still needs to be made in relative international terms. Scotland lags behind the 100 plus countries which already have a domestic constitutional law provision on protection of the environment.[16] There is no equivalent home for such a provision given that the United Kingdom has no codified constitution. Furthermore, the United Kingdom has opposed internationally the recognition of a substantive human right to a healthy environment.[17] Currently, the closest to a Bill of Rights in the United Kingdom, including Scotland, is domestic legislation (the Human Rights Act 1998) which gives further effect to rights within the European Convention on Human Rights. On international environmental regulation, the United Kingdom has been described as 'an active supporter'[18]; on the international legal

Minister's Advisory Group on Human Rights Leadership, *Recommendations for a new human rights framework to improve people's lives: Report to the First Minister* (Final Report, December 2018) 22 <https://humanrightsleadership.scot>.

[12] *National Taskforce for Human Rights Leadership* (n 7).

[13] A progressive approach is also evidenced in the Scottish Government's endorsement of the UK's first national human rights action plan; Scottish Human Rights Commission, *Scotland's National Action Plan for Human Rights* (Web Page) <https://www.scottishhumanrights.com/projects-and-programmes/scotlands-national-action-plan/>.

[14] See Scottish Human Rights Commission, 'SNAP 2: Proposal for Scotland's second National Action Plan for Human Rights', *Scotland's National Action Plan for Human Rights* (PDF, September 2019) at 16-18 <http://www.snaprights.info/wp-content/uploads/2019/09/SNAP-2_Online.pdf>.

[15] *Climate Change (Scotland) Act 2009*; See also Mary Robinson, 'Climate Justice – Challenges and Opportunities' (Speech, Magnusson Lecture, Glasgow, 7 October 2011) <https://www.scottishhumanrights.com/our-law-and-policy-work/environment-and-climate/>; *Climate Change (Emissions Reduction Targets) (Scotland) Act 2019.*

[16] See United Nations Environment Programme, *What are your environmental rights?* (Web Page) <https://www.unenvironment.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what-0>.

[17] See UK declaration in the United Nations Economic Commission for Europe, *Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters*, 2161 UNTS 447 (Aarhus Convention, 25 June 1998); see also discussion in Elisa Morgera and Gracia Marin, 'Commentary to Article 37 – Environmental Protection' in Peers, Hervey, Kenner, and Ward (eds), *Commentary on the EU Charter of Fundamental Rights* (2nd ed, Oxford: Hart Publishing, 2013).

[18] Richard Macrory, 'Environmental law in the United Kingdom post Brexit' (2019) 19 *ERA Forum* 643–657, at 655.

plane, Scotland is represented by the UK Government. However, we are entering a new phase in which it is yet to be seen how the UK's implementation of international agreements will take shape since its exit from the European Union's regulatory framework.[19]

In the aftermath of the Brexit referendum in the UK, the first Minister of Scotland established an Advisory Group guided by principles of non-regression from, and keeping pace with, rights protections at European Union level, and by an ambition to demonstrate human rights leadership.[20] The aim is to enable better protection of people's rights in everyday life by giving effect to a wider range of international human rights standards within Scots law. The proposed framework will enhance the standards of the European Convention on Human Rights, which are, since the United Kingdom's exit from the European Union, the only domestically enforceable supranational human rights standards. In its final report, published in 2019, the Advisory Group proposed that social, economic, cultural and environmental rights be embedded in a new legal framework for Scotland, and be accompanied with a 'duty to comply' after an initial period of a 'due regard' duty.[21] This development would involve bringing together for the first time a range of human rights standards, including those in the International Covenant on Economic, Social and Cultural Rights, and provide an opportunity to integrate international legal developments on a human right to a healthy environment.[22]

Specifically, the Report of the First Minister's Advisory Group on Human Rights Leadership recommended that a 'right to a healthy environment' would:

> […] include the right of everyone to benefit from healthy ecosystems which sustain human well-being as well the rights of access to information, participation in decision-making and access to justice. The content of this right will be provided within a schedule in the Act with reference to international standards such as the Framework Principles on Human Rights and Environment developed by the UN Special Rapporteur on Human Rights and the Environment, and the Aarhus

[19] Ibid.
[20] First Minister's Advisory Group on Human Rights Leadership (n11) at 20-21.
[21] Ibid 33-34.
[22] Ibid 31-32.

> Convention […].[23]

Subsequently, the development of an environmental right has continued since the establishment of the National Taskforce. In addition to cross-sector participation events, the Taskforce hosted three roundtables between June 2020 and January 2021 on the right to a healthy environment in Scotland. At these events, more than fifteen organisations were represented, including umbrella organisations for Scottish environmental civil society,[24] as well as a cross-section of public authorities and bodies within and outside the environmental policy area.[25] Discussions, which involved current and former UN Special Rapporteurs,[26] included challenges and opportunities from the perspective of local experience, which could inform: procedural and substantive dimensions of the proposed new right; the international context, including UN Framework Principles on Human Rights and the Environment, and progress in recognition of a human right to a healthy environment; and potential key features of the human right to a healthy environment in the proposed framework. The roundtables also discussed case studies to assess to what extent existing practices in Scotland were already addressing the inter-relationship of human rights and the environment and to explore the potential added value of recognising a human right to a healthy environment. It also links to policy recommendations emerging from other aspects of the Taskforce process relating to economic, social and cultural rights, access to justice and remedies.

Roundtables also discussed future capacity building needs and opportunities. A great emphasis was placed by rightsholders and duty-bears on clarifying the content of the right to a healthy environment for the purpose of future planning processes in Scotland. NGOs underscored the high degree of subjectivity applied by planning bodies when

[23] Ibid 32.
[24] ERCS (Environmental Rights Centre for Scotland), *Why Scotland needs a human right to a healthy environment?* (Web Page, 2 February 2021), <https://www.ercs.scot/blog/why-scotland-needs-a-human-right-to-a-healthy-environment/ 2>. ERCS is the Environmental Rights Centre for Scotland that participated in the roundtables together with Scottish Environment LINK, representing 35 civil society members including Friends of the Earth Scotland; Keep Scotland Beautiful; Royal Society for the Protection of Birds Scotland; Scottish Wild Land Group; Scottish Wildlife Trust; Woodland Trust Scotland; WWF Scotland.
[25] Scottish Parliament; Law Society for Scotland; Environmental Standards Scotland; Commission on Children and Young People's Rights; NatureScot; Scottish Environment Protection Agency; Land Commission; Public Health Scotland; Scottish Human Rights Commission; Scottish Crofting Commission; Faculty of Advocates; Convention on Scottish Local Authorities.
[26] On Human Rights and the Environment, Professor John Knox (June 2020) and Professor David Boyd (January 2021). On Toxics, Mr Baskut Tuncak (August 2020).

interpreting the law and instances in which not only environmental protection interests were de-prioritised compared to economic development, but also climate change action (notably renewables development) was pitted against other environmental protection interests (biodiversity conservation).[27] Another opportunity identified for the capacity building programme was to discuss lessons learnt in the context of the human rights-based approach to land reform in Scotland (focused on 'responsible access' and 'communities' as means of change), on the understanding that human rights in land reform helped emphasise the broader public policy dimensions of land and focus attention on the lived experience of the negative impacts of land concentration on local economies, community development, housing provision and business opportunities.[28] In addition, capacity building was considered important to further understand the linkages between the human right to a healthy environment, non-discrimination and the human right to health[29] as part of Scotland's national public health priorities ('places and communities') and its agenda on health and equality.[30] Given Scotland's incorporation of the UN Convention on the Rights of the Child,[31] the capacity building programme was also seen as an essential opportunity to understand how these specific standards of protection could assist in raising the bar in the protection of the environment to the benefit of all, with a view to also better protecting other parts of the population that may be particularly vulnerable to environmental degradation. Finally, the need to better understand what the human right to a healthy environment would mean at the interface between the natural and built environment in Scotland, in rural as well as in urban areas, was singled out as an important area for capacity building, including in the context of Scotland's efforts to eliminate homelessness and achieve net-zero emissions.[32]

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[27] Environmental Rights Centre for Scotland*, The Case for a Substantive Right to a Healthy Environment: Prepared by the Environmental Rights Centre for Scotland for the National Taskforce for Human Rights* (Report, November 2020) < https://www.ercs.scot/wp/wp-content/uploads/2020/11/The-case-for-a-substantive-right-to-a-healthy-environment-November-2020.pdf>.
[28] Scottish Parliament Information Centre (SPICe) and Scottish Land Commission, *Case study to the Taskforce for Human Rights Leadership* (Unpublished Report, August 2020) (Copy on file with author).
[29] Public Health Scotland, *Case study to the Taskforce for Human Rights Leadership*(Unpublished Report, August 2020) (Copy on file with author).
[30] SNIFFER (Scotland and Northern Ireland Forum for Environmental Research), 'Investigating environmental justice in Scotland: links between measures of environmental quality and social deprivation' (PDF, March 2005) <http://eprints.staffs.ac.uk/1828/1/1828.pdf>.
[31] United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill 2020.
[32] Public Authorities' Reference Group meeting,15th December 2020. For an overview of meeting attendees and broad discussion points, see Scottish Government, *National Taskforce for Human Rights Leadership: Summary of Stakeholder Engagement Events* (Report, March 2021)

The need for a large-scale programme of capacity building was emphasised in the report of the National Taskforce for Human Rights Leadership published in March 2021.[33] Scotland's small population of approximately 5.4 million arguably makes this vision more achievable than in larger nations. Nevertheless, the aim is ambitious. It requires buy-in from political and policy actors, the public sector, civil society, and wider communities. This *shared responsibility* for ambitious progress is what is described in the Scottish context as 'human rights leadership'. The aim of this 'human rights leadership' approach is to develop a shared top-down *and* bottom-up approach to make human rights real in peoples' everyday lives, whilst signaling to the outside world that the international human rights framework is reaffirmed. It is anticipated that an outcome of shared leadership in Scotland will be 'sustainable progress' for rights-holders and 'manageable progress' for duty-bearers.[34] This is the broader context within which an environmental right is being developed, underpinned by a vision of long-term transformative capacity building.

III THE SUBSTANCE OF AN ENVIRONMENTAL HUMAN RIGHT: THE OPPORTUNITY PRESENTED BY A FOCUS ON 'DIGNITY'

At first glance it is perhaps difficult to see how a focus on the idea of dignity could be a helpful fit, either in the environmental context or for capacity building. There are several reasons for this, which will be discussed below. Nevertheless, we suggest that the idea of dignity could provide a starting point for promoting a sense of rightful claim over the proposed human rights legislation, including its environmental right as well as more holistically. In this way, the status of 'dignity' as a human rights value can potentially support practitioners to confidently engage with the normative scope of the proposed right. If engagement on the basis of identifiable understandings of 'dignity' can take place within a process of mutual learning to embed and develop international standards, this

<https://www.gov.scot/publications/national-taskforce-for-human-rights-leadership-summary-of-stakeholder-engagement-events/>; Scottish Parliament Environment, Climate Change and Land Reform Committee, 'Environment, Climate Change and Land Reform Committee Agenda (ECCLR/S5/21/3/M)' (PDF, 26 January 2021) at the evidence session minutes, <https://archive2021.parliament.scot/S5_Environment/Meeting%20Papers/ECCLR_2021.01.26_Meeting_papers_(public).pdf?>.

[33] *National Taskforce for Human Rights Leadership* (n 7).

[34] Alan Miller, *Time for Leadership,* Strathclyde Law School Blog (Blog Post,19 February 2020) < https://www.strath.ac.uk/humanities/lawschool/blog/timeforleadership/>.

can simultaneously build local alliances to support implementation.

A *The Value Base of Human Rights as a Positive Resource in Capacity Building*

In Scotland, the First Minister's Advisory Group recommended that the proposed human rights legislation should make explicit reference to 'human dignity' as the underpinning value of human rights.[35] The National Taskforce has explored in more depth the role and meaning of 'human dignity' as the new legislation's underpinning value.[36] The Advisory Group's first recommendation stated: 'The Preamble of the Act should make clear that its purpose is to give further effect to human rights and that human dignity underpins all rights.'[37] The link between 'dignity' and all rights is reinforced several times in the Report,[38] which itself picks up on 'dignity' mentions in the Group's terms of reference[39] and in Scotland's governance outcomes framework linked to the Sustainable Development Goals.[40] The Report suggested that 'human dignity' could act as 'a route for promoting a sense of ownership of the legislation within Scotland's public culture […]'.[41]

'Ownership' underpins the possibility of effective implementation. The purpose of the current process in Scotland is to improve the realisation of rights—to drive long-term transformation in the delivery of public services and the shape of public policy. This is why capacity building is a core element of the process—to support the development of a sustainable and widespread human rights culture. Capacity building must thus be about more than facilitating knowledge of human rights law. This is the case in all contexts, including the environmental one. Capacity building must improve confidence to make informed claims about risks of human rights violations within receptive organisational cultures. This confidence maps onto a distinction between *knowing about* a human right to a healthy environment and *interpreting* a human right to a healthy environment in a

[35] First Minister's Advisory Group on Human Rights Leadership (n11).
[36] Elaine Webster, 'The Underpinning Concept of Human Dignity', Academic Advisory Panel to the National Taskforce on Human Rights Briefing Paper (Briefing Paper, June 2020) <https://www.gov.scot/publications/national-taskforce-for-human-rights-leadership-academic-advisory-panel-papers/>.
[37] First Minister's Advisory Group on Human Rights Leadership (n11) at Annex B, 33.
[38] Ibid 7, 33-7, 50.
[39] Ibid Annex C, 60.
[40] 'Scotland's National Performance Framework: Our Purpose, Values and National Outcomes', *National Performance Framework* (Web Page) <https://nationalperformance.gov.scot/sites/default/files/documents/NPF_A4_Booklet.pdf>.
[41] Webster (n 36) at 15.

locally embedded way.[42] Local-level interpretation should be informed by the existing state of international law understandings of human rights and environmental protection because maintaining this connection ties local understandings of the substance of a right to a healthy environment to the power of existing international law interpretations and state obligations. At the same time, local-level interpretation can go beyond the international minimum floor of protection. Previous research on civil society actors using human rights law in Scotland found evidence of a link between those actors' engagement with the legal standards and a sense of entitlement to make claims about when those standards had not been upheld.[43]

To attain this kind of internationally informed, locally embedded interpretation of a right to healthy environment as a core goal of transformative capacity building, mechanisms for enabling local engagement with human rights law is required. One such mechanism is a focus on 'human dignity' as a foundational human rights law value. As an underpinning value it can potentially act as a portal, providing a *way in* for stakeholders (who do not necessarily have legal expertise) to feel entitled to take ownership and to engage with the legal standards. Pilot empirical research is underway in Scotland to explore how 'human dignity' as an underpinning value is seen to contribute to the way that international human rights law is taken up within local civil society communities in Scotland.[44] This project aims to build upon findings from socio-legal research which notes the potential positive role of values underpinning law for making the legal framework accessible. Merry, Levit, Rosen and Yoon describe human rights law as characterised by three dimensions: law, values, and ideals of good governance.[45] In their study on the use of human rights by grassroots social movements against discrimination in the United States, they found that: '[…] the values side of human rights is more open to mobilization by grassroots social movements than the law side […].'[46] This research concerns the invocation of human rights by grassroots activists within social movements rather than professional practitioners, but its insight into 'the way that human rights work as law

[42] Elaine Webster and Deirdre Flanigan, 'Localising human rights law: A case-study of civil society interpretation of rights in Scotland' (2018) 22(1) *International Journal of Human Rights* 22 at 36.
[43] Ibid 34-35.
[44] Elaine Webster, ''Human Dignity' and Local Engagement with International Human Rights Law' project, funded by the UK Society of Legal Scholars, 2020-2021.
[45] Sally E Merry et al, 'Law from Below: Women's Human Rights and Social Movements in New York City' (2010) 44(1) *Law & Society Review* 101 at 106-09.
[46] Ibid 109.

from below'[47], particularly regarding the accessibility of human rights law via values, is relevant for exploring effective approaches to capacity building. 'Dignity' as a value arguably also has potential to support practitioners, including duty-bearers, to access and engage with the normative scope of the proposed right when it raises new or not fully understood legal issues, which is the case of the human right to a healthy environment in Scotland. It can potentially lay a foundation for development of rich homegrown interpretations of the right, less reliant on instances of (past or projected future) judicial interpretation and rather based on the views of rightsholders and duty-bearers at earlier stages of implementation. In other words, 'dignity' as a value has potential to open a door to the level of engagement that could transform processes of local implementation.

Further, the idea of dignity, because it concerns the purpose behind all human rights, has potential to support a 'big picture' perspective in a three-fold way. One benefit of this might be in facilitating different stakeholders to understand other stakeholders' perspectives. Second, some stakeholder engagement with the point of the framework, beyond individual/organisational interests and expertise, also has potential to minimise siloed understandings, which might be detrimental to implementation in multi-faceted contexts of practice. This big-picture perspective could support understandings of interconnections between rights, which is crucial in respect of a human rights perspective on the environment, and has raised interesting points about the right to a healthy environment and intersectionality.[48]

B *Challenges of Engagement with 'Dignity'*

However, to achieve all of this, numerous barriers will have to be overcome. Some such barriers will be practical—What is realistic in terms of the scale of capacity building? What is the best way to engage the widest range of practitioners with seemingly abstract human rights ideas? Again, empirical research will be required to gain a nuanced picture of the nature of these challenges and to gain an evidence-based understanding of how best to address them. In addition to practical barriers, there are preliminary and

[47] Ibid 102.
[48] Scottish Government, *National Taskforce for Human Rights Leadership: Minutes of the Third Roundtable on the Right to a Healthy Environment* (Unpublished Meeting Notes, January 2021) (Copy on file with author).

significant conceptual barriers.

Conceptually, the link between 'dignity' and the human right to a healthy environment is in some ways obvious and in some ways not obvious at all. Some conceptual challenges relate to dealing with 'dignity' as an idea in general, and one is specific to the human right to a healthy environment.

International human rights law indicates that 'dignity' is relevant for understanding all human rights and for understanding particular human rights through interpretation, but (unsurprisingly) the founding texts do not tell us what 'dignity' means.[49] It is accepted in practice and scholarship that 'dignity' expresses something about the worth of human persons, mirroring the connection to 'worth' that is visible in the founding documents of international human rights law.[50] Describing the meaning of 'dignity' as being about recognition of the equal worth of persons is a starting point but only takes us so far. What this recognition of worth consists of, and gives rise to in particular contexts, will be understood differently by different people (whether scholars, legal or policy practitioners, or individuals). When we look to broader conceptual debates outside of human rights law and practice for guidance as to a *more developed meaning* of 'dignity', we are confronted with an array of possible meanings in diverse contexts.[51] This is partly because 'dignity' may have different meanings within different 'language games'.[52] It is also partly because of a close tie between the language of 'dignity' and the language of 'worth' which derives from different worldviews[53] and, thereby, from inherently contestable perspectives.[54] The shared-yet-abstract recognition of human worth

[49] See, e.g., Beitz referring to the UN Charter and UDHR in Charles R Beitz, 'Human Dignity in the Theory of Human Rights: Nothing But a Phrase?' (2013) 41(3) *Philosophy and Public Affairs* 259 at 265-268.
[50] UN, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Preamble; UN General Assembly, Universal Declaration of Human Rights (10 December 1948) 217 A (III), Preamble; UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Preamble; UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, Preamble.
[51] For a discussion of these two points, see Elaine Webster 'Interpretation of the Prohibition of Torture: Making Sense of 'Dignity' Talk' (2016) 17(3) *Human Rights Review* 371.
[52] Mary Neal, 'Dignity, Law and Language-Games' (2012) 25(1) *International Journal for the Semiotics of Law* 107.
[53] Doron Shultziner, 'Human Dignity – Functions and Meanings' in Jedd Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity: A Conversation* (Dordrecht: Springer, 2007), 73 at 78-81.
[54] Mary Neal and Elaine Webster, 'Dignity as Rank: Triangulating the relationship between human rights and intrinsic worth' (The Future of Human Dignity Conference, 11 October 2016). This argument advocates a radical linguistic and conceptual shift in how academic debate addresses the relationship between 'dignity' and international human rights discourse in order to overcome a lack of consensus and to avoid devaluing the contribution of the idea of human dignity; see also Elaine Webster,

provides only the starting point for more developed meanings of 'dignity', able to inform local-level interpretive decisions.

