

## Undue Influence and Unconscionability in Comparative Common Law: Delivering Contextualized Justice for Minority Sureties

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*Legal transplantation through colonization, mass migration, and—more recently—globalization has long been under the microscope of scholars, anthropologists, and lawyers, among others, who have sought to better understand the workings of the law in contexts foreign to its place of origin. This quest for understanding the relevance and operationalization of law in different contexts is part of the broader discourse of legal pluralism, which encompasses the study of the role of formal and informal normative values and institutions and the interaction between them as alternative, overlapping, or conflicting systems of relational ordering in diverse socio-political contexts. The law’s effectiveness as a tool for responsive justice is brought into sharp focus due to implicit biases which result from the law’s grounding in a dominant cultural framework which leaves minorities outside its legal lens. When the legal order delivers differential justice by overlooking or distorting the lived realities of those who fall outside law’s original frame of reference, it befits a critical inquiry about the*

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*law's commitment to equality and non-discrimination in a plural legal order. The increasing convergence of legal systems cannot, on its own, be taken as determinative of an on-the-ground shift in values among all populations, communities, and peoples. Without an accompanying shift at the societal level, the law risks marginalizing and excluding minorities from an accessible framework for justice.*

*Indeed, equality scholars have long argued that justice requires more than equal treatment and warrants a review of the substantive