Circular conversations within conceptual academic debate on 'dignity' stem not only from different contextual and philosophical/spiritual/socio-cultural perspectives, but also from a lack of clarity about different dimensions of the multi-faceted idea of 'dignity'. There are diverse, often implicit, understandings of what 'dignity' actually is (e.g. a property, a potential, a status); of 'dignity' as something that is negatively acted upon and/or something that is positively realised; and of the subjects of 'dignity' (individual and/or community).[55] The potential negative consequences of circular conversations have long been observed.[56] This poses a challenge because if we do not take steps to begin from a shared baseline there is a risk that conversations about 'dignity' will involve talking in circles about quite different ideas. In the human rights practice context, the founding documents of the international regime position the idea of dignity as a foundational value and this idea has been described as central to understanding the very 'essence' of human rights laws.[57] This foundational connection heightens a risk that serious scepticism in debate about the idea of 'dignity' can lead to a deeper scepticism about the very foundations of the human rights regime. Lack of a clear baseline is thereby not only a high-level conceptual risk, but a practical one also. Crucially, a similar risk applies to discussions taking place much closer to contexts of local practice. Here, everyday language and implicit understandings about dignity interact with the international human rights context. If we talk in circles from conflicting starting points about 'dignity' in the context of capacity building, we minimise the likelihood of this idea making a valuable contribution to practice-driven decisions. In general, if the language of dignity is overused, it risks losing added value.

To overcome this challenge, we should encourage care and precision in how we use the language of 'dignity' in the human rights context. In the case of capacity building, we

'Reconceptualising the Relationship between Rights, Dignity and Intrinsic Worth workshop presentation' (4th Dignity Rights Virtual Workshop Commemorating the 70th Anniversary of the Universal Declaration of Human Rights, 30 November 2018).

[55] Elaine Webster, 'Interpretation of the Prohibition of Torture: Making Sense of 'Dignity' Talk' (2016) 17(3) *Human Rights Review* 371, at 382-385.

[56] Herbert Spiegelberg, 'Human Dignity: A Challenge to Contemporary Philosophy' in R Gotesky and E Laszlo (eds) *Human Dignity: This Century and the Next* (New York: Gordon and Breach, 1970) 39-64.

[57] See, e.g., European Court of Human Rights, *Bouyid v Belgium*, App. No. 23380/09, 28 September 2015, paras. 89 and 101.

should aim to be as sure as possible that we are asking the same question, from the perspective of a shared understanding. This means refraining from accepting at face value any particular developed understanding of 'dignity' and instead to pay close attention to personal and professional assumptions about the dignity idea's 'meaning', to explicitly address uses of the language of dignity and how it might be navigated, and to attend to how certain conceptual understandings interact with intuitive understandings in local contexts.

A further challenge that is specific to the human rights and environment context is a perhaps common view (whether unarticulated assumption or developed academic argument) that 'dignity' is an individualised idea (based on human value deriving from, for example, capacities of persons), and that this is difficult to reconcile with the 'ecological embeddedness'[58] needed to make sense of a right to a healthy environment. The question of how to conceptualise the relationship between 'dignity' and a right to a healthy environment is tied to the aforementioned general challenges—there is no agreed upon meaning at present and there are many ways in which we might formulate a meaning. What we do know is that a connection has been made in international law that we have to work with:[59] any newly articulated international human rights should '[b]e of fundamental character and derive from the inherent dignity and worth of the human person'.[60] This would include a human right to a healthy environment. So, in developing an understanding of 'dignity' within the context of such a right we should be aware of the more general challenges: we should first recognise the complexity of the question[61] of where to start in order to make sense of the meaning of 'dignity' in the environmental context.

Academic debate addressing in depth the relationship between dignity and an environmental human right has been limited. Foremost and most recent, is the work of Daly and May, and of Townsend, who have begun to explore the 'undervalued and

[58] Gail Whiteman and William H Cooper, 'Ecological Embeddedness' (2000) 43(6) *The Academy of Management Journal* 1265.
[59] Jeremy Waldron, 'Is Dignity the Foundation of Human Rights?' in Rowan Cruft, S Mathew Liao and Massimo Renzo (eds) *Philosophical foundations of human rights* (Oxford University Press, 2013) at 125-126.
[60] United Nations General Assembly, *Setting International Standards in the Field of Human Rights*, UN Doc A/RES/41/120 (4 December 1986), para. 4.
[61] Webster (n 55).

underexplored'[62] contribution of the dignity idea. Daly and May focus on constitutional level protections, and most recently they have drawn out links between 'dignity' and ideas of environmental justice.[63] Writing both separately and together, they recognise nuances in the role that 'dignity' plays and the way that dignity-related standards are formulated in the contexts that they analyse.[64] However, they also use the language of a 'right to dignity' and 'dignity rights' in a broad sense, interchangeably with 'dignity' as a constitutional 'right' and a constitutional 'value', and with terms like 'dignity interests'.[65] Different terminology is used fluidly, which arguably undermines the complexity of the idea and precision in debate about its meaning. Daly has articulated three aspects of 'dignity' that are seen in comparative constitutional case-law, relating to individual 'agency', material living conditions, and treatment 'with dignity'.[66] This is grounded in existing examples of case-law, which is a convincing starting point.[67] But the question is then how to move from this and from general claims about the dignity idea's meaning ('[…] every human being has worth that must be respected in equal measure by all')[68] to a less abstract articulation of meaning that could guide decisions—including by non-legal practitioners in environmental sectors at earlier stages in implementation than the stage of access to justice and remedies. If we rely solely on *courts* to provide an indirect understanding of 'dignity' via the facts and outcomes of claims that happen to be brought before them, being able to articulate a useable meaning of 'dignity' may be of less concern. But if we are interested in a meaning that a wider range of stakeholders can engage with, at earlier stages of policy, law- and decision-making, a useable articulation of meaning that is able to guide a wider range of decisions becomes of greater concern. This seems critical to support the implementation of the international and EU environmental law principles of prevention and precaution,[69] and the idea of everyday accountability

[62] Dina L Townsend, *Human Dignity and the Adjudication of Environmental Rights* (Edward Elgar Publishing, 2020) at 2.
[63] Erin Daly and James R May, 'Exploring Environmental Justice through the Lens of Human Dignity' (2019) 25(2) *Widener Law Review* 177.
[64] Ibid 180.
[65] Ibid.
[66] Summarised in Daly and May (n 63) at 180-181; see more generally Erin Daly, *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person* (University of Pennsylvania Press, 2012).
[67] Webster (n 55).
[68] Daly and May (n 63) at 181.
[69] Note that continued engagement with EU environmental law principles is considered essential for Scotland to keep page with EU environmental law after Brexit: *UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021*, Chapter 1.

enshrined in Scotland's approach to human rights leadership.[70]

A further question is to what extent we should draw insights from Daly and May's analysis, which is based to a significant extent on domestic *constitutional* law where the presence of 'dignity' has been most 'dramatic',[71] for understanding the dignity-environment connection in *international human rights* law? This is an important question since, currently, the richest source of judicial development of the meaning of dignity in the environmental context can be drawn from an extensive body of constitutional, not international human rights, law. If we do look to constitutional law insights, we should also remain aware of the need for precision in the use of dignity language. The nature of the links in constitutional case law between a right to a healthy environment and the idea of human dignity is wide-ranging. This is partly due to the variety of ways in which constitutional texts and national courts arrive at a 'right' to a healthy environment (via the right to life, right to health, right to respect for private and family life etc.). It is also partly due to differences in how national texts and judicial bodies perceive the nature of the idea of dignity—as a *value* underpinning existing rights and/or as a *qualified or absolute right* in itself.[72] There are thereby a number of preliminary questions to address in relation to Daly and May's substantive understanding of the dignity–environment link, but a major contribution of their work is to reject any sense that 'dignity' as a value does not fit with legal standards related to the environment.

Townsend explores the approaches of courts to understand ways in which 'dignity' is invoked in judicial interpretation and, more specifically, in environmental-related litigation. A greater focus on human rights courts (albeit regional rather than UN-level bodies) provides a more direct international human rights law perspective, although Townsend includes in her analysis case-law of constitutional courts based on what she sees as a similar foundational role of 'dignity'.[73] While Townsend considers a 'dignity

[70] *National Taskforce for Human Rights: Leadership Report* (n 8).
[71] James R May and Erin Daly 'The Role of Human Dignity in Achieving the UN Sustainable Development Goals' in Tuul Honkonen and Seita Romppanen (eds) *International Environmental Lawmaking and Diplomacy Review 2019* (University of Eastern Finland – UNEP Course Series 19, 2020) 15.
[72] See Barak, who unpacks all these dimensions and the differing implications thereof for constitutional interpretation; Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press, 2015).
[73] Dina L Townsend 'Taking dignity seriously? A dignity approach to environmental disputes before human rights courts' (2015) 6(2) *Journal of Human Rights and the Environment* 204 at 208; Townsend (n 62) at 25-28.

approach to environmental adjudication'[74] via the lens of other human rights, as opposed to an articulated right to a healthy environment, this work is important in that it interrogates in depth what a substantive link between 'dignity' and a healthy environment might look like. Her starting point is that we must delve beneath the surface of assumptions and 'classic' accounts of the dignity idea's meaning in order for it to be seen in a useful and evolving light in the environmental context.[75] It is a very significant step towards an understanding of how 'dignity' might inform the substance of a right to healthy environment.

A further step would be to explore how to integrate human rights case-law findings into a meaning of 'dignity' that is of the appropriate depth to guide decisions about environmental practices, including decisions made by non-legal practitioners (and by national courts, including lower-tier courts). Like the present discussion, Townsend also addresses challenges of the dignity idea's meaning: the 'trouble with dignity in legal adjudication', as she describes it.[76] One such challenge is that 'dignity' could weigh against environmental protection in a legal claim.[77] Such acknowledgements are positive and, we agree with her, not fatal. Townsend's optimistic yet limited ambition for the contribution that the dignity idea can make[78] fits with the approach that we advocate of pursuing this path whilst paying close attention to the challenges of invoking dignity language. The challenges that we have identified here are preliminary conceptual ones because we are concerned less with judicial use and more with prospective engagement by practitioners in a way that might facilitate effective practical implementation at all stages (in line with the environmental principles of prevention and precaution, as well as the idea of everyday accountability with human rights).

C *Understanding 'Dignity' as Part of Mutual Learning and Alliance Building*

Although 'dignity' as an underpinning value might be seen as conceptually abstract, our

[74] Ibid 205.
[75] Townsend (n 62) at 3 and for in-depth discussion see Chapter 4.
[76] Ibid 222.
[77] Ibid 222-25.
[78] Ibid 10-11, 38.

intuitive knowledge of 'dignity' and 'indignity'[79] is not abstract—it is experientially known and identifiable. Conceptual debate about an idea like 'dignity' might seem to detach it from practical experience, but vast debate exists only because 'dignity' is such a present and impactful value in peoples' lives and in the organisation of societies. The task is to learn from both developments in conceptual understandings *and* in legal, public, and civil society practice. If we recognise the complexities of trying to understand and make claims about the substance of a human right to a healthy environment with reference to 'dignity', this need not be a barrier. Conversely, engagement with the challenges becomes part of the capacity building process and a reflection of shared human rights leadership in practice.

Therefore, we suggest that an interesting avenue for exploration is to consider whether this kind of approach to capacity building has potential to increase the effectiveness of a right to a healthy environment. This would involve exploring the extent to which national-level recognition of the human right to a healthy environment can be filled with content by enabling stakeholders to engage with international legal materials on the substance of the right. In the case of Scotland, the Taskforce's report singled out specifically the UN Framework Principles on Human Rights and the Environment, the Aarhus Convention, and UN Special Rapporteur Boyd's definition of the substantive content of the right to a healthy environment[80] as a minimum floor. On that basis, the capacity-building programme can both support mutual learning about embedding relevant international standards and shared leadership through further developing the substance of the right to a healthy environment within the local context on the basis of experientially known and identifiable understandings of 'dignity', particularly foregrounding the experiences of rightsholders and duty-bearers.

Within the roundtables, there was evidence of integration of experiential perspectives, local priorities, and international legal materials in a process of mutual learning, which

[79] Kaufman, Paulus et al, 'Human Dignity Violated: A Negative Approach – Introduction' in Paulus Kaufman et al (eds), *Humiliation, Degradation, Dehumanization: Human Dignity Violated* (Volume 24 of Library of Ethics and Applied Philosophy) (Dordrecht: Springer, 2010) 1-5.

[80] This includes 'clean air, a safe climate, access to safe water and adequate sanitation, healthy and sustainably produced food, non-toxic environments in which to live, work, study and play, and healthy biodiversity and ecosystems': United Nations Human Rights Council, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN DOC A/HRC/43/5 (30 December 2019).

has already been of added value. During the second of three roundtables on the right to a healthy environment, two duty-bearers presented case studies on the ecological and social rehabilitation of derelict land in Scotland through bringing together public bodies, businesses, and community representatives who want to make a positive difference to place and in engaging with those who would/could not normally access consultation processes. These case studies were significant in showing the pre-existence of good practices leading to multiple benefits (for health, education, minimising anti-social behaviour, economic prospects, reducing isolation, natural flood management, accessibility for persons with disabilities, biodiversity) arising from relying on existing natural features of the area. They provided a reference point for other duty bearers and rightsholders to articulate their understandings and expectations of what the right to a healthy environment could deliver in Scotland. It was also interesting that the presenters of the case studies were able to speculate that these practices could have gathered faster support if a healthy environment was already recognised as a 'must have' in human rights terms. They also underscored that the success of the case studies depended on trust built by delivering on smaller, short-term projects, which contributed to building capacity.[81]

Similar experiences were shared at the second roundtable by the Scottish Land Commission, which indicated that the recognition of the right to a healthy environment creates a new opportunity to look at 'responsible access to the countryside' from a more holistic environmental and public benefit perspective. To that end, it was noted that the capacity building programme on human rights leadership could provide the avenue for learning from the Land Commission's experience of working simultaneously with state and non-state actors (all types of landowners and local communities) to progress the human rights dimensions of land reform in policy and practice.

The capacity building programme was also seen as an avenue to develop a multi-stakeholder implementation approach to Scotland's net-zero-emission action plan, as well as capitalising on the work already done on climate justice and a just transition.[82] In effect, there is great scope to explore in Scotland the interface between 'dignity' and

[81] National Taskforce for Human Rights Leadership, *Minutes of the Second Roundtable on the Right to a Healthy Environment* (Unpublished Meeting Notes, August 2020) (Copy on file with author).
[82] Scottish Parliament Environment, Climate Change and Land Reform Committee (n 32) at the evidence session minutes.

environmental justice through capacity building. We refer here to a pluralist notion of justice[83] that can support different duty bearers and rights holders to understand the interactions and trade-offs between distributive justice, recognition, procedural justice, corrective justice and capabilities[84] in a specific context.[85] The capacity-building process can thus be at the same time a supportive space for dialogue and mutual learning to recognise which actors have benefitted from environmental goods and services, which actors have suffered injustices from past environmental management choices, and what kind of remedies may be identified through a human rights lens,[86] and to better equip duty bearers and rights holders to discuss the existing and alternative distribution of opportunities for individuals and groups' wellbeing arising from a healthy environment[87] within local power dynamics and different cultural perspectives.[88]

Another area for capacity building that emerged concerned access to justice and effective remedies, where long-standing issues have been identified by environmental NGOs with regard to Scotland's compliance with the Aarhus Convention[89], due to the high associated costs and low success rates. Opportunities for mutual learning were recognised in relation to similar barriers to justice for cases concerning the Convention on the Elimination of All Discrimination Against Women and the Convention on the Rights of Persons with Disabilities.

[83] See, e.g., David Schlosberg, *Defining Environmental Justice: Theories, Movements and Nature* (Oxford: Oxford University Press, 2017); Melanie McDermott, Sango Mahanty and Kate Schreckenber, 'Examining Equity: A Multidimensional Framework for Assessing Equity in Payments for Ecosystem Services' (2013) 33 *Environmental Science and Policy* 416; and Unai Pascual et al, 'Social Equity Matters in Payments for Ecosystem Services'(2014) 64(11) *Bioscience* 1027.
[84] Melanie McDermott, Sango Mahanty and Kate Schreckenber, 'Examining Equity: A Multidimensional Framework for Assessing Equity in Payments for Ecosystem Services' (2013) 33 *Environmental Science and Policy* 416 at 419.
[85] As synthesised in McDermott et al (n 83) at 419, 424; see also discussion of reflexivity and engagement in David Schlosberg (n 83) 187-212.
[86] Ernest J Weinrib, 'Corrective Justice in a Nutshell' (2002) 52(4) *University of Toronto Law Journal* 349.
[87] This refers to the debate around Martha C Nussbaum and Amartya Sen, *The Quality of Life* (Oxford: Oxford University Press, 1993); see discussion in David Schlosberg (n 83) 29-34.
[88] Saskia Vermeylen and Gordon Walker, 'Environmental Justice, Values and Biological Diversity: The San and Hoodia Benefit-Sharing Agreement' in JoAnn Carmin and Julian Agyeman (eds) *Environmental Inequalities Beyond Borders: Local Perspectives on Global Injustices* (Cambridge: Cambridge University Press, 2011) 105 at 109, 122.
[89] E.g., Second progress review of the implementation of decision V/9n on compliance by the United Kingdom with its obligations under the Convention (Aarhus Compliance Committee, 2017), § 117; First progress review of the implementation of decision VI/8k on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention (Aarhus Compliance Committee, 2019), § 132.

The opportunity to co-develop guidance for planners, as part of a capacity building process, was also seen as opening the door to data sharing among public authorities (for instance, medical data relating to the environment and different impacts on adults and children) and ways in which more proactive and integrated decisions can be taken with regards to the environment so as to benefit a variety of other human rights. This would allow for a pragmatic approach to balancing exercises between environmental and other public policy objectives over a long-term perspective that allows for protecting children's rights to development. In addition, capacity building was seen as an opportunity to support the separate process of incorporation of the Convention on the Rights of the Child, while developing children-friendly mechanisms for their participation in decision-making and monitoring, as well as access to remedies, in environmental matters.[90]

On the whole, the roundtables indicated that the future capacity building programme was seen as an opportunity to *embed* the recognition of the right to a healthy environment in Scotland: on the one hand, by supporting further mutual learning and alliance-building among stakeholders and public bodies that are not yet collaborating, thereby missing opportunities for co-delivery on multiple human rights and SDGs; and on the other hand, in terms of a process to clarify the right's content in a context-specific way. Mutual learning and alliance building can be seen as practical corollaries of the principle of shared leadership and this ethos can promote integration of multiple local experiences alongside international legal perspectives.

While benefits of this approach have already been seen, there is a need to go further if Scotland is to achieve long-term transformative change. This is why we suggest that one way of supporting deeper integration of experiential perspectives and local ownership over the developing understanding of the right would be to explicitly include shared reflection on the idea of dignity in relation to the human right to a healthy environment within capacity building programmes. Doing so has potential to deepen shared leadership around a right to a healthy environment, and it has the further advantage of simultaneously creating space for conversations that could deepen shared leadership around human rights in a more holistic way (across siloes, by other actors that can

[90] National Taskforce for Human Rights Leadership, *Minutes of the Third Roundtable on the Right to a Healthy Environment* (Unpublished Meeting Notes, January 2021) (Copy on file with author).

contribute to everyday accountability, prevention, and precaution).

IV CONCLUSION

In this exploratory article, we have begun to consider whether and in which sense focusing on the nature of capacity building processes has potential to create space—between academic conceptual critique and procedural legal discourses—for local, substantive discussions about a human rights perspective on the importance of the environment for the way that we live as individuals and as communities. Although motivated by policy opportunities in Scotland, the broader significance of this exploration is its relevance in any context for thinking about how to improve implementation by harnessing positive dimensions of international human rights frameworks in a collaborative, critical, reflexive and locally embedded way.

We have explored how recourse to the fundamental human rights value of 'dignity' within capacity building processes might help to understand how local stakeholders relate to human rights and environmental protection. We have started from the idea that human rights values are a potentially useful resource for increasing a sense of local-level ownership over human rights law. There is still much to explore in terms of the meaning of 'dignity' and the implications of that meaning in contexts of practical application of a right to a healthy environment. We have outlined conceptual issues and starting points, and we have suggested that it is necessary for stakeholders to engage with nuances in the language of 'dignity' as part of a process of connecting intuitive understandings to a healthy environment through an international human rights lens. Whilst many questions remain unanswered, this is not unique to the environmental governance context as there is still much to explore about the relationship between 'dignity' and the interpretation of most human rights in their contexts of practical application, and about the role of values in promoting local realisation of international human rights. In this sense, there is an opportunity to develop wider insights for the growing body of work on the substantive relationship between dignity and an environmental human right, and on processes of human rights localisation.

There are several potential avenues for further research. Additional empirical research would be valuable to evidence the extent to which different stakeholders respond to

different forms of knowledge, which factors influence their engagement, and the nature of differences between sectors, organisations and individuals. It would be interesting to explore how up-to-date scientific knowledge is integrated within capacity building processes relating to environmental protection, and how this can fit with a collaborative and reflexive approach to capacity building. Integrating insights from environmental science in a way that is accessible to community-based discussions about the importance of environmental protection in people's everyday lives could mirror the approach to engagement with human rights law referred to above. In addition, it would be interesting to reflect, not only on the integration of 'hard' science, but on the role of social science insights. Here, it would be fruitful to further explore the link between capacity building, 'dignity' and environmental justice research, which captures interactions in local contexts because of environmental degradation, and as such can inform substantive understandings.

Sustained local-level engagement with the substantive importance, and urgency, of environmental protection is key. This article, by exploring the link between new articulations of a right to a healthy environment and the underpinning human rights value of 'dignity', has aimed to highlight one promising way of facilitating this: a focus on approaches to capacity building as a means of creating transformative change in implementation through shared understanding by rightsholders and duty-bearers that can contribute to everyday accountability, prevention, and precaution.

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DO WE CARE ABOUT WHAT WE SHARE? A PROPOSAL FOR DEALING WITH THE PROLIFERATION OF FALSE INFORMATION BY CREATING A PUBLIC PLATFORM

DR TAUEL HARPER*

Meaningful engagement with public space is a fundamental part of how we determine truth. The use of social media as a replacement for public space has exacerbated a crisis in public confidence in shared truths. This article advocates for the establishment of a truly public network or digital platform for 'truth telling', as a counterpoint for this growing public incredulity. Because 'truth' is an expression of power, such a platform would need to operate as an inclusive public, creating a space for valorising earnest public contributions and recognising the inherent contingency of truthfulness and authority. Such a forum would act as an important counterbalance to the proliferation of misinformation on social media but more importantly, it could help form a more collaborative and constructive shared public space.

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CONTENTS

I INTRODUCTION

When governments around the world design policy to combat misinformation and disinformation, it is important to acknowledge that their approach to policing false information will significantly reflect and affect the values of society itself. In every culture, the qualities of public communication dramatically impact the qualities of public knowledge and what is considered powerful. In pre-settlement Aboriginal Australia, 'Songlines' related cultural information to geographical features so that knowledge was embedded in the natural landscape.[1] The era of the hand-copied Bible enabled the 'Word of God' to pontificate far beyond Rome, before the Guttenberg Printing Press enabled Martin Luther to protest that a more subjective relationship with knowledge was possible.[2] The rise of journals and reading groups allowed for the development of specialist and critical publics, which formed the basis of the Enlightenment and motivated the great democratic revolutions.[3] The mass media era saw the age of plebiscitary politics and propaganda reflected in Chartism, Fascism and representative democracy. More recently, the breaking up of a national media audience has led to the emergence of

[1] Lynne Kelly, *The Memory Code* (Allen & Unwin, 2016).
[2] Marshall McLuhan, *The Gutenberg Galaxy: The making of typographic man* (University of Toronto Press, 1962).
[3] Jurgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, tr Thomas Burger (MIT Press, 1989) [trans of: *Strukturwandel der Öffentlichkeit: Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft* (1962)].

'spectacle' being the currency of public knowledge.[4] In all these instances, the quality of how information is shared publicly determines what is understood to be 'true'.

The relationship between truth and power has always been a central concern of academic inquiry into public communication and a point of fierce contestation within the social sciences. In 1973, Jurgen Habermas put forward a notion of 'truth' based upon a 'general symmetry of conditions' whereby 'truth' is defined as a statement that can be made by anyone, that can be explained in a way acceptable to everyone, when that explanation is inherently reasonable to everyone.[5] The 'truth' of the statement 'two plus two is four', for instance, is ascertainable because we can explain what this statement means in a way that seems reasonable to anyone. As has been pointed out *ad nauseum* since that time, what 'seems reasonable' is still contingent upon power, language, and the communication skills of those speaking.[6] However, while post-structuralism has quite rightly focused upon how constructions of 'truth' are contingent, marginalising, and hegemonic, it is worth remembering that the way we determine 'truth' is a form of public pedagogy in itself. Despite the philosophical dismissal of the notion of 'truth', every democratic system relies upon an acceptance of the notion that there are 'reasonable' ways to form opinions and arguments. While the notion of an absolute 'truth' is monstrous, we should not be so terrified of it that we dismiss any attempt to discuss what is 'true' for our democratic community.

Habermas refined the conditions of this 'ideal speech situation' that could be used as a 'weak transcendental' formula for determining communal understandings of truth. This would include the following conditions:

1. All participants are allowed to speak and do so freely;
2. Participants ought to be prepared to explain and justify their claims wherever asked to; and

[4] Tauel Harper, *Democracy in the age of new media: The politics of the spectacle* (Peter Lang, 2011).
[5] Jurgen Habermas, 'Wahrheitstheorien' in H. Fahrenbach (ed), *Wirklichkeit und Reflexion* (1973); Jurgen Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society*, tr T. McCarthy (Beacon Press, 1984) vol 1, 90-100.
[6] Michel Foucault, *Discipline and Punish: the Borth of the Prison* (Random House, 1975); Chantal Mouffe, *The Democratic Paradox* (Verso, 2000); Jean-Francois Lyotard, 'Answering the Question: What is Postmodernism?' in I. Hassan and S. Hassan (eds), *Innovation/Renovation*, tr R. Durrand (University of Wisconsin Press, 1983) 329-341.

3. The sole goal of the interaction should be to establish the most legitimate outcome for all participants.[7]

This structure was devised by Habermas in order to 'exclude all force…except the force of the better argument', so that 'argumentation can be conceived as a reflexive continuation, with different means, of action oriented to reaching understanding'.[8] While this formulation may seem both vague and simplistic, these basic communicative conditions are replicated in every institution that seeks to establish 'truth' or public legitimacy, including academic research, courts of law and democratic debate itself. It is my contention that these broad conditions ought to also determine how we arrive at 'truth' within democratic polity. Realising that without a definition of how to arrive at truth, we cannot hope to determine what is false.

The argument made in this paper is that the mechanisms that we have for arriving at 'truth' in public communication are centred on a broadcast communication system that is becoming obsolete. We can no longer rely upon traditional media structures or representative democracies to be the arbiters of truth because they lack the level of scrutiny and debate integral to a public. It is not only that 'representative' media and democracy have proved themselves so many times over to be open to propaganda, populism, or economic influence, but it is also because the format of public communication has fundamentally changed, and with it, so has the public pedagogy of 'truth-seeking'.

In February 2021, Facebook's sudden restriction of the sharing of Australian news sites brought into sharp focus the role that internet media giants currently play in mediating public debate. The Australian Government attempted to pass legislation to address the impact that tech giants (primarily Google and Facebook) were having on the public sphere. The legislation was primarily aimed at retaining a share of these companies' advertising revenues for traditional large journalistic enterprises in Australia. However, a significant justification for this proposed legislation was that these tech giants were not adequately policing a 'veritable tsunami of misinformation and "fake news"'.[9] As the

[7] Jurgen Habermas, *Moral Consciousness and Communicative Action*, tr Christain Lenhardt (MIT Press, 1990) 86.
[8] Habermas (n 5) 95.
[9] Australian Parliament, *Parliamentary Debates*, Treasury Laws Amendment (News Media and Digital Platorms Mandatory Bargaining Code).

legislation was being considered in the Australian Senate, Facebook banned all sharing of Australian news on its platform, presumably as a way of highlighting the crucial role it had come to occupy in the distribution of news and opinion in Australian public life. This move made it abundantly clear that we have become reliant on privately-run social media platforms and internet search engines to mediate our 'public' discussions.

The government quickly compromised to ensure that no business interests would be undermined. Within a week, an industry group comprised of Facebook, Google, Twitter and other leading tech companies published a new Australian code of practice that would be used to regulate disinformation and misinformation on their platforms.[10] This would bind the signatories to 'opt in' to whatever regulation of false information they found suited their platform—essentially voluntary self-regulation. The government, meanwhile, vowed to carefully monitor the effectiveness of the code.[11] This system represents a completely laissez-faire attitude regarding the foundation of democratic opinion and will formation. It suggests the current proliferation of false information is a technical problem that presents a mere tactical threat to governments' political power. However, the recent storming of the US Capitol building indicates that the spread of false information does not just present a tactical threat to a political party—it presents an existential threat to democracy.

Despite the centrality of social media to public political debate and engagement, Australia has decided to leave policing false information to private companies with limited public oversight. False information can be very profitable for these tech giants,[12] and effective policing is both problematic and expensive,[13] which suggests that their policing of false information is likely to be highly symbolic. Meanwhile, governments throughout history have shown that they only care about false information if that false information generates

[10] *Australian Code of Practice on Disinformation and Misinformation*, 2021 ('*Australian Code of Practice on Disinformation and Misinformation*').
[11] Josh Taylor, 'Australian government ready to pursue Facebook and Twitter if misinformation code doesn't work', *The Guardian* (22 Feb) <https://www.theguardian.com/australia-news/2021/feb/22/australian-government-ready-to-pursue-facebook-and-twitter-if-misinformation-code-doesnt-work>.
[12] Joshua A. Braun and Jessica L. Eklund, 'Fake News, Real Money: Ad tech platforms, profit driven hoaxes, and the business of journalism' (2019) 7(1) *Digital Journalism* 1.
[13] Tarleton Gillespie, *Custodians of the internet: Platforms, content moderation and the hidden decisions that shape social media* (Yale University Press, 2018).

problems for the ruling party.[14] Suggesting that a government and private platforms are best placed to judge the self-regulation of platforms' censoring of false information is akin to asking the inmates to run the asylum.

There are aspects of sharing information on digital and social media that make false information a particular problem for contemporary democratic debate. These include the lack of truly public space on digital platforms, the ability for anyone to broadcast to an audience of billions without any liability or oversight, and the crisis of contemporary authority. Broadly construed false information includes both intentionally deceptive 'disinformation' and innocently spread but still untrue 'misinformation'. While the problems of false information are as old and as intractable as public communication itself, the lack of transparency and accountability of online information distribution have made false and misleading information a particularly pernicious problem at this historical moment.

And of course, it is particularly problematic to leave it up to governments to adjudicate what is considered 'true'. Attempts to deal with fake news in Singapore, for example, have led to the development of 'Factually', a government-run website which proposes to refute 'fake news', but which will often 'prove' the news is fake through simple reference to other government sources and opinions.[15] Similarly, defining truth through plebiscite will condemn unpopular but true statements as false, even when they are not. But it is the very ethos of the democratic system that these issues should be confronted and dealt with by democratic institutions that allow claims to truth to be argued and explained in a reasonable way.

Traditionally, journalism has sought to legitimise its 'claims to truth' by ensuring its legitimacy and redeeming claims to truth in a shared public. However, the digital media public is fragmented, with nothing like the shared space of 'conjoint and interacting interests' as described by John Dewey—and it does not conform to the nationally 'imagined community' as defined by Benedict Anderson. Instead, the digital media 'public' is international, interest-based, and sensationalist, driven by imperatives of profit. What

[14] John Corner, 'Mediated politics, promotional culture and the idea of 'propaganda'' (2007) 29(4) *Media, Culture and Society* 669.
[15] For an overview see Singapore Government Agency, *Factually* (n.d.) ≤https://www.gov.sg/factually/>.

has been lost is a political public where an engaged citizenry read the same newspapers and share the same spaces and issues that are discussed in earnest by the democratically elected representatives of the people. What we have instead is manipulation, all the way through the system, of particular messages for particular spaces and particular purposes. The construction of political messaging takes place around the foibles of the particular 'public' that is being spoken to, and as a result, we have a complete and consistent betrayal of truth and trust.

Public debate is both norm and identity forming—it shapes the way that we understand ourselves as co-creators of meaning, and it shapes who we are and what we care about. While digital technology has introduced particular challenges for the integrity of public debate, it has, at the same time, opened up the possibility of improving citizens' engagement in issues of public importance. Any policy that attempts to deal with false information online should seek to 'equalise private citizens in the public use of reason',[16] not just to avoid the public spread of falsehoods, but because this opportunity inspires people to engage with the world we share. I would therefore like to suggest that the best way to deal with false information online is to create a 'Public Platform' that could be formed as a distributed, peer-assessed forum for testing claims to truth.

This would be a public forum that can serve a similar news-sharing role to Facebook and Twitter, but whose primary function is to serve the public interest. The goal of this network would be not to make money, but solely to establish the public legitimacy of public statements—a forum for 'truth-telling' and for the exposure of lies and misdirection. The rationale, cost, and management of this platform could fall under the auspices of existing public service broadcasting funding (and regulations) within nation states, with a similar overall remit to ensure fairness, objectivity, education, and a forum for the freedom of expression. It would not replace existing media structures and journalism, but rather be a place where anyone could question public claims to truth and examine the way those claims were discursively redeemed, safe in the knowledge that this space was designed to exclude all force aside from the force of the better argument. Journalists could still comment on the legitimacy of this forum in other media, and they could also operate as 'gate watchers' for violations or abuses of the forum. The forum

[16] Slavko Splichal, 'The principle of publicity, public use of reason and social control' (2002) 24(1) *Media, Culture and Society* 5.

would be known as a place where 'truth' was valorised more than profit, or electoral success, and journalists could critique and assess statements made on the forum in light of that normative goal. This is not unlike the current expectations placed upon journalists, but this forum would provide journalists and citizens a shared place to investigate competing versions of 'the truth'.

At first glance, such a platform would appear to have little to suggest it could compete with the tech giants — but so long as public engagement were judged by its contribution to public interest (and not private profit), it would quickly develop a reputation as the best place to test claims to 'truth'. Once people understood the value of that quality in a public, it would also become a far more enticing place for public engagement, and present an important public counterpoint to social networking platforms. What follows is a description of the three broad principles that should underpin this platform. There is, unfortunately, no space here to go into specifics — and the devil does lie in the detail. Nevertheless, these are the principles that could redeem the public as a place to not only find 'truth', but to facilitate human progress in a manner commensurate with the dignity of every human.

II THE NEED FOR A TRULY PUBLIC SPACE

The quality of being public—that is, being seen by a diverse range of people—creates value because individuals invest faith and meaning in what they share with others. Google, Amazon, Facebook, Apple, and Microsoft (GAFAM) are companies that have understood the inherent value of appearing as a public resource. Their massive value (around US $1 trillion each) is derived from the manner in which these private companies serve the roles that public space once did. They provide us a place to meet, a way to work, and a forum for our collective expressive engagement. They are examples of how the contemporary public sphere is typically mediated—privately owned and controlled spaces that appear public, and which fulfill some limited functions of the public, without being subject to public scrutiny or control.[17]

The problem with accepting these tech giants' platforms as the medium for public engagement is that they still operate for private interests. Despite their stated claims to

[17] Harper (n 4).

'build community' or 'refrain from evil', the ultimate ambition of Facebook and Google is to gain audiences for advertisers and therefore create profit for shareholders. As can be seen by Facebook's ban on news-sharing during the New South Wales bushfires, the profit orientation of these companies determines their conduct, rather than any notion of 'public interest' or 'public responsibility'. While these companies do moderate their platforms in order to ensure their social license to operate, they do this more or less privately, without subjecting their decisions to public scrutiny or judgement. Generally, platforms allow user reporting of false or misleading information, but platforms do not disclose or reveal how they deal with these reports. Platforms and their moderators can and do also make their own decisions about what issues are banned or promoted.[18] In this way, 'private' value judgements and interests come to shape the formation of public discussion.

There is an aspect of being broadly shared that mandates a reflexive consideration of the accuracy of information. As Hannah Arendt describes:

> Being seen and being heard by others derive their significance from the fact that everybody sees and hears from a different position. This is the meaning of public life, compared to which even the richest and most satisfying [private] life can offer only the prolongation or multiplication of one's own position with its attending aspects and perspectives … Only where things can be seen by many in a variety of aspects without changing their identity, so that those who are gathered around them know they see sameness in utter diversity, can worldly reality truly and reliably appear.[19]

For Arendt, the importance here is the 'utter diversity' of the people who engage in this process. However, with social networking services, you cannot ensure that diversity. Moderation happens in private, and audiences are grouped together by taste. When we send and receive information in 'private channels that appear to be public', we fail to

[18] Frederik Stjernfelt and Anne Mette Lauritzen, 'Facebook and Google as Offices of Censorship', *Your Post has been Removed: Tech Giants and Freedom of Speech* (Springer International Publishing, 2020) 139-172; Bernhard Rieder and Guillaume Sire, 'Conflicts of interest and incentives to bias: a microeconomic critique of Google's tangled position on the Web' (2013) 16(2) *New Media and Society* 195-211.
[19] Hannah Arendt, *The Human Condition* (University of Chicago Press, 1958) 57.

really engage and enjoy the public scrutiny that might come from different perspectives and opinions.

Our news feeds are constructed by organisations selling our attention to advertisers. Their only shared goal is to engage our desire to consume more, and consumption has therefore become the one universal form of public display.[20] Public claims tend to be viewed by a select and narrow public who have already formed an opinion on the matter,[21] or who have no vested reason to care for 'the broader public' at all.[22] For these reasons, technical solutions to the spread of false information that don't rest on increasing public engagement with judgements about truth fail to solve the problem. A lot of the proposed technical fixes for false information online reside in detecting fake news through algorithmic interrogation of collected data about messaging. Generally, these algorithms test message data against expected behaviour patterns, in terms of message composition, source reputation, frequency and distribution—and anything significantly unexpected is reported as 'possibly false news'. While this algorithmic testing of the novelty of data has significant potential to help flag false information, if the judgement on the veracity or 'reality' of the information is formed outside of truly public scrutiny, then, once again, we are allowing what is 'true' to be judged in private. Technical fixes for false information will always be one tool for addressing technical issues, but they will exacerbate the problem of false information if privately regulated by a government or a private company. According to democratic ideals, judgements about truth should always be available to be interrogated by the public.

III THE OPPORTUNITY TO GAIN REPUTATION FOR PUBLIC CONTRIBUTIONS

One of the significant impediments to halting the spread of misinformation online is the lack of reputational liability for being wrong and the lack of public acclaim for being right. Representative democracies were meant to be served by a vibrant and engaged 'fourth estate' of journalists, journals, and newspapers who would monitor the affairs of

[20] Tauel Harper, 'The big data public and its problems: Big data and the structural transformation of the public sphere' (2017) 19(9) *New Media & Society* 1424.
[21] Eli Pariser, *The Filter Bubble: How the New Personalized Web is Changing What we Read and How we Think* (Penguin Books, 2011).
[22] Ibid; Nick Couldry and Joseph Turow, 'Advertising, big data and the clearance of the public realm: marketers' new approaches to the content subsidy' (2014) 8 *International Journal of Communication* 1710.

government on behalf of the broader public. In practice, the operation of the 'fourth estate' as a forum for the 'political public sphere' has always been highly problematic, as such a construction privileges certain voices and particular types of discussions.[23] Nevertheless, the process of public review and the threat of litigation for defamation ensured that the verifiability of the information being presented to government and within news reports was publicly defensible. At least theoretically, whether in a newsroom or a government, journalists and politicians knew that their employment and continued good standing depended on their reputation for presenting publicly defensible claims.

Under this system, the veracity of claims and the reputation of the speaker was scrutinised by the press—the news and affairs of the powerful were shared by a ubiquitous but largely plural public. Where more than one newspaper serviced an area, they operated as checks on each other's integrity—where there was only one, the plural public that shared a single newspaper held the objectivity of that paper to account. Media regulation allows for further oversight in this environment because the number of sources of information is low. Traditional news organisations broadcast their news to an audience which both shared a political jurisdiction, and which also had to be framed to be read as legitimate, or at least plausible, by anyone within that jurisdiction. Claims to legitimacy in such an environment are at least somewhat grounded in public use of reason. Spreading false information would undermine the integrity of the journalist and the news source.

In contrast, internet service providers and digital media platforms accept no legal responsibility for the content that people publish on them. People with a modicum of technological talent or equipment can appear—at least stylistically—every bit as authoritative and 'real' as any other news organisation.[24] There is no shared public forum where fake news can be identified and exposed, no professional code of practice, or code of ethics for those disseminating information, or mechanism to hold bad actors to

[23] Habermas (n 3); Nancy Fraser, 'Rethinking the public sphere: a contribution to the critique of actually existing democracy' in Craig Calhoun (ed), *Habermas and the Public Sphere* (MIT Press, 1992) 109; Edward S. Herman and Robert W. McChesney, *The Global Media: The New Missionaries of Corporate Capitalism* (Continuum, 2001); Noam Chomsky and Edward S. Herman, *Manufacturing Consent: The Political Economy of the Mass Media* (Pantheon Books, 1988).

[24] S. Mo Jones-Jang, Tara Mortensen and Jingjing Liu, 'Does media literacy help identification of fake news? Information literacy helps, but other literacies don't' (2021) 65(2) *American Behavioral Scientist* 371.

account. While certain legal liabilities may apply to certain aspects of defamation and libel on the internet, prosecuting these cases is problematic because service providers both deny liability and often reside in other jurisdictions from the complainant.[25] The legal and professional incentives to ensure what is published is 'defensible' are simply not evident on social media.

This could be changed by undermining the anonymity of internet use—something the Australian government has already begun to do, by asking internet service providers to record users' metadata. However, in practice, such forced lack of anonymity is problematic. As illustrated by Voltaire, Banksy, Mr Brown, and many other satirists, at times anonymity is *necessary* to speak truth to power or play with provocative subject positions. Secondly, there probably always will be some way to evade identification on the internet.[26] Creating compulsory internet identification would merely restrict truly 'free speech' to those who either support the powerful or those who have the technological or economic ability to avoid identification.

Instead, we should employ a positive system of public expression so that people want to be known for their public contribution — just like a social networking site, such a system could track contributions to public debate and associate these statements with a person's public profile. A general metric could be used to track the public judgements about the quality of any contributions to public discussions, and upvoting and downvoting on any given topic could help readers sort notable contributions from indolent ones, not unlike Reddit forums. Anyone would be free to make and critique assertions—and people would be free to speak as any identity they wished—as they could be anonymous, eponymous, or engaging under a *nom de plume*. However, crucially, if they wanted any particular identity to gain a reputation, then they would need to maintain that particular, singular and consistent identity in order to do so. So while every user of the public forum might have a number of identities for playful provocations and dangerous ideas, they may also have one (or several) where they care about and curate their ability to speak earnestly, clearly, and honestly about issues of public importance. Identities without reputations would initially have a harder time being noticed, but if they made sensible and useful

[25] Michael Douglas and Martin Bennett, ''Publication' of defamation in the digital era' (2021) 47(7) *Brief* 6.
[26] Eric Jardine, 'Tor, what is it good for? Political repression and the anonymity granting technologies' (2018) 20(2) *New Media & Society* 435.

contributions to public debate and public knowledge, they would eventually gain a reputation that meant their statements were more readily and quickly considered by the broader public. Thoughtful and correct contributions over time (and with the full judgement of hindsight) would increase the value of an identity, whereas ludicrous, short-sighted and unhelpful contributions would decrease it.

Importantly, anchoring public reputation to public statements automatically introduces the 'public' as a consideration of those statements. This would reintroduce 'reputational risk' for making or spreading statements that can be proven to be false. By creating a reputational forum for the testing of truth, we would actually do something to reinspire humanity to engage with what we share—'the public'—because of the possibility of gaining reputation in the process. Considering the inspirational quality of public life, Arendt identifies that people want to engage in public life because it is the only way to immortalise your contribution to humanity.[27] In the absence of a forum where our contributions to the public matter, she argues that we tend to 'seek immortality' through whatever contributions are recognised in the forums in which we are engaged. In 1954, she argued that the struggle to achieve immortality through the purchase of material goods had led to excessive materialism and a 'waste' economy. We have subsequently seen consumption grow and be valorised as a form of expression, even when that consumption has led to catastrophic environmental collapses.[28] This speaks to the fact that we are valorising the wrong form of public expression and the wrong conception of 'truth telling'.

Reattaching reputation to public contribution may begin to address many years of instrumental abuses of publicity, and act as a counterbalance to the influence of social networking sites that privilege image over action. Records of statements made and stories told would act as both a testament to great acts and noble thoughts, as well as also create a space where full consideration of the impact upon public interest over time is the primary concern for attributing status and authority. A 'Public Platform' could celebrate what it is to be a human by recognising the contributions people make to their community. Perhaps most importantly, such a forum would reignite our eternal

[27] Arendt (n 19).
[28] Dana M. Bergstrom et al, 'Combating ecosystem collapse from the tropics to the Antarctic' (2021) 27(9) *Global Change Biology* 1692.

imaginary, providing us a place to work and act, not just for money and not just for Facebook, but a place where we can all contribute by trying to introduce ideas, concepts, and truths that would sustain and enrich our collective lives.

IV THE CONTINGENCY OF AUTHORITY

It would be reckless not to acknowledge that the decline of the shared public realm has been accompanied by a dissolution of public trust in authority. We can see this as a result of the decline of a mass mediated public that had 'strengthened the efficacy of social controls' by providing a universal mouthpiece for the powerful.[29] Neo-liberal political philosophy has long preached distrust of public institutions—possibly most succinctly expressed through Ronald Regan's statement, 'The nine most terrifying words in the English language are: "I'm from the Government, and I'm here to help"'. While, in many senses, scepticism about authority should be the foundation of any approach to dealing with false information, there is a particularly dangerous aspect to the general scepticism (whether deserved or not) about public authority as a coordinating framework for human development at a time when trust in journalism and government is also in a crisis.

As an illustration, recent research into the rise of anti-vaxxers in Italy highlighted that an increase in anti-vaccine sentiment had coincided with a decline in the State's economic capacity to deliver on health policy.[30] Growing incredulity toward the vaccine program was not only a result of the failure of the government to communicate effectively about the benefits of vaccinations, it also arose because the State had begun to forfeit its central role in the lives of its citizens. At the same time, social media had become increasingly prevalent as a main source of information for Italian citizens, and the State had lost its command of the authoritative voice. As the State loses its role as the 'voice of authority', it also becomes less central in the 'lifeworld' of its citizens — a situation compounded by the constraints of low taxation and fewer engagements of citizens with public institutions and public voices.

[29] Jurgen Habermas, *The Theory of Communicative Action: Lifeworld and System: A Critique of Functionalist Reason*, tr T. McCarthy (Beacon Press, 1987) Vol 2, 390.
[30] Katie Attwell et al, 'Communication breakdown in Italy's vaccination governance' (2020) 30(Supplement 5) *European Journal of Public Health*.

Once again, this illustrates the close relationship that exists between the nature of the 'public realm' and the types of authority that are appropriated within it. As much as we wish to see the rise of misinformation as a product of the internet, we should not ignore that theorists had identified the emerging 'incredulity toward metanarratives' many years before the internet became ubiquitous.[31] Well before the internet arrived, post-structuralists identified that spectacles, desire, and post-modernism itself had more cultural agency than reason or 'the truth'.[32] This 'spectacular' public realm has certainly made it harder to appeal to a shared metanarrative about public reason as the basis for human progress.

Nevertheless, there are aspects of this moment of incredulity toward authority that make it ideal for creating a new public space. Arendt identifies that real public engagement is always energised by the exclusion from power, as when power is so discursively open, it creates an equality that is essential for free and engaging public action.[33] Previous publics have always been exclusive of certain people, certain types of reason, and certain forms of authority. But now we have the chance to reassess what ought to be publicly powerful, in a world where claims to authority are open for debate.[34]

To make the most of this freedom, we need to equalise the ability to make statements within a public sphere, enabled by an absolute commitment to the freedom of thought and speech. What this means in practice is an absolute and principled agreement to ensure public access to, and scrutiny of, every statement, and an earnest attempt to understand and engage with the reason they each contain. Even though an internet forum is bound to suffer from spam and trolling — and some form of community policing of such activity will be necessary — everything that passes through the 'Public Platform' should remain available for public scrutiny, even if it is stored in a folder named 'offensive' or 'spam'. By allowing all to speak, we can actually open up communicative power to the public, enabling individuals to have more input into the legitimacy of authority.

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[31] Jean-Francois Lyotard, *The Postmodern Condition: A Report on Knowledge*, tr Geoff Bennington and Brian Massumi (University of Minnesota Press, 1984).
[32] Guy Debord, *The Society of the Spectacle*, tr Donald Nicholson-Smith (Zone Books, 1995) [trans of: *1967*; Gilles Deleuze and Felix Guattari, *Anti-Oedipus: Capitalism and Schizophrenia* (University of Minnesota Press, 1983); Fredric Jameson, *Postmodernism, or, The Cultural Logic of Late Capitalism* (Duke University Press, 1991).
[33] Hannah Arendt, *On Revolution* (Penguin Books, 1990).
[34] Habermas, (n 29).

While textual and digital platforms of verbal exchange do privilege a certain form of public engagement, marginalised and emergent expressions of knowledge can be encouraged by features of digital media, such as translation technology, multimedia, and hypertext. A 'Public Platform' should encourage the exchange of all kinds of cultural practices as part of the toolbox of understanding. The potential for the eruption of egalitarian access to meaningful cultural production on the internet was described by Mark Poster more than twenty years ago:

> The "magic" of the Internet is that it is a technology that puts cultural acts, symbolizations in all forms, in the hands of all participants; it radically decentralizes the positions of speech, publishing, filmmaking, radio and television broadcasting, in short the apparatuses of cultural production.[35]

I would add to this that—structurally at least—the internet solves the problem of how humanity can share information in a relatively egalitarian and open way across dispersed communities and huge distances, with more opportunities for reasonable and enriching interpersonal interaction than ever before.

V CONCLUSION

Meaningful expressive engagement with public space is a fundamental part of the human experience. How we equip citizens to find the truth in public debate is not just important for democracy, but important for the maintenance of our mental, ecological, and social health, as a polity and as a species. There is a pressing need to move 'public broadcasting' into the era of social networks, and the way to do that is to develop a 'Public Platform' that would allow citizens to engage in 'truth telling' and testing the claims of public authority. This platform should not exclude the formation of other publics, but should aspire to be one place where all public claims can be reasonably heard. It should not exclude existing media structures, or traditional journalism, but augment them as a place where the 'truthfulness' of claims can be earnestly assessed by citizens themselves. Allowing this process to take place on privately owned and run internet sites is a dereliction of public duty, and it also forfeits significant public value. Moreover, it

[35] Mark Poster, 'Cyberdemocracy: The Internet and the Public Sphere' in David Holmes (ed), *Virtual Politics: Identity and Community in Cyberspace* (Sage, 1997) 212.

encourages the proliferation of false information. A 'Public Platform' would raise the possibility of arresting the proliferation of false information in the public sphere, and it may also help us to re-engage with caring for our shared institutions and spaces.

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A NEW GIG FOR UNCONSCIONABILITY — EQUITY AND HUMAN DIGNITY IN *UBER TECHNOLOGIES v. HELLER* [2020]

RAÚL MADDEN*

In Uber Technologies Inc. v. Heller the Canadian Supreme Court affirmed the capacity of the doctrine of unconscionability to protect workers in the 'gig economy' from oppressive implications of non-negotiable standard form contracts, tendered by drastically more powerful business entities. On the basis of unconscionability, the Court rejected Uber's attempt to enforce a clause in their non-negotiable standard form contract that would preclude its drivers from invoking employment law rights in a domestic court, having stipulated dispute resolution through arbitration in a foreign jurisdiction at upfront and unaffordable expense to the driver. This case note critically elucidates how the Court's decision advances standards of human dignity for working people through an equitable reading of the relevant statute, and subsequently applying the characteristic elasticity of the Equitable doctrine of unconscionability in addressing changing social and economic circumstances and drastic power imbalances between parties.

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CONTENTS

I INTRODUCTION

As the power dynamics of the global economy increasingly favour large multinational corporations at the expense of working people, their wages, and the conditions in which they work and live,[1] the ability of these businesses to instrumentalise the law against or

[1] Soaring profits and personal wealth increases respectively for the world's largest companies and wealthiest billionaires coincide with the proliferation of poverty and precarity in communities crushed between the converging 'gig economy' and the 'COVID economy' (potentially, also the post-COVID economy): Oxfam America, *Pandemic Profits Exposed: A COVID-19 Pandemic Profits Tax as one essential tool to reverse inequalities and rebuild better post-pandemic* (Media briefing, July 2020). Rupert Neate, 'Ten billionaires Reap $400bn boost to wealth during pandemic' *The Guardian* (Web Page, 19 December 2020) <https://www.theguardian.com/technology/2020/dec/19/ten-billionaires-reap-400bn-boost-to-

strip its protection from their workers present legal issues of growing concern. The latter occurs, for instance, when entities, sufficiently powerful to withhold opportunity for negotiation from persons applying to work for them, may rely on contract law to prevent their workers from having a dispute heard by domestic courts. One way of accomplishing this is by designing standard form contracts — containing arbitration and choice of law clauses — to avoid rights allocated under employment law and arrogate the jurisdiction of domestic courts to uphold them. Such conduct was the subject of the Canadian Supreme Court's recent decision in *Uber Technologies Inc. v. Heller* in which, following an exercise of 'small e' equitable reasoning permitted by statute, a 'large e' Equitable resolution was applied through the doctrine of unconscionability.[2]

In a David-and-Goliath-like confrontation between a worker leading a class proceeding and a multinational business giant, respectively wielding arguments based on principles of 'unconscionability' and 'freedom of contract', the Court recognised the appropriateness of the former to prevail over the latter in the circumstances described. The Court's decision, authored by Judges Abella and Rowe, represents a major blow to contractual methods through which multinational businesses entrench conditions that often force workers to choose between abusive industrial relationships and unemployment.[3] Deteriorating working and living conditions intensify the broader need for legal and political strategies for addressing their causal power imbalance.[4] This case note illustrates, through *Heller*, how litigation based on Equity's rejection of 'unconscionable'

wealth-during-pandemic>; The World Bank, 'Covid-19 to Add as Many as 150 Million Extreme Poor by 2021' (Press release, October 2020); Larry Elliot, 'TUC wants clampdown on 'poverty pay' in gig economy jobs' *The Guardian* (Web Page, 28 September 2018) <https://www.theguardian.com/business/2018/sep/28/tuc-wants-clampdown-on-poverty-pay-in-gig-economy-jobs>; Juliet Schor, 'How the Gig Economy Promotes Inequality' *Milken Institute Review* (Web Page, 18 September 2018) <https://www.milkenreview.org/articles/how-the-gig-economy-promotes-inequality>.

[2] *Uber Technologies Inc. v. Heller* 2020 SCC 16. This case note will distinguish between 'small e' equity and 'large E' Equity referring respectively to: a principle concerning interpretation of meaning, and the conscience-based body of law in common law jurisdictions.

[3] Denial of the industrial nature of the relationship itself, through unilaterally stipulated contractual provisions, is one such method and an aspect of this industrial abuse. While the Canadian Supreme Court has opened the door for Canadian courts to consider the question of employment status, this matter has not been determined by a Canadian court. The United Kingdom Supreme Court, however, upheld earlier tribunal and appeal court decisions rejecting Uber's argument that its drivers are not 'workers' under industrial legislation: *Uber BV v Aslam* [2021] UKSC 5 (see n 35 below). An informative discussion on industrial misclassification and related issues in the gig economy can be found in: Austin Zwick, 'Welcome to the Gig Economy: Neoliberal Industrial Relations and the Case of Uber' (2017) 83 *GeoJournal* 679.

[4] Two recent films, Boots Riley's *Sorry to Bother You* (Significant Productions, 2018) and Ken Loach's *Sorry We Missed You* (Sixteen Films, 2019), portray conditions experienced by ordinary American and British people working for predatory business entities.

transactional practices offers one such approach when these imbalances materialise specifically as the assertion of contract law by multinational entities against the dignity of the people whose labour generates their profits.

Part II establishes a framework for discussing *Heller*, illustrating the relationship between, and industrial significance of, human dignity and Equity. Part III outlines *Heller*'s factual scenario and procedural history. Part IV summarises the issues the Court considered and conclusions of each judgment. Part V shows how both majority judgements adopt an 'equitable' statutory interpretation that preserves the Court's ability to uphold dignitary standards by invoking exceptions to the principle against judicial questioning of an arbitration clause. Part VI, engaging with the three judicial responses to the validity question, illustrates how the relevant industrial injustice demanded an Equitable defence of human dignity by compelling conscionable standards of conduct pursuant to social and economic developments. It observes, however, that Judges Abella and Rowe's judgment, which constitutes the Court's decision, could have, especially in response to their colleagues' 'autonomy' and 'commercial certainty' complaints, benefited from a more forcefully affirming unconscionability, (definitively conscience-based) scope, to prevent law from becoming commandeered by, or impotent to restrain, powerful entities determined to transact with less powerful others heedlessly of their dignity. Part VII reflects that while *Heller* indicates Equity's potential in serving human dignity by mandating conscionable standards within *relations between parties*, deeper dignitary aspirations would require non-curial efforts aimed at conditioning conscience into *social relations* with assistance from a similarly reformative or transformative conceptualisation of equity.

II DIGNITY, EQUITY AND INDUSTRIAL JUSTICE

Human dignity denotes respect owed to people because they are human. Minimally conceptualised, it might support legal intervention only to secure basic freedoms concerning one's person, transactions, and property ('formal freedom dignity').[5] More

[5] The intellectual authority for such a position can be drawn, *inter alia*, from Immanuel Kant's 'Doctrine of Right'. See Immanuel Kant, *The Metaphysics of Morals*, ed Lara Denis, tr Mary Gregor (Cambridge University Press, 2017), [6:238]. It is not impossible, however, to adapt a more substantive theory of human dignity and human rights from this doctrine. See, e.g., Stephen Riley, *Human Dignity and Law: Legal and Philosophical Investigations* (Routledge, 2018) 42, citing Immanuel Kant, *The Metaphysics of Morals*, tr Mary Gregor, (Cambridge University Press, 1997 [1797]), 30.

substantive conceptions justify standards, beyond the aforementioned rights, obliging engagement with people as morally-valuable ends in themselves, rather than merely a means to one's own self-interest ('people as ends dignity)'.[6] Common law jurisdictions, especially through Common Law doctrines, tend to establish *sine qua non* rules of engagement based on the former.[7] They also tend to supplementarily recognise contexts and circumstances demanding higher standards than those upholding 'formal freedom dignity'. This includes legislative (e.g., employment) protections, as well as Equitable doctrines, compelling engagement of our moral reasoning capacities in evaluating whether contemplated conduct would instrumentalise another and traduce their moral worth. In labour contexts, like *Heller*, where profound power imbalances exist and opportunities often abound for skirting around legislated protection, the significance of 'people as ends dignity' warrants attention.

The need for Equitable involvement in industrial justice is inferable from Stephen Riley's observations about a 'dehumanising aspect of global capitalism' manifesting in contractual practices, utilised by transnational business engaged in 'a race to the bottom to secure cheap labour under the minimum of regulatory oversight'.[8] Difficulty plagues efforts to impose accountability upon parties' intent on deploying abundant resources and multinational arrangements, to reduce the law to a means for profit-seeking, or an avoidable hurdle thereto.[9] Courts have observed that Uber, for example, engages 'armies of lawyers' contriving documents … which simply misrepresent the true rights and

[6] This idea is articulated in Kant's well known 'Principle of Humanity'. See Immanuel Kant, *Groundwork of the Metaphysics of Morals*, tr Mary Gregor and Jens Timmermann (eds) (Cambridge University Press, 2nd edn, 2012) [4:429]: '*So act that you use humanity, in your own person as well as in the person of any other, always at the same time as an end, never merely as a means*' (italics in original).

[7] In this note, the distinction between uncapitalised 'common law' and capitalised 'Common Law' signifies that between the 'common law system' and 'Common Law' as a body of doctrine (as distinct from Equity which is also part of the common law system).

[8] Riley, *Human Dignity and Law*, 147. See John W Budd, *Employment with Human Voice: Balancing Efficiency, Equity, and Voice'* (Cornell University Press, 2004): In the field of industrial relations, Budd contends that 'society should seek to *balance* efficiency, equity, and voice'. Whereas efficiency is 'the primary objective of employers', equity and voice are 'objectives of labour' that pertain to human dignity, respectively concerning workers' wages and conditions, and meaningful involvement in decisions affecting them (2, 13, 18-25). That common law jurisdictions not only permit exercise of an interpretative principle of 'equity', but a distinct body of law called 'Equity', urges research into the latter's potential to uphold human dignity (including 'voice' concerns). See Duane Rudolph, 'Workers, Dignity, and Equitable Tolling' (2017) 15 *Northwestern Journal of Human Rights* 126: Rudolph contributes to such a project with his work on the potential of the American 'equitable tolling' doctrine to uphold dignity for workers suffering from mental illness by insisting that Courts hear, rather than humiliate, them.

[9] Riley, *Human Dignity and Law*, 146, 148.

obligations on both sides'.[10] Multinationals like Uber attempt to evade jurisdictions of domestic courts through 'non-statal forms of alternative dispute resolution and 'forum choice'.[11] This is coupled with power to 'lobby national governments to pass or import regulations of labour' favourable to their interests.[12] Power dynamics, between multinational business giants and workers in transnational labour contexts, often replicate in deficiencies of governmental willingness and ability to address dignitary concerns arising therefrom. Meaningful commitment to human dignity necessitates enforceable legal standards capable of overriding contractual obligations that assist abuses of private power against workers.[13]

Riley uses the language of conscience to articulate the need for legal developments to protect human dignity from oppressive reliance on contract law. While 'freedom of contract' is a basic concept of justice,[14] 'human dignity implies the impermissibility of *unconscionable* contracts which degrade the individual and encourage a race to the bottom in wages and conditions'.[15] This particularises his broader assertion that any violation of human dignity must be considered legally 'unconscionable' —[16] in other words, against the conscience of the law — as human dignity, he theorises, is constitutive of, and foundational to, legitimate law.[17] From the perspective of human dignity, international and domestic public law often 'fail[s] in the face of the technocratic and profit-generating promises of [multinational entities]'[18] and where its limits appear, '[r]emedies in private law … offer some promise'.[19] Riley recognises that human dignity requires not only constraints protecting individuals from state power (or upholding their agreements), but also adequately equipped state power to prevent abuses of power imbalances — particularly concerning labour.[20] Without discussing Equity, its

[10] Mitchell McInnes, 'Uber and Unconscionability in the Supreme Court of Canada' (2021) 137 *Law Quarterly Review* 30, 31 quoting *Aslam v Uber BV* [2016] EW Misc B68 (Et); [2017] IRLR 18, [96], quoting *Consistent Group v Kalwak* [2007] UKEAT 0535; [2007] IRLR 560, [57].
[11] Riley, *Human Dignity and Law*, 146.
[12] Ibid 146.
[13] Ibid 148.
[14] Ibid 72: As Riley considers human dignity constitutive of and foundational to the law, he holds that 'the capacity to enter into contracts is the presumption of an equal entitlement to enter into contract'.
[15] Ibid 148 (my italics).
[16] Ibid 6, quoting Mary Neal, 'Respect for Human Dignity as "Substantive Basic Norm"' (2014) 10 *International Journal of Law in Context* 26, 36.
[17] Ibid 4–5.
[18] Ibid 148.
[19] Ibid.
[20] Ibid149.

conscionable basis, or 'unconscionability', he stimulates consideration of their significance for upholding standards of human dignity in the context of industrial power relationships.

Irit Samet's explanation of the function of Equity's conscience picks up where Riley finishes. Whereas Common Law tends to take the form of 'rules', Equity provides broader supplementary 'standards' and 'principles'.[21] Common Law rules reflect the 'Rule of Law' ideal,[22] promoting 'human dignity in a very specific way, viz. by limiting the extent to which the state can meddle with people's long term planning'.[23] Equity, too, honours human dignity through framing its interventions as standards, 'embod[ying] deep respect for the citizens' autonomy and competence as practical reasoners' by requiring them to ethically think through their responses to circumstances confronting them in life and business.[24] We realise our own dignity as conscience-bearing moral ends by exercising this capacity of practical reasoning, regarding other people moral as moral ends.[25]

Whereas rule of law values informing Common Law's typically rule-based formulation, protecting people from arbitrary exercises of state power, Equity's conscience-based principles protect people from arbitrary exertion of private power.[26] What differentiates formal and more substantive conceptions of dignity, and their respective places in the common law system, becomes apparent here. The first reflects in fundamental rights-oriented Common Law rules valorising our capacities to make *prudent* decisions for oneself, such as entering contractual relations. The second reflects in supplementary Equitable principles promoting our capacities to make *moral* decisions concerning others. Common law systems treat the former as fit to govern most types of interactions

[21] Irit Samet, *Equity: Conscience Goes to Market* (Oxford University Press, 2018), 17.
[22] Ibid 74.
[23] Ibid 17.
[24] Ibid 25. Samet cites Waldron's view that broadly articulated legal provisions can be appropriate to treat 'people as having the dignity to respond positively to the task': Jeremy Waldron, 'Vagueness and the Guidance of Action' in Andrei Marmor and Scott Soames (eds) *Philosophical Foundations of Language in the Law* (Oxford University Press, 2011), 66. She also quotes (57) his support for standards concerning human dignity that rely on ''a shared sense of positive morality … and some common "conscience" we already share'': Jeremy Waldron, 'Inhuman and Degrading Treatment: The Words Themselves' (2010) 23 *Canadian Journal of Law & Jurisprudence* 269, 284.
[25] See Kant *Metaphysics*, [6:400], [6:348]. See also Susan Meld Shell, 'Kant on Human Dignity', in Robert Kraynak and Glenn Tinder (eds), *In Defense of Human Dignity: Essays for Our Times* (University of Notre Dame Press, 2003), 56: 'Dignity in short, applies to any finite being who has, or can be presumed to have, a conscience. It is thus something that all human beings possess because we are all co-legislators of the moral law'.
[26] Samet (n 21) 73.

and transactions, while demarcating space for the latter to conceptualise and categorise situations that urge deeper moral questions.

Contrasting with Equity's distinctive character, '[r]ule-based doctrines are prone to be abused by sophisticated players who seek ways to act near the sharp edges of the rule', in acquisitive pursuits regardless of moral duties to others.[27] Compounding this, '[c]lever 'legal engineers' advise well-resourced parties on using 'form over substance' methods to avoid legal control by circumventing the true purpose of the norms'.[28] By proclaiming conscience-based 'communal' principles and standards of interpersonal morality,[29] Equity instructs: 'if we want to be on the right side of the law we should avoid taking advantage of the rule-like nature of our legal rights where that would (clearly) breach our moral duty to the other party'.[30] The conscience of law may engage when human dignity is threatened by deviousness and power exercised by a private party. Equity's elasticity to curb arbitrary exercises of private power, promotes exploration of its dignitary significance in contexts of labour engaged by 'gig economy' giants inclined and equipped to manipulate law and evade justice.

Recent gig economy contractual contrivances exemplify potential for manipulation of legal rights to enable market power abuses against human dignity. One controversy arises from a 'gag clause' incorporated into Uber's Australian standard form contract, prohibiting drivers from speaking out against the company's treatment of them,[31] pursuant to another clause permitting Uber to unilaterally alter the contract at will.[32] Following legal challenge, Uber removed their 'gag clause', but still purport the right to arbitrarily change contractual terms.[33] Deliveroo are presently defending their obstruction of their riders from collectively bargaining, by categorising them as

[27] Ibid 36.
[28] Ibid.
[29] Ibid 48.
[30] Ibid 63.
[31] UberEATS, 'Delivery Person Agreement' (Contract) <https://www.twu.com.au/wp-content/uploads/2021/01/AU_Delivery_Person_agreement_Jan_2021.pdf>, cl 14.2 (b) (ii).
[32] UberEATS, 'Delivery Person Agreement' 15.2.
[33] Transport Workers' Union, 'Uber Backflips on Rider Gag Order Prompting Fresh Calls For a Tribunal to Set Standards' (Press Release, 31 January 2021); Transport Workers' Union, 'Federal Court Savages Uber Over Sham Business Model' (Press release, 30 December 2020). See also Transcript of Proceedings, *Amita Gupta v Portier Pacific Pty Ltd* (Federal Court of Australia, No. NSD 566 of 2020, Bromberg, Rangiah, and White JJ, 27 November 2020).

'independent suppliers', in the English and Welsh Court of Appeal.[34] Britain's Supreme Court rejected Uber's appeal against the EWCA's finding that the initial tribunal legitimately deemed their drivers 'workers' under workplace legislation, prescribing a minimum wage and holiday pay.[35] Gardner notes, however, such a decision may provide little tangible protection if the 'services agreement' was designed to render the courts inaccessible like in *Heller*.[36] If human dignity, concerning people as morally valuable ends, is accepted, then Equitable solutions, to these forms of industrial exploitation, appear attractive. It is worth evaluating recent Canadian authority for applying Equitable doctrine in the context of standard from contracts in the gig economy. The following account and analysis of *Heller*, postulates Equity's strength (and the significance of equitable statutory interpretation) in confronting contemporary industrial matters of human dignity.

III FACTUAL SCENARIO AND PROCEDURAL HISTORY

In 2017, David Heller, a Canadian UberEats driver, initiated a class action against Uber for breaches remediable under Ontario's *Employment Standards Act* ('*ESA*').[37] Heller's class proceedings concerned claims that depend on employee status under the *ESA*.[38] The substance of these matters and the employment status question were not debatable in

[34] Matt Trinder, 'Deliveroo collective bargaining case reaches Court of Appeal', *Morning Star* (Web Page, 2 February 2010) <https://morningstaronline.co.uk/article/b/deliveroo-collective-bargaining-case-reaches-court-of-appeal>. The matter is on appeal from the High Court's ruling that the right to collective bargaining under the European Convention on Human Rights (art 11) does not apply to these riders who are classified as 'independent suppliers'. See *R (on application of The Independent Workers Union of Great Britain) v Central Arbitration Committee & Roofoods Limited* [2018] EWHC 3342 (Admin).

[35] *Uber BV v Aslam* [2021] UKSC 5; *Uber BV v Aslam* [2018] EWCA Civ 2748. Lord Leggatt, writing for the UKSC, stated that 'the vulnerabilities of workers which create the need for statutory protection are subordination to and dependence upon another person in relation to the work done', and 'a touchstone of [which] is… the degree of control exercised by the putative employer over the work or services performed by the individual concerned' [87]. He emphasised five aspects of the original tribunal's reasoning in finding that Ubers drivers are, in fact, workers ([93]–[100]), specifically that Uber: (1) fixes 'the remuneration paid to drivers for the work they do', (2) dictates 'terms on which drivers perform their services', (3) constrains 'a driver's choice about whether to accept requests' upon logging into the app, 'monitoring [their] rate of acceptance (and cancellation) of trip requests', (4) 'exercises a significant degree of control over the way in which drivers deliver their services', and (5) 'restricts communication between passenger and driver to the minimum necessary to perform the particular trip and takes active steps to prevent drivers from establishing any relationship with a passenger capable of extending beyond an individual ride'.

[36] Jodi Gardner, 'Being Conscious of Unconscionability in Modern Times: *Heller v Uber* Technologies' (2021) Modern *Law Review* (forthcoming), 2.

[37] *Employment Standards Act, 2000,* S.O. 2000; *Heller*, [1]–[3], [12]: for breaches of the *ESA*, breach of contract, negligence, and unjust enrichment.

[38] *Heller*, [12].

the present case. It concerned whether they could even be *heard* by a court in the jurisdiction in which Heller worked. This is because Uber invoked the arbitration clause in the contract between them to block the claims of Heller and his co-litigants from being adjudicated by Canadian courts.

To become an 'Uber driver' one signs the non-negotiable standard form contract that Uber had drafted to avoid domestic employment protections ('the agreement').[39] It contained a clause ('the arbitration clause') stipulating that any disputes arising under it would be resolved through a process of mediation and arbitration in the Netherlands, under the International Chamber of Commerce rules,[40] with Dutch law applying — rather than by a Canadian court, under Canadian law, which can enforce workers' protections under the *ESA*.[41] This imposed an unstated obstacle of an upfront $14,500 filing fee (before legal and other associated costs) to even have the matter heard through Uber's chosen dispute resolution process, that the driver could only learn of by seeking out the ICC rules externally to the 'agreement'. Heller's yearly take-home earnings as an Uber driver would barely, or not quite, amount to this.[42]

His counsel argued that the arbitration clause was invalid because it was a) unconscionable, and b) contracted out of *ESA* provisions.[43] The motion judge granted Uber's motion to stay the proceedings. He applied the *International Commercial Arbitration Act* (ICAA) —[44] not the Arbitration Act (AA) —[45] which covers 'international' and 'commercial' arbitration agreements, as the parties were based in different jurisdictions and the agreement seemed to him, *prima facie,* commercial. He also applied the 'competence-competence' principle, under which contractually stipulated arbitrators are deemed competent to determine their own jurisdiction and rejected both arguments of invalidity.[46] This decision was overturned by a unanimous appeal court, which found it unnecessary to determine which arbitration statute applied (because the result would

[39] Ibid [2].
[40] *ICC Rules of Arbitration*, International Chamber of Commerce (at 1 March 2017).
[41] *Heller*, [7], [8], [9].
[42] *Heller*, [10], [11].
[43] Ibid [3], [13].
[44] *International Commercial Arbitration Act, 2017,* S.O. 2017, c. 2.
[45] *Arbitration Act, 1991*, S.O. 1991, c. 17.
[46] *Heller*, [14], [15], citing *Heller v. Uber Technologies Inc.* 2018 ONSC 718, 421 D.L.R. (4th) 343 (Perell J).

be the same regardless),[47] and the clause invalid for unconscionability and contracting out of *ESA* protections.[48]

IV UBER TECHNOLOGIES V HELLER IN THE SUPREME COURT OF CANADA

Uber appealed to Canada's Supreme Court. The ultimate question was whether the stay of proceedings issued by the motion judge should be reinstated or the appeal court's decision to overturn it upheld; respectively, whether the matter should be referred to Uber's stipulated arbitration process or whether Heller's employment law action — beginning with the question of employment status — should progress into a domestic court.[49] This depended on two issues. First, whether the general principle of arbitral fitness to assess their own competency, or jurisdiction, to adjudicate a matter governed by an arbitration clause, including the validity of that clause (the 'competency-competency' principle), applies to this case.[50] This entailed a question of applicable statute.[51] If the *ICAA* applied on the basis that the matter was both 'international' and 'commercial',[52] this principle would apply,[53] unless the court finds the clause 'null and void',[54] although ordinarily the arbitrator must rule on validity first.[55] The *AA* applies the same principle to disputes not covered by *ICAA* (therefore, if non-international or non-commercial),[56] with the exception that a court 'may' reject a 'stay' motion if the 'arbitration agreement is invalid'.[57] The Court has developed a framework for determining when, exceptionally to the 'competency-competency' principle, validity

[47] *Heller*, [16], citing *Heller v. Uber Technologies Inc.* 2019 ONCA 1, 430 D.L.R. (4th) 410 (Feldman, Pardu and Nordheimer JJA). Nordheimer JJA wrote that the 'Arbitration Clause [was chosen] in order to favour itself and thus take advantage of its drivers, who are clearly vulnerable to the market strength of Uber'.
[48] Neither Judges Abella and Rowe nor Judge Brown deem it necessary to address the ground of invalidity for contracting out of *ESA* protections. Judge Cotê does so [259]-[306].
[49] *Heller*, [1].
[50] *Heller*, [15], [31] (Abella and Rowe JJ), [122] (Brown J). Judge Cotê [222] refers specifically to the arbitrator's competency to adjudicate the validity of the clause appointing them as the 'rule of systematic referral'.
[51] Ibid [18].
[52] *ICAA*, s. 5(3).
[53] *ICAA*, s. 9, implementing *UNCITRAL Model Law on International Commercial Arbitration*, art 1.
[54] *ICAA*, sch. 2, implementing *UNCITRAL Model Law on International Commercial Arbitration*, art. 8(1).
[55] *ICAA*, sch. 2, implementing *UNCITRAL Model Law*, art. 16(1).
[56] *AA*, s. 7(1), s. 17(1). Meshel argues that 'the SCC's decision in *Uber v Heller* signals that it may be time for the provincial legislatures to clarify whether employment disputes should be excluded from Canadian international arbitration statutes, whether particular employment-related claims should be considered as non-arbitrable, and to what extent arbitral tribunals may determine the validity of arbitration agreements such as the one in this case': Tamar Meshel, 'International commercial arbitration in Canada after *Uber Technologies v Heller*' (2021) *Arbitration International*, (forthcoming), 25.
[57] *AA*, s. 7(2), para. 2.

should be considered by the court.[58] Second, if deemed permissible under either statute to consider the question of the validity of the arbitration clause, then the Court addresses is. The two grounds pleaded were 'unconscionability' and contracting out of employment legislation.[59] A decision of invalidity would entitle Heller to be heard by the relevant domestic court on the statutory employment status question. Otherwise, the stay would be reinstated, and the matter referred to arbitration.

Judges Abella and Rowe authored the judgment with seven other colleagues concurring, grounding the Court's decision.[60] They found that 1) the *AA* rather than the *ICAA* applies,[61] and permits departure from the 'competence-competence' principle in this instance;[62] and 2) the arbitration clause was invalid for unconscionability.[63] The Court therefore rejected Uber's request to stay proceedings, allowing Heller's class proceedings to progress. Judge Brown agreed 1) on the application and implications of the *AA*,[64] but rejected 2) the unconscionability argument,[65] alternatively finding the clause invalid due to public policy for undermining the rule of law.[66] Judge Cotê, dissenting, considered 1) that the *ICAA* applicable, but no exception to the competency-competency principle should arise under either statute,[67] and found 2) the clause valid,[68] although the stay should be reinstated conditionally upon Uber paying Heller's filing fee.[69]

V EQUITY OF THE STATUTE

Equitable reasoning was key in unlocking the Equitable jurisdiction that unblocked the drivers' right to be heard. *Heller* entails both 'small e' equity, as an interpretive principle, and 'large E' Equity, as a distinct body of law. The former reflects in judicial attitudes to the 'equity of the statute' relating to Ontarian arbitration legislation.[70] Both statutes enact

[58] See *Heller*, [31]–[34] (Abella and Rowe JJ), citing *Dell Computer Corp. v. Union des consommateurs,* [2007] 2 S.C.R. 801; *Seidel v. TELUS Communications Inc.,* [2011] 1 S.C.R. 531.
[59] *Heller*, [52].
[60] Wagner CJ, and Moldaver, Karakatsanis, Martin, and Kasirer JJ.
[61] *Heller*, [28].
[62] Ibid [48].
[63] Ibid [98].
[64] Ibid [104].
[65] Ibid [103].
[66] Ibid [176].
[67] Ibid [201].
[68] Ibid [202].
[69] Ibid [199], [203].
[70] Insights into this notion can be found in: Gary Watt, *Equity Stirring* (Hart Publishing, 2009), 6-7, James Edelman, 'The Equity of the Statute' in Dennis Klimchuck, Irit Samet, and Henry E. Smith (eds),

the 'competence-competence principle' with exceptions, inviting judges to apply them through equitable engagement with emerging situations. The Court's three judgments convey varying attitudes to equitable engagement with an open-ended statute, and the implicit extent to which their reasoning could honour dignitary concerns. The following explains how the spirit of the law was presumed consistent with human dignity through equitably reading legislation in light of private power ploys to instrumentalise it contrarily.

The majority judgments applied the *AA* because employee status controversies are naturally about employment,[71] not 'international commercial' arbitration disputes covered by the *ICAA*.[72] Judge Cotê applied the *ICAA*, deeming the dispute *prima facie* commercial because the agreement calls itself a 'licencing', rather than employment, agreement.[73] In the former logic, equitable reasoning treats arbitration legislation as part of a broader web of law, including the statutory protection affording workers (considering the power bosses naturally have over them), inconsistently with having employers avoid such protections by labelling the relationship 'international and commercial'.[74]

Under the *AA*, the court 'may' refuse to stay proceedings, despite the 'competence-competence' principle, for an invalid arbitration agreement.[75] The framework in *Dell Computer Corp. v. Union des consommateurs*, for exercising the discretion to question

Philosophical Foundations of the Law of Equity (Oxford University Press 2020), 352-3, 369, and; Benoit Jenneau, 'Equity in French Private and Public Law' in R.A. Newman (ed), *Equity in the World's Legal Systems: A Comparative Study* (Etablissement Emile Bruylant, 1973), 223-224.

[71] *Heller*, [26].

[72] Ibid [19] (Abella and Rowe JJ); *ICAA* s. 5(3), incorporating *UNCITRAL Model Law on International Commercial Arbitration*, U.N. Doc. A/40/17, Ann, art. 1(1); [104] (Brown J). *ICAA* and *AA* are mutually exclusive: *AA,* s. 2(1)(b).

[73] *Heller*, [217]. Judge Cotê added that '[t]he Service agreement expressly states that it does not create an employment relationship' but 'a software licensing agreement, which… is a type of transaction that is identified as coming within the scope of the model law [that *ICAA* ratified]': [216]. She argued also that proving otherwise would require further evidence than permissibly considerable, under the relevant framework (explained below), 'without usurping… the tribunal'.

[74] At least for Judges Abella and Rowe who explicitly mention the significance of employment law: *Heller*, [39]. See Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1988), 191-192 (ebook): For Dworkin, judges must treat law as if it were one 'seamless web' by endeavouring to interpret and apply the relevant provision to the case before her or him as consistently as possible with the other common law, legislative, and constitutional provisions that comprise the law as a whole. We might infer that the integrity of the law is be upheld through a notion of 'equity' that extends to ensuring that a legal provision is coherent with the larger corpus, or 'seamless web' of law. As Dworkin insists that either human dignity or a similar notion must underpin our conception of legal rights (19, 23), it follows that the law's integrity might depend on equitable reasoning holding sight of this end.

[75] *Heller*, [29]–[30], *AA* s.7(1)-(2).

validity, instructs that:[76] a) this is warranted if the invalidity question is purely of law; b) questions largely of fact must "normally" be referred to arbitration;[77] and c) mixed fact and law questions require referral unless the factual components require "only superficial consideration" of available documentary evidence.[78] Respective legislative and judicial choices, of the words '*may*' and 'normally', indicate scope for the courts to synthesise relevant considerations as they emerge — that might present exigent cause for considering validity — into a dynamic framework for deciding whether the exception *should* be exercised. The approaches by Judges Abella and Rowe to the statutory discretion and *Dell* framework accepted the invitation to uphold the spirit of the law through its refinement pursuant to experience. They found that *Heller*'s facts engage the 'mixed fact and law' exception because the validity question could be determined by superficially reviewing the record, but elaborated that even *if* deeper factual considerations were needed, the scenario departs from 'normal' circumstances that would demand referral to arbitration.[79] In abnormal circumstances contradicting the 'underlying assumption', informing the framework that referral will result in actual arbitral resolution of the issue, referral would generate an affront to access to justice that parliament 'could not have intended'.[80] This includes arbitration stipulations being excessively expensive or logistically inaccessible or containing 'a foreign choice of law clause … circumvent[ing] mandatory policy' (including industrial protections).[81]

Judges Abella and Rowe explain the equitable nature of the adjustment to the framework: 'These situations were not contemplated in *Dell*. The core of *Dell* depends on the assumption that if a court does not decide an issue, the arbitrator will'.[82] They counterbalance this flexibility through a 'good faith' test concerning such challenges, namely whether: a) a 'genuine challenge' is apparent on the pleaded facts, and b) supporting evidence indicates a 'real prospect' that staying the proceedings may not result in the arbitrator resolving the challenge.[83] Both limbs were satisfied because

[76] *Heller*, [32], citing *Dell Computer Corp. v. Union des consommateurs,* [2007] 2 S.C.R. 801; *Seidel v. TELUS Communications Inc.,* [2011] 1 S.C.R. 531.
[77] *Heller*, [32], quoting *Dell*, [84]-[85].
[78] Ibid [32], quoting *Dell*, [85].
[79] Ibid [37].
[80] Ibid [38].
[81] Ibid [39]: 'In these situations, an arbitration agreement is 'insulated from meaningful challenge'.
[82] Ibid, [40].
[83] Ibid [44]. The 'real process' question can be determined from 'a single affidavit' and '[b]oth counsel and judges are responsible for ensuring the hearing remains narrowly focused'.

'prohibitive fees … embedded in the fine print … impose a brick wall' to resolution.[84] The machination to prevent determination of employee status without first paying 'possibly unconscionable' fees can only be foiled by answering the validity question.[85] Judges Abella and Rowe equitably exercised their discretion conveyed through the word '*may*' and expanded on the circumstances enlivening it. Their reasoning exemplifies equitable engagement with an open-textured statute framed to enable judges to establish and develop a framework consistent with its own purposes and fundamental values underpinning the legal system. 'Access to justice', a dignitary concern,[86] entails that parties — whom powerful entities would silence — be heard; statute is interpreted in this light.[87]

Judge Brown narrowed his recognition, of exceptional considerations of fact requiring more than superficial review, to stipulations 'preclud[ing] access to legally determined dispute resolution', as a matter of 'public legitimacy of the law in general'.[88] He 'limit[ed] [the] exception to cases where arbitration is arguably inaccessible', asserting that 'it should not apply merely because the parties' agreement contains a foreign choice of law provision'.[89] For him, public policy ensures that the *AA* is interpreted and applied in accordance with the 'rule of law' hallmark, access to justice,[90] as the 'integrity of the justice system' would be assailed if this were no longer treated 'as a right inalienable even by the concurrent will of the parties'.[91]

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[84] Ibid [47].
[85] Ibid.
[86] See David Luban, *Human Dignity and Legal Ethics* (Cambridge University Press, 2007), 69, 88: Luban's conception of human dignity as 'nonhumiliation' — which he contextualises with reference to the role of lawyers in litigation — centralises the right to be heard and the corollary insistence that a person be heard. 'The courtroom advocate defends human dignity by giving the client a voice and sparing the client the humiliation of being silenced and ignored' (72).
[87] A similar attitude, that could be explained as an equitable approach to interpreting legislation in light of fundamental rights, is promoted by Australia's High Court. *Bropho v Western Australia* (1990) 171 CLR 1, 304 (Mason CJ, Deane, Dawson, Toohey, Gaudron, and McHugh JJ): '… the rationale of the presumption against the modification or abolition of fundamental rights or principles is to be found in the assumption that it is "in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used"' (citations omitted).
[88] *Heller*, [125]–[126].
[89] Ibid [126].
[90] Ibid, [105]–[106], [120]–[121].
[91] Ibid [110], quoting *Scott v Avery* (1856) 5 HLC 811, 10 ER 1121, 1133.

The plurality, however, identified and closed potential loopholes that the present case revealed as readily exploitable by powerful parties.[92] This includes tactics for 'evading the result of this case through a choice of law clause' by 'convert[ing] a jurisdictional question… of law (which therefore could be decided by the court) into a question as to the content of foreign law, which would require hearing evidence in order to make findings [on] foreign law'.[93] Had Uber introduced questions or evidence concerning any Dutch counterpart to 'unconscionability', the Court would have to uphold the stay — unless prepared to recognise that the word 'normally' implies potential for this type of abnormality.[94] Giving the word this operation also closes a wider loophole for parties in Uber's position to force referral to arbitration by 'unreasonably disputing facts'.[95] Judge Abella and Rowe's concern with 'access to justice' not only includes costs and logistics precluding resolution, but also choice of law provisions 'circumvent[ing] mandatory local policy', including statutory employment protections. Granting a stay in either situation would 'insulate [the arbitration agreement] from 'meaningful challenge'.[96] The plurality equitably presumed legislative consistency with prior dignitary commitments to access to justice and labour standards by identifying loopholes available to flout them.

Both majority judgments adopt equitable reasoning in factoring newly emerging factors into the framework for exercising the statutorily prescribed scope of discretion. The minimum 'equity of the statute' is that, while the legislature generally intends referral of disputes, to arbitration, that arise under agreements stipulating such avenue for resolution, there are appropriate times for courts to find that questions concerning validity of an arbitration clause warrant refusal to order referral and resume their function of determining such questions. Judge Brown's milder equitability implies narrower dignitary influence in his 'legitimacy of the law' and 'inalienable rights' basis,[97] for his limited exception which only applies by demanding access to resolution when arbitration is rendered inaccessible. The plurality's reasoning more equitably implies

[92] Ibid [50].
[93] Ibid [49]–[50]. Their honourable justices astutely noted, this is 'something that one would not ordinarily contemplate in a superficial review of the record'.
[94] Ibid [50].
[95] Ibid [51]. It was observed that this would allow avoidance of potential adverse costs orders that civil courts can award following such conduct.
[96] Ibid [39].
[97] Ibid [126].

deeper dignitary concern by more robustly identifying demonstrably exploitable loopholes.

Judge Cotê's insistence on referral, for fidelity to either statute or the *Dell* framework, eschews equitable concern for any meaningful dignitary principles in construing statutes. Her 'superficial' finding of 'commerciality' shrewdly avoids the equally superficial observation that relationships characterised by a person's labour generating capital for a business that has many others doing the same usually constitute employment. An attitude that the statutes, and their emanating framework, enact ironclad authority for forbidding meaningful equitable reasoning to elicit dignitary commitments, recurs in Judge Cotê's dissatisfaction with the available evidence to superficially indicate a situation in which the validity question warrants consideration,[98] refusal to recognise exceptions allowing deliberation deeper than superficial review,[99] and rigidifying the 'competence-competence' principle.[100] This obscures obvious observations that power dynamics between multinational business giants and people labouring under them for a living may reflect severely in the formulation of their 'agreement' and make validity questions exigent. The majority's equitable reading of legislation, however, that upheld well-established dignitary legal objectives, prevented statute from becoming an instrument of oppression.

[98] For her, the validity question would require 'testimonial evidence' beyond what can be established from a 'superficial review of the documentary evidence'. Namely, concerning 'Mr Heller's 'financial position, his personal characteristics, the circumstances of the formation of the contract and the amount that would likely be at issue in a dispute to which the Arbitration Clause applies' (*Heller*, [234]). Even if she were prepared to 'consider the testimonial evidence in the record', such would be insufficient to justify exception to the competence-competence principle. She claimed: '[t]he record is simply not sufficient… to conclude with certainty that Mr. Heller was vulnerable throughout the contracting process' because 'there is no evidence that [he] was in a state of necessity or was incapacitated', the 'unlimited amount of time [allowed] to review the agreement', his apparent capability of 'understanding the significance of the Arbitration Clause' and 'considerable sophistication' in his dealings with Uber' [235].
[99] On the basis that 'there is no evidence in the record regarding the comparative availability of third-party funding for arbitration or litigation' (*Heller*, [236]).
[100] Judge Cotê rejects the majority's exception for arbitration agreements deemed '"too costly or otherwise inaccessible"' should be 'created or applied to this case', on the purported basis of fidelity to the statutes and the *Dell* framework (Heller, [241] - [247]). Similarly, she rejects Judge Brown's policy-based approach because '[a]ny impediment to access [to the courts] under the [AA] or [ICAA] exists simply because the parties … must abide by their agreement' (*Heller*, [254]).

VI UPHOLDING DIGNITY THROUGH UNCONSCIONABILITY

Following the plurality's and Judge Brown's reasoning regarding the competence-competence principle, it was appropriate to decide on the validity question.[101] Despite deeming that unanswerable, Judge Cotê disputed the bases of invalidity her colleagues asserted.[102] This section affirms the plurality's application of 'unconscionability' in response to a contemporary dignitary issue, but suggests that their judgment could have benefitted from more explicitly conscience-based responses to 'autonomy' and 'commercial certainty' criticisms from their colleagues.

A '*Dignity' and 'e/Equity' in Judgment*

The response to the validity question reflects different attitudes towards human dignity and Equity. Judges Abella and Rowe advance a 'people as ends' dignitary understanding through Equitable doctrine. Judge Brown embraces the shallower, but not quite the deeper, conception of dignity with support from equitable (not Equitable) reasoning'. Judge Cotê uses language associated with 'formal freedom dignity', while employing a scant, selectively context sensitive, degree of equitable reasoning.

1 *Judges Abella and Rowe*

The plurality define 'unconscionability' as 'an [E]quitable doctrine' for rescinding 'unfair agreements [resulting] from an inequality of bargaining power'.[103] It addresses 'serious flaws in the contracting process that challenge the traditional paradigms of the common law of contract, such as faith in the capacity of the contracting parties to protect their own interests'.[104] In such cases, suppositions underpinning freedom of contract 'lose their justificatory authority'.[105] The 'ideal assumptions' of freedom of contract provide a 'good-starting point', but to pretend they always 'align with reality' would contradict 'human experience'.[106] Equitable doctrines, therefore, permit judges to consider 'individual requirements of particular circumstances … humaniz[ing] and contextualiz[ing]' legal

[101] *Heller*, [47] (Abella and Rowe JJ), [125] (Brown J).
[102] Ibid [202] (Cotê J).
[103] Ibid [54], quoting John D McCamus, *The Law of Contract* (2nd ed, Irwin Law, 2012), 424.
[104] Ibid [58]. Their honourable justices notably mention negotiability as part of this paradigm: [56].
[105] Ibid [59].
[106] Ibid [57], quoting PS Atiyah, *Essays on Contract* (Oxford University Press, 1986), 148.

judgment.[107] The 'core values' that base freedom of contract remain intact and effective as courts identify relatively exceptional cases where 'unfair bargains cannot be linked to fair bargaining' and justify 'avoid[ing] the inequitable effects of enforcement'.[108] Unconscionability, unlike other forms of relief for more specific types of problematic contracts, focuses on vulnerability in contracting processes, has the advantage of closing 'gaps between existing "islands of intervention". Courts protect the 'weak from over-reaching by the strong',[109] by concentrating on this justification for withholding their power to enforce provisions of an 'agreement'. This reveals the distinction between the Common Law's and Equity's protection of human dignity. The Common Law upholds 'formal freedom' human dignity through enforcement of contracts.[110] Equity's conscience-based reasoning registers 'people as ends' dignitary concerns arising from misused 'freedom of contract' dogma as discerned from contexts and circumstances attending interactions between the parties. Its unconscionability doctrine advances 'people as ends' dignity by insisting powerful parties engage their capacity for other-regarding (conscience-based), beyond self-interested, reasoning in their dealings.

2 *Judge Brown*

Judge Brown valorises freedom of contract as 'a hallmark of a free society', in securing the individual's ability 'to arrange their affairs without fear of overreaching interference by the state'.[111] He rejects the majority's application of unconscionability for 'compound[ing] the uncertainty that already plagues the doctrine, and… introduc[ing] uncertainty to the enforcement of contracts generally'.[112] Instead, he reaches the conclusion of invalidity '[a]s a matter of public policy' under which 'courts will not enforce contractual terms that, expressly or by their effect, deny access to independent dispute resolution according to law'.[113] This 'rule of law' approach conveys dignitary

[107] Ibid [58], quoting Leonard I Rotman, 'The 'Fusion' of Law and Equity? A Canadian Perspective on the Substantive, Jurisdictional, or Non-Fusion of Legal and Equitable Matters' (2016) 2 *Canadian Journal of Contemporary and Comparative Law* 497.
[108] *Heller*, [59], citing Peter Benson, *Justice in Transactions: A Theory of Contract Law* (Harvard University Press, 2019), 182.
[109] *Heller*, [61], citing *Hunter Engineering Co v. Syncrude Canada Ltd.*, [1989] 1 SCR 462, 516.
[110] It sometimes even accepts internally 'equitable' reasoning insofar as it recognises duress as a negation of the consent upon which it is premised by the violation of the innate freedom of security of person, transaction, or property.
[111] *Heller*, [107].
[112] Ibid [103].
[113] Ibid [105].

implications through the concepts and language of the 'integrity' of the law and 'inalienable' rights that apply 'irrespective of the value placed on freedom of contract'.[114]

The court must uphold 'the rule of law' through public policy to guarantee stability, predictability, and order for individuals to arrange their lives. Judge Brown's reasoning reflects the 'formal freedom dignity', through the understanding that the 'legal rights' embodying this security are 'meaningless' without 'an independent judiciary' to uphold them; 'the rule of law', its 'legitimacy', and the common law's 'development' would suffer.[115] Recognising arbitration agreements as generally meritorious,[116] he denies that they may permissibly preclude resolution.[117] For him, 'there is no value in a contract that cannot be enforced', and 'unless everyone has reasonable access to the law and its processes where necessary to vindicate legal rights, we will live in a society where the strong and well-resourced will always prevail over the weak'.[118] The basic dignitary rights and rules of law necessitate equitable (but not Equitable) reasoning to protect contract law through public policy to prevent them from self-defeating unenforceability.

The rule of law, for Judge Brown, supports 'commercial certainty' 'because access to justice allows contracting parties to enforce their agreements'.[119] Similar logic predicates his fear that the majority's formulation of 'unconscionability' will cause 'profound uncertainty about the enforceability of contracts'.[120] The upper threshold of the dignity, and the equitable virtue, that Judge Brown seems to endorse resonates in his phrase: 'It is the rule of *law*, not the rule of *Uber*'.[121] This acknowledgement aims to prevent rules integral to the legal system from collapsing under their rigidity. The law's integrity to its 'formal freedom dignity' foundation generates his 'public policy' reasoning. It refuses entities, like Uber, a complete litigation shield, but leaves them considerable scope to instrumentalise law against their workers through other means, including stipulating an *accessible* body other than a domestic court to adjudicate questions of employee status. Judge Brown's barriers, to firmly asserting the 'people as ends' dignity, through Equity's

[114] Ibid [110], citing *Scott v Avery* (1856) 5 HLC 811, 10 ER 1121, 1133.
[115] Ibid [111].
[116] Ibid, [116].
[117] Ibid [121].
[118] Ibid [112].
[119] Ibid.
[120] Ibid [161].
[121] Ibid [137].

conscience-based standards, reappear in his criticisms of the plurality's application of unconscionability.

3 *Judge Cotê*

Judge Cotê prefaces her judgment with determination to recognise only the most abstract understanding of human dignity:

> 'One of the most important liberties prized by a free people is the liberty to bind oneself by consensual agreement. *Although times change and conventional models of work and business organization change with them, the fundamental conditions for individual liberty in a free and open society do not.* Party autonomy and freedom of contract are the philosophical cornerstones of modern arbitration legislation'.[122]

She professes:

> 'The parties… have bound themselves to settle any disputes under it through arbitration. My colleagues… advance competing theories which impugn, to varying degrees, the choice of law that governs the parties' contractual arrangements, the designated seat of arbitration, and the selection of an international arbitral institution's procedural rules. [They] do not impeach the parties' agreement to submit disputes to arbitration, yet they find that the parties commitment to do so is invalid. I cannot reconcile this result with the concepts of party autonomy, freedom of contract, legislative intent, and commercial practicalities.[123]

The conception of dignity apparent here, though less concerned with the law's structural integrity than Judge Brown, concerns formal 'liberties' established as rights and rules forming restrictive authorisations of lawful interferences, through public power, into human affairs.

Despite recognising economic change, Judge Cotê rules out considering how these changes tangibly alter the requisite conditions for any meaningful experience of 'individual liberty'. She erases context regarding the impact of power relationships,

[122] Ibid [177] (citations omitted) (my italics).
[123] Ibid [178].

between parties to arbitration agreements, on a working person's 'liberty' and 'autonomy', instead flagging intention to contextualise her reasoning with commercial concerns. Despite recognising the 'formal freedom' human dignity, through its sub-principles of 'party autonomy' and 'freedom of contract' as embedded as Common Law rights (and arbitration legislation) which entail state enforcement through law, Judge Cotê is silent on the potential for degradation of the legal system and human dignity when it fails to shield its subjects from attempts to preclude its protection of their own Common Law rights. Much less is she concerned about power dynamics between the parties that enabling one to instrumentalise the other. Disinterest in 'person as ends dignity' is apparent from Judge Cotê's confident commerciality categorisation of the relevant relationship, and her, perhaps equitable (in a non-moral sense), promotion of Canada's 'world leadership in arbitration law' as an exigent factor informing her reasoning.[124]

Other than that — having rejected 'unconscionability' both 'public policy' —[125] the extent of Judge Cotê's selective equity in her proposed resolution to the problem of whether an arbitrator would end up resolving the question of its own jurisdiction, conditionally granting the stay motion upon Uber advancing Heller's filing fee.[126] Despite her own inflexibility towards circumstances undermining the assumption of 'party autonomy' informing entry into the arbitration agreement,[127] she recognises the need to impose such a condition '[i]n light of Mr. Heller's particular circumstances'… 'to enable him to initiate such proceedings'.[128] Her insistence on so-called 'legislative intent' obscures the scopes for informed judgement built into the *ICAA* and *AA*,[129] while she embraces a statutorily prescribed 'generous approach to remedial options',[130] allowing judges to conditionally stay proceedings on 'terms considered just'.[131] This otherwise uncharacteristic flexibility recurs in Judge Cotê insisting that *if* she found invalidity in the arbitration agreement, such would only concern the selection of the ICC rules entailing

[124] Ibid [210].
[125] Ibid [237]: she 'fear[s] that the doctrines of unconscionability and public policy are being converted into a form of *ad hoc* judicial moralism or "palm tree justice" that will sow uncertainty and invite endless litigation over the enforceability of arbitration agreements'.
[126] Ibid [199].
[127] See *Heller*, [257]–[262]. This includes her insistence upon a vulnerability particular to the unconscionability claimant, and rejection in relation to this claim, on the available and considerable evidence, of his particular circumstances concerning understanding and financial means.
[128] Ibid [324].
[129] Ibid, [237].
[130] Ibid [321].
[131] Ibid [321], quoting *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 106.

the obstructive fee, which can be avoided by 'blue-pencil severance'.[132] These alternatives to finding invalidity, says Judge Cotê , uphold the parties' 'autonomy' and 'commitment' to arbitration and legislative encouragement thereof.[133] Failure to uphold that 'commitment' would undermine the 'certainty upon which commercial entities rely in structuring their global operations' and 'be commercially impractical'.[134] Impeccably, Judge Cotê illustrates how undignifying and inequitable the law's treatment of its subjects can become when it adopts overly formalistic dignitary reasoning, and accommodates non-dignitary considerations instead of human circumstances and contexts concerning imbalanced power relationships. This attitude informs her rejection of the majority's understanding of unconscionability.

B *Elements*

Judges Abella and Rowe's formulation of unconscionability strengthens, while their colleagues would straitjacket, its ability to uphold human dignity amid contemporary economic conditions. The former assert a two-limb test of 'inequality of bargaining power', pertaining to a vulnerability affecting one party and a resulting 'improvident transaction' for that party.[135] They argued that a higher threshold and additional elements would render the doctrine 'more formalistic and less equity-focused' and distract from the inquiry into 'unfair bargains resulting from unfair bargaining'.[136] Judges Brown and Cotê disagreed, concerning the following elementary matters, on commercial certainty and autonomy bases.[137] They insist that recognisable inequalities stem from 'vulnerability *particular* to the claimant', lest contracts become challengeable for 'substantive reasonableness'.[138] They advocated knowledge, by the stronger party, of the particular vulnerability, as a necessary element.[139] Judge Brown opposed the majority's rejection of 'independent legal advice' as an automatic and sufficient alleviation of a

[132] Ibid [326]–[336].
[133] Ibid [201], [325]. Judge Cotê even claims it would be 'absurd' to defeat 'the parties' commitment to submit disputes to arbitration' [336].
[134] Ibid [336].
[135] *Heller*, [62], quoting Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (LexisNexis, 2014), 524, citing *Hunter Engineering Co. v. Syncrude Canada Ltd*., [1989] 1 S.C.R. 426; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; *Douez v. Facebook Inc*., [2017] 1 S.C.R. 751.
[136] Ibid [82].
[137] Ibid [257]: Judge Cotê endorses Judge Brown's formulation of the doctrine.
[138] Ibid [161]–[163] (Brown J) (my emphasis).
[139] Ibid [164]–[167] (Brown J), [258]-[259], [287] (Cotê J).

party's vulnerability.[140] He found the majority's contextual approach to 'improvidence' insufficiently precise and inappropriately concerned with distributive justice, arguing that it must be established on the basis of the entire bargain, not just part disadvantageous to the weaker party.[141] Judge Cotê's only disagreement with Judge Brown regarding unconscionability concerns her view that arbitration clauses merit separate consideration.[142] This struggle between formalism and Equity, characterising the divergence between the judgments on unconscionability, is substantively between commercial interests and human dignity.

C *'Vulnerability'*

The plurality asserted that vulnerabilities establishing inequality of bargaining power exist 'when one party cannot adequately protect their interests in the contracting process'.[143] Previously recognised disadvantages assist in identifying, without exhausting the scope of, potentially qualifying attributes.[144] They are generally classifiable as 'understanding' and 'necessity' cases, respectively concerning: (a) characteristics hindering one's ability to exercise self-interested judgements; or (b) circumstances affecting them such as financial desperation and economic contingencies.[145] 'Understanding' cases concern vulnerabilities in 'appreciat[ing] the full import of the contractual terms'. They could occur 'because of personal vulnerability or… disadvantages specific to the contracting process, such as … dense or difficult to understand terms'.[146] In 'necessity' cases, the weaker party's dependency on the stronger is such that 'serious consequences would flow from not agreeing to the contract', thereby impairing 'the weaker party's ability to contract freely and autonomously'. Equity

[140] Ibid [167]. Since this is the least discussed element, and in the interests of brevity, only the 'independent legal advice' matter will not receive separate its own discussion in what follows.
[141] Ibid [170]–[173].
[142] Ibid, [258] (Cotê J).
[143] Ibid [66].
[144] Ibid [67]. Judges Abella and Rowe list the following examples where vulnerabilities have been recognised, which 'bear little resemblance to the operative assumptions on which the classic contract model is constructed' [58]:'The elderly person with cognitive impairment who sells assets for a fraction of their value (*Ayres v. Hazelgrove,* Q.B. England, February 9, 1984); the ship captain stranded at sea who pays an extortionate price for rescue (*The Mark Lane* (1890), 15 P.D. 135); the vulnerable couple who signs an improvident mortgage with no understanding of its terms or financial implications (*Commercial Bank of Australia Ltd. v. Australia Ltd. v. Amadio*, [1983] HCA 14, 151 C.L.R. 447)'.
[145] *Heller*, [69]–[70] (necessity cases), [71] (understanding cases); [67], citing Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Lexis Nexis, 2014), 525. McInnes labels the two categories as '*personal*' and '*circumstantial*'.
[146] Ibid [72].

obstructs financially powerful parties from 'push[ing] the weak to the wall' by leveraging 'unfortunate situation[s]' where the former 'would accept almost any terms, because the consequences of failing to agree are so dire'.[147] In either context, 'assumptions about free bargaining either no longer hold substantially true or are incapable of being fairly applied'.[148] Both categories warrant emphasis in the 'gig economy' where workers seeking employment engage on radically uneven playing fields with business giants. They respectively concern their ability to comprehend the impacts of convoluted clauses companies propose *and* financial pressures necessitating acceptance of oppressive conditions.

Obscuring these factors — by restricting the scope of recognisable disadvantage to those peculiarising the claimant from their peers — ignores that severely unequal bargaining power and vulnerability exist proportionately to magnitudes of corporate giants' market dominance. Judges Brown and Cotê thus dilute unconscionability as a conscience-based doctrine. Distancing 'unconscionability' from its moral denotation,[149] Judge Brown insists it solely remedies '*procedural* deficiencies' in contract formation, not 'substantive unfairness'.[150] Some 'vulnerability particular to the claimant is required'; none was argued for Heller.[151] He finds vulnerability absent where the 'only procedural deficit [was] the nature of Uber's contract terms, as … presented … through a standard form contract'.[152] If unconscionability applied, '*any* party contracting with Uber [could] raise [it] because they were unable to negotiate the contract's terms'.[153] He complained (Judge Cotê concurring):[154] 'this Court has never before accepted that a standard form contract denotes the degree of inequality of bargaining power necessary to trigger the application of unconscionability'.[155] Such an application would apparently threaten 'freedom of

[147] Ibid [69], quoting *Janet Boustany v. George Pigott Co (Antigua and Barbuda*), [1993] UKPC 17, 6, quoting *Alec Lobb (Garages) Ltd. v. Total Oil (Great Britain) Ltd.,* [1985] 1 W.L.R. 173, 183.
[148] Ibid [72], quoting Rick Bigwood, 'Antipodean Reflections on the Canadian Unconscionability Doctrine' (2005) 84 *Canadian Bar Review* 173, 185.
[149] Ibid [150]: '… even though in a generic or lay sense, the arbitration agreement at issue in this appeal might well be considered "unconscionable", it does not follow that it is unconscionable in the specific sense contemplated by the equitable doctrine of that name'.
[150] Ibid [156]–[157].
[151] Ibid [161], [175].
[152] Ibid [162].
[153] Ibid [162].
[154] Ibid [263]: Judge Cotê fears that the majority's finding — that combined factors of the arbitration agreement taking the form of a clause in a standard form contract and its silence about the cost of proceedings thereunder — amounts to a contention 'that an arbitration agreement in a standard form contract is itself unconscionable'.
[155] Ibid [162].

contract' and its underlying 'respect [for] individual autonomy', arguing that such contracts do not harm a 'party's ability to bargain effectively from the standpoint of legal autonomy, choice and responsibility'.[156] It would render an 'undisciplined' turn in the development of unconscionability and render 'profound uncertainty' upon enforcement of contracts.[157] Judge Brown's 'public policy' alternative, he claims, direct focuses on substantive injustice, but is limited to a 'rule of law' conception pertaining to limitations upon access to 'legally determined dispute resolution' that are '[un]reasonable between as the parties' or cause 'undue hardship'.[158] Other types of 'hardship' imposed through standard form contracts would likely remain enforceable, along with arrangements that enable 'legally determined dispute resolution' (such as choice of law clauses) selected to avoid protections of the dignity of working people.

Judges Abella and Rowe explain why — especially in terms of the 'understanding' disadvantage but not sufficiently clearly for those of 'necessity' — the unconscionability doctrine holds particular contemporary significance for the advent of nonnegotiable 'standard form contracts' in the labour market. They emphasise that its alertness, to situations when the assumptions underpinning the general rule of freedom of contract depart from reality, must extend to circumstances surrounding these contracts. A void is left unfilled, otherwise, skewing the relationship between 'commercial certainty' and 'fairness' in favour of the former.[159] On one hand, courts recognise standard form contracts as useful in many industries and not *per se* entailing power imbalances.[160] On the other, unconscionability is conceptually suitable for scrutinising such agreements in its attentiveness to the general examination of 'conditions behind consent as … with any contract' as well as the specific and intensified concerns surrounding 'standard form contracts'. Such contracts may generate and exacerbate transactional vulnerability, especially through deliberate drafting techniques applied 'by one party without input from the other', including inserting 'provisions that are difficult to read or understand'. They may also 'enhance the [stronger party's] advantage … at the expense of the more vulnerable one, particularly through choice of law, forum selection, and arbitration

[156] Ibid [162], citing Bigwood, 'Antipodean Reflections', 199-200.
[157] Ibid [163].
[158] Ibid [129].
[159] Ibid [86].
[160] Ibid [88].

clauses that violate the adhering party's reasonable expectations by depriving them of remedies'.[161]

The majority considered *Heller*, therefore, as 'precisely the kind of situation in which [unconscionability] is meant to apply',[162] and confidently found unequal bargaining power. Absence of opportunity to negotiate terms presented in Uber's take-it-or-leave-it offer renders obvious and operative the bargaining inequality between the 'food deliveryman' and the far more sophisticated 'large multinational corporation'. Further, the arbitration clause effectively hides the ICC rules, through which it imposes the $14,500 filing fee and travel costs, that drivers would have to seek out themselves, and could not reasonably be expected to appreciate even in the unlikely event that one read the entire agreement.[163] The conscience informing Equity's concern with the power enabling businesses to tender non-negotiable standard form contracts to parties insists that this power be exercised responsibly regarding the dignity of individuals they transact with. Conscionability in this context, therefore, should ameliorate 'business culture', by discouraging legitimate competitiveness from devolving into contests of ruthlessly one-sided contract drafting.[164] This reflects Samet's argument that Equity's conscience establishes moral standards and methods of reasoning for applying them *as well as* a communicative function to market participants that their business will harmonise with private law if they exercise moral reasoning when conducting it.[165] Equity, thereby, promotes business conduct that comports with the dignity of others.

Judges Brown and Cotê reject that lack of clarity in (especially standard from) contractual terms could establish vulnerability. Judge Cotê deflects that such standard would be so 'vague and illusory' and thus 'be open to abuse by a party' in Heller's position.[166] She claims that alleged vulnerability concerning Heller's limited education and resources would require testimonial evidence — therefore referral to arbitration — and that available testimonial evidence fails to establish unconscionability.[167] She assumes that he 'declined to read' the arbitration clause, rather than not appreciating its implications.

[161] Ibid [89].
[162] Ibid [89].
[163] Ibid [93].
[164] Ibid [91].
[165] Samet (n 21) 63.
[166] *Heller*, [257].
[167] Ibid [261].

Moreover, he demonstrated sophistication in standing up for himself. The record also lacked evidence indicating why he 'decided' to drive for Uber.[168] This reasoning denies moral responsibility — to clearly consider and explicate impacts of terms one proposes — that accompanies the power to tender standard form contracts knowing that many parties will depend on the ensuing relationship for a livelihood. It obliterates the reality that few people applying to parties like Uber (especially those economically embattled), regardless of education or sophistication, have expendable time and energy to thoughtfully read every standard form contract they click through, not to mention concealed provisions whose content must be sought elsewhere. Judge Brown emphasises that the plurality's view that unconscionability may arise from a party's misunderstanding or unappreciation of a term, 'suggests that [the arbitration agreement] could have been remedied if the US$14,500 fee … was spelled out expressly'.[169] His and Judge Cotê's respective minimisation of economic dominance asserted by Uber over its drivers, warrants *contextual* attention of what constitutes a relevant vulnerability. The plurality could have compellingly accounted for their criticisms by expounding that such a provision, howsoever clearly articulated, would not be rejectable by people whose financial necessity leaves few alternatives but unemployment. They perhaps eschewed this line of reasoning to avoid grappling with Judge Cotê's insistence that insufficient evidence exists surrounding Heller's financial position and his decision to contract with Uber.

This should be answerable through empirical knowledge that Heller worked fulltime for Uber and that job markets are increasingly challenging for applicants.[170] Not *all* standard form contracts are unconscionable. Provisions therein, imposing conditions clearly leveraging economic desperation afflicting large portions of those entering into them, are oppressive, and surely unconscionable. Knowledge that people seeking to become Uber

[168] Ibid [262].
[169] Ibid [171].
[170] This has been exacerbated by pandemic conditions, which had emerged before the Court handed down its judgment. For instance, in April 2020, 2 million Canadians lost their jobs: 'Canada lost nearly 2 million jobs in April amid COVID-19 crisis: Statistics Canada', *CBC* (Web Page, 8 May 2020) <https://www.cbc.ca/news/business/canada-jobs-april-1.5561001>. In the same month, the U.S. experienced 20.5 million job losses: 'U.S. economy lost 20.5 million jobs in April', *CBC* (Web Page, 8 May 2020) <https://www.cbc.ca/news/business/united-states-coronavirus-jobs-unemployment-april-1.5561026>. See also: Brandie Weikle 'What the COVID-19 employment crisis tells us about the future of work' *CBC* (Web Page, 29 May 2020) <https://www.cbc.ca/news/business/covid-19-employment-crisis-recovery-employment-in-2030-1.5588285>. See also above (n 1).

drivers often accept oppressive conditions out of necessity,[171] entails an obligation to heed the call of conscience that proscribes exercising private power to exploit desperation. Although the plurality recognised *necessity*-based vulnerabilities, their application only addressed difficulty in *understanding* contractual provisions. They could have discredited their colleagues' criticisms by drawing attention to the relevant disparity of economic power that could constitute a sufficient disadvantage *notwithstanding understanding deficit*. The 'understanding' category is persuasively applicable in *Heller*, as few people would appreciate the significance of the arbitration clause. However, Judges Brown and Cotê's insistence on a particular 'vulnerability',[172] and their 'freedom of contract' and 'commercial certainty' objections, beg a retort concerning the potential for future cases solely based on arbitrarily exercised economic power. Such a riposte could underscore that their objections do not liberate market players from obligations of conscience to treat people with dignity. They merely advocate a generous scope of 'autonomy' to wield their market power mindlessly of human dignity and contractually secured 'certainty' to avoid legal consequences. Unconscionability cannot be severed from its underpinning interpersonal conscience. While Judges Abella and Rowe commendably activate this to advance human dignity to confront power imbalances characterising gig economy contracts, they could have more explicitly affirmed its applicability when these imbalances are overwhelmingly economic.

D *'Knowledge'*

Following Judges Brown's and Cotê's insistence upon particular personal vulnerability, both deem 'knowledge' thereof an indispensable element. Judge Brown, worries that Equity's protection of the vulnerable could threaten 'countervailing interests of commercial certainty and transactional security', thus demanding 'explanation as to why

[171] Uber's unconscionable behaviour arguably extends considerably beyond this immediate exploitation of economic disadvantage. See Richard Heeks et al, 'Digital Platforms and Institutional Voids in Developing Countries: The Case of Ride Hailing Markets' (2021) 145 *World Development* 1: Having 'circumvented the state's ability to control labour supply and levels of competition in the market', platform companies including Uber use 'their control over labour supply', to ensure 'a greater supply of drivers than demand from customers to reduce the chance that customers are unable to find, or have to wait excessively for, a driver', which has resulted in compulsion for drivers to expose themselves to greater risks on the job and work extreme hours (8) In some places, this has followed a '"bait-and-switch" tactic' of 'luring workers in on expectations of particular levels of income but then making changes (e.g. unilaterally to payment terms) that reduced income" (9).

[172] *Heller*, [162].

the defendant should suffer the consequences of the plaintiff's vulnerability'.[173] To not require 'knowledge' threatens parties' ability 'to know whether their agreement is enforceable at the time of contracting', and 'is commercially unworkable' because 'parties are left to wonder whether an unknown state of vulnerability will someday open up their agreement to review on the grounds of "fairness"'.[174] Judge Cotê adds that Uber could not have known about Heller's education level and financial status, and evidence was lacking concerning Heller's decision-making including 'why he *chose* [Uber] as his primary source of income and not to seek other work'.[175] She disputes the appeal court's finding that sufficient knowledge *was* present, because 'it erred in principle regarding the kind of vulnerability which would be sufficient', which 'tainted its finding [concerning] knowledge'.[176]

For Judges Abella and Rowe, a 'knowledge' requirement would wrongly shift unconscionability's focus from protecting the vulnerable to the empowered party's state of mind, 'erod[ing] [its] modern relevance …, effectively shielding from its reach improvident contracts of adhesion where the parties did not negotiate'. Establishing knowledge is *assistive* in proving unequal bargaining power, but not determinative because the vulnerable party 'is as disadvantaged by inadvertent exploitation as deliberate exploitation'. Therefore, one 'cannot expect courts to enforce improvident bargains formed in situations of inequality of bargaining power'.[177] This reasoning implicitly recognises the conscience underpinning the doctrine, asking whether a party can conscionably seek *enforcement*. A 'knowledge' requirement, pertaining to particular personal disadvantage, justified by contractual certainty, trivialises the consciousness that parties like Uber have of the power imbalance which they seek to intensify and evince in their conduct in tendering non-negotiable standard form contracts that convolutedly block access to the courts.

Judge Brown and Cotê's erasure of widespread economic disadvantage by demanding 'particular' vulnerability, enables their insistence on 'knowledge' of special characteristics — protecting powerful parties from moral responsibility for deliberately

[173] Ibid [166].
[174] Ibid [166]-[167].
[175] Ibid [288] (emphasis added).
[176] Ibid.
[177] Ibid [85].

drafting contracts to exploit, and entrench, such disadvantage. Judge Cotê's complaint about insufficient evidence about the driver's 'choices', displaces a powerful party's moral onus to not design contractual devices that target classes of people who lack meaningful employment *choices*, and are vulnerable to further disempowering contracts. They would humiliate economically embattled workers, by claiming that a party, who instructed lawyers to draft provisions that deliberately seize upon their disadvantage to induce acceptance of terms that will compound it, must not have their commercial certainty undermined.

A common limitation in each judgment is reticence to explicate the relationship between knowledge and good conscience in the context of power dynamics between the parties. The notion of conscience demands emphasis as the capacity for moral reasoning and the basis of Equity's jurisdiction to interfere in contractual arrangements. It explains why requiring 'knowledge' in such cases distracts from the relevant question of whether Uber should be entitled to enforce the agreement against the other party, given the dynamics of their relationship. Insistence that Uber have 'knowledge' of a particular vulnerability, or specific circumstances, affecting an individual driver, undermines the conscience at the heart of unconscionability. The relevant 'knowledge', that should stimulate the conscience of Uber's officials, concerns their own market power, the fact that many people contracting with them have few other choices available, and logical corollaries of their drafting choices upon those people. By emphasising injustices resulting from failure to engage conscience to recognise the dignity of others in the formation of contractual relations, courts can prevent Equity's ability to respond to contemporary abuses of private power from atrophying under the burden of specious demands for 'particular vulnerability' and 'knowledge'.

E *'Improvidence'*

A troubling prospect in measuring 'improvidence' is potential for powerful parties to justify oppressive terms, which themselves might be 'improvident' for less powerful parties, by implicitly relying on the latter's poverty to argue that the overall transaction may have ameliorated their position. This approach would fuel the 'race to the bottom' of callous profit-seekers in instrumentalising workers struggling for employment and income contrarily to the dignity of the latter — whose 'autonomy' means more than

formal freedom to sign contracts out of necessity. This 'choice' is often materially between accepting dehumanising labour relationships and dehumanising experiences often accompanying underemployment. Judges Abella and Rowe recognised that oppressive terms, at least those contained in arbitration clauses, are rescindable for unconscionability without deeming the entire agreement unconscionable.[178] Their colleagues' counterarguments provoke contemplation, however, of how their reasoning could benefit from explicit, conscience-based, explanation of why oppressive aspects of contracts that leverage economic necessity should not be defendable on the effective basis that such desperation might render the contract beneficial.

For the plurality, establishing 'improvidence' concerns whether the power imbalance affecting the contracting process manifests in undue advantage *or* disadvantage respectively for stronger and weaker parties. When one's *necessity* or desperation indicates 'almost *any* agreement [would] be an improvement', emphasis is warranted on any undue benefit the other derived.[179] Undue advantage may become apparent only once terms are considered in relation to 'surrounding circumstances at the time of formation, such as market price, the commercial setting or the positions of the parties'.[180] Moreover, a party's limitation in *understanding* 'the meaning and significance of important… terms' warrants attentiveness for 'undu[e] disadvantage' caused by terms outside their appreciation, that 'unfairly surprise' them or disregard their 'reasonable expectation'.[181] The elements interact in a mutually indicative manner: as a matter of 'common sense', a demonstrably improvident transaction can illuminate the nature and existence of disadvantage that lead to it, and the character of the disadvantage might indicate what constitutes improvidence for that person.[182] The majority's insistence on 'fairness', in assessing improvidence, reflects Equitable conscience:

> 'Because improvidence can take so many forms, this exercise cannot be reduced to an exact science. When judges apply equitable concepts, they are entrusted to "mete out situationally and doctrinally appropriate justice". Fairness, the foundational premise and goal of equity, is

[178] Ibid [96].
[179] Ibid [76].
[180] Ibid [75].
[181] Ibid [77] (citations omitted).
[182] Ibid [79].

> inherently contextual, not easily framed by formulae or enhanced by adjectives, and necessarily framed on the circumstances'.[183]

This open-ended approach to improvidence reflects the moral reasoning required in establishing unequal bargaining power. The plurality identifies the improvidence in Uber's effective extinguishment of Heller's legal rights. Not only is the imposition of filing, travel, and associated costs in excess of a driver's yearly income and disproportionate to any expectable amount an arbitral decision would award; these barriers render all contractual rights 'illusory' and '[e]ffectively … unenforceable by a driver'.[184] Notwithstanding the accuracy of these observations, the reasoning of the plurality's judgment less emphasises 'necessity and desperation' than the 'understanding and appreciation' side of unconscionability in establishing improvidence — similarly to how they elucidated that desperate circumstances can premise unequal bargaining power while ultimately applying the 'understanding' and 'appreciation' ground.

They highlight Uber's contractual device of obscuring the cost of arbitration from their drivers and difficulties one might face in comprehending that concealed, but in a manner that elides the reasons why a worker might accept such oppressive terms: 'No reasonable person who had understood and appreciated the implications of the arbitration clause would have agreed to it'.[185] Despite having recognised the significance of desperate circumstances in driving people to accept oppressive contractual provisions proposed by financially powerful parties (and that such can suffice to find improvidence),[186] the majority seem to forget that reasonable people are often so desperate for employment that they have little choice but to enter an agreement in hope that the consequences will be less improvident than unemployment.[187] The plurality's judgment could have more accurately added 'if they had a meaningful choice' to the quoted sentence.

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[183] Ibid.
[184] Ibid [95], [97].
[185] Ibid [95].
[186] Ibid [76], [69]: 'When the weaker party would accept almost any terms, because the consequences of failing to agree are so dire, equity intervenes to prevent a contracting party from gaining too great an advantage from the weaker party's unfortunate situation'.
[187] Some demographics are more highly represented in the gig economy, especially migrant workers, given differentiated restrictions in available employment opportunities, and are thus more vulnerable to arguments that oppressive conditions are just one part of a contract that was, overall, a lifeline. See, e.g, Neils van Doorn, Fabian Ferrari, Mark Graham, 'Migration and Migrant Labour in the Gig Economy: An Intervention' (Scholarly Paper, June 2020) <https://ssrn.com/abstract=3622589>. See also Zwick (n 3).

For the plurality, the obstacle might be having to defend an improvidence finding in circumstances where the agreement might rationally be seen by the weaker party as preferable to rejecting it. Perhaps they were wary of justifying Judge Brown's criticism that 'it is hard to imagine a judicial approach more likely to undermine commercial certainty' than their context-sensitive approach to improvidence.[188] Judge Brown's preference of public policy over unconscionability entails that public policy can more precisely identify the wrong in an arbitration clause that restricts access to justice and is able to '"ascertain the existence and the exact limits" of substantive public policy considerations'.[189] He rejects application of unconscionability to individual contractual provisions,[190] criticising the majority for not examining 'the overall exchange of value and assumption of risk between [parties], which may very well justify what appears to be substantial "improvidence" … '.[191] While Heller could not 'negotiate the terms … he did receive the benefit of working as an Uber driver and receiving an income'; the contract was not 'foisted upon him'.[192] Judge Brown, therefore, accuses the plurality of misapplying unconscionability to an individual term as a 'distributive justice' measure, and failing to recognise the parties' power to make exchanges of equal value.[193] Judge Cotê would require further evidence to establish improvidence because the only evidence concerning Heller's financial position is that he worked full time as an Uber driver,[194] ignoring that fulltime Uber drivers tend to depend on earnings they will receive through the agreement, and rarely have amounts equivalent to their yearly earnings (plus additional expenses) available to instigate overseas arbitration. Further, she rejects any basis for claiming that the fees render unenforceable Heller's rights under the agreement,[195] despite that in ordering a stay of proceedings she stipulates that Uber advance Heller's filing fees to make them potentially enforceable.[196]

The chicanery of 'certainty'-based circumscription of recognisable disadvantage recurs in the mirroring position that improvidence cannot be established for parties for whom

[188] *Heller*, [170].
[189] Ibid [169].
[190] Ibid [171] (citation omitted).
[191] Ibid [172].
[192] Ibid.
[193] Ibid [173], citing Benson, *Justice in Transactions*, 109.
[194] Ibid [286].
[195] Ibid.
[196] Ibid [199], [324].

accepting such provisions might, especially from the time the agreement was made, enhance their financial position. If the standard of good conscience informs unconscionability, courts and businesses can assess 'improvidence' from the perspective of whether formulating and tendering contractual terms would survive scrutiny by that moral capacity as to whether they reduce a person to a mere means to an end. Two helpful questions would be, (a) whether a party who had a meaningful choice, would likely accept the proposed terms, and (b) whether the terms are being proposed to parties who likely lack availability of such meaningful choices. While the plurality upholds human dignity by deeming the arbitration agreement unconscionable, they would have better safeguarded it by declaring the incompatibility of conscience with rewarding arguments that implicitly excuse oppressive terms vis-à-vis another party's likely desperation.

VII POTENTIAL AND LIMITATIONS IN *HELLER*: FROM 'VULNERABILITY' TO STRENGTH

Although the Court could have more boldly articulated and advanced the role of Equity's conscience in applying unconscionability, it upheld standards of human dignity for workers rather than gaslighting them with 'commercial certainty' and 'autonomy' claims. It resolved the issue of 'who has authority to decide whether an Uber driver is … an "employee"',[197] in a way that preserves potential for unconscionability to address indignities like those mentioned in Part II. Whether the Ontarian court, like Britain's Supreme Court, decides that Uber's drivers are legally afforded workplace protections, remains to be determined.

Courts may sometimes uphold human dignity through equitable reading in applying an open-textured statutory provision. This depends on legislative allowance of scope for judges to register dignitary concerns when appropriate. Uber is already lobbying Canadian provinces to introduce legislation to circumvent *Heller*.[198] Furthermore, Courts may, consistently with their capacity as active moral reasoners vested in their Equitable

[197] Ibid [1].

[198] Analysis, 'Uber is Lobbying Canadian Provinces to Rewrite Labour Laws and Create a New 'Underclass of Workers', *PressProgress* (16 March 2021) <https://pressprogress.ca/uber-is-lobbying-canadian-provinces-to-rewrite-labour-laws-and-create-a-new-underclass-of-workers/>. See also Tara Deschamps, 'Uber Canada to shift operations to Canada after Ontario class-action lawsuit', *Global News* (Web Page, 4 June 2021) <https://globalnews.ca/news/7978246/uber-canada-operations-move/>: Furthermore, Uber's new post-*Heller* contract still includes the previous agreement's — also potentially unconscionable — clause, forbidding drivers from engaging in collective bargaining or litigation. It also, by default, notwithstanding hidden instructions to opt out, includes a domestic arbitration clause, as the employment status question is still undetermined.

jurisdiction, invoke the court's conscience in disputes between parties — when ordinarily applicable rules and rights, and therefore one party, are threatened with instrumentalisation, by another party. They thereby command parties to act in accordance with their moral capacities, with respect to the other party's human dignity as a moral end and not a mere instrument.

Equity's conscientious capacity — beyond merely equitable reading — enables it to draw into alignment the moral value and moral capacities of the court and both parties who come before it. Simultaneously, it restrains other-disregarding exercises of power and sanctions communal standards that, like in *Heller*, respond to the everchanging conditions in which we live and in which power is concentrated and exercised. The power that Equity restrains, however, remains in the hands of parties wielding it. The vulnerability it identifies, and shields, retains its impact on parties experiencing it. While Equity's conscience can uphold dignity in interactions between disparately empowered parties, if these power relationships are socially unconscionable *in themselves*, then deeper aspirations of dignity and equity must guide our direction in establishing conscionable arrangements of power in society.

Equity's limitations do not render the precedents set by its interventions into the interactions between parties without social impact. In Canada pursuant to *Heller*, although yet to be determined in Australia,[199] and England,[200] Equity may compel parties

[199] The Australian doctrine known as unconscionable dealing or unconscionable conduct, 'may be invoked whenever one party by reason of some condition [or] circumstance is placed at a special disadvantage vis-à-vis another and unfair or unconscious advantage is then taken of the opportunity thereby created': *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 462 (Mason J). It remains to be determined whether Australia's High Court would recognise a worker's disadvantage relative to a business wielding vast resources and market power as a recognisable disadvantage. As Gardner notes, however, Queensland's Supreme Court recognised, in a decision now before its Court of Appeal, ''situational disadvantage and vulnerability'' of four coal mining companies relative to a multinational conglomerate they were dealing with: Jodi Gardner, 'Being Conscious of Unconscionability in Modern Times: *Heller v Uber* Technologies' (2021) Modern *Law Review* (forthcoming), 10, quoting *Adani Abbot Point Terminal Pty Ltd v Lake Vermont Resources Pty Ltd* [2020] QSC 260 (Dalton J). Australia's High Court recently required 'knowledge' of the relevant disability. *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, 68 [162], insisting that the doctrine 'requires proof of a predatory state of mind', not 'inadvertence, or even indifference, to the circumstances of the other party to an arm's length commercial transaction': [161]. Bigwood provides a persuasive criticism of the High Court's entrenchment of a strict knowledge requirement and emphasis on outright predation: Rick Bigwood, '*Kakavas v Crown Melbourne Ltd* — Still Curbing Unconscionability: *Kakavas* in the High Court of Australia' (2013) 37 *Melbourne University Law Review* 463. It is submitted, here, that it should not be problematic for the Court to deem relationships between workers and gig economy giants as something other than 'an arm's length commercial transaction'.

[200] Gardner submits that '[i]n light of the standard required for 'vulnerability' in English unconscionability cases, this aspect of *Heller v Uber* is unlikely to cause any controversy: Jodi Gardner, 'Being Conscious of

to abandon contractual contrivances, that capitalise on the polarity between their own market strength and the deprivation afflicting the surplus population in the labour market, to entrench and compound disempowerment of the latter parties. Vulnerabilities, however, that the Canadian unconscionability doctrine now recognise by virtue of understanding and necessity disadvantages, and the contrasting dominance enjoyed by entities like Uber, remain in place. In such situations, working people must claim their relative position of vulnerability to receive protection. For many proud workers, the experience of disadvantage or vulnerability in a hostile job market is compounded by having to identify oneself as 'the weaker party'. One might hope for a future where working people and those seeking employment are no longer at the mercy of either immensely powerful private entities or the courts' willingness to interfere.

David Luban, quoting Friedrich Schiller's consternation at invocations of human dignity that distract from economic injustices,[201] advocates for 'the role that human dignity arguments have come to play in understanding why it would be morally shameful not to clothe the naked adequately'.[202] *Heller*'s advancement is preferable to leaving working people legally 'naked'. A fundamentally dignitary and equitable community, however, is imaginable where opposing poles of economic vulnerability and dominance are replaced with collective empowerment. That aspiration could be pursued through more reformative or transformative goals. Either would require collective efforts beyond litigation.

VIII CONCLUSION

Judges may read statutes equitably, if their texts permit, in accordance with principles upholding human dignity. In private law matters, if statute leaves a court's Equitable jurisdiction unimpaired, judges may cultivate doctrines embodying good conscience to compel regard for our dignity. Fears concerning 'commercial certainty' and 'autonomy' might dilute (Judge Brown's reasoning) or drown (Judge Cotê's reasoning) judicial

Unconscionability in Modern Times: *Heller v Uber* Technologies' (2021) Modern *Law Review* (forthcoming), 10, citing *Cresswell v Potter* [1978] 1 WLR 255.

[201] David Luban, 'The Inevitability of Conscience: A Response to My Critics' (2008) 93 *Cornell Law Review* 1437, 1456 quoting (with slight amendment of his own) Friedrich Schiller, *Würde des Menschen* (Musenalmanach, 1797), 32-33: 'Enough about human dignity, I pray you. Give a man food and a place to live. When you have covered his nakedness, dignity will follow by itself'.

[202] Luban (n 201) 1457.

preparedness to confront threats superhuman corporate power poses to human dignity — through arsenals of monetary resources, legal professionals, and contractual devices. This heightens demand for bolder articulation of Equity's conscientious role in defending a meaningful conception human dignity adaptively in accordance with emerging threats thereto. Equitable insistence on dignified standards, in interactions between parties, accounts for power asymmetries between them. It does not import a deeper experience of human dignity and equity into the economic and social conditions in which parties interact, which create and entrench these asymmetries. Such would require a deeper and broader, reformative, or transformative, theory and practice of conscience levelled at the power dynamics and material conditions governing life and labour.

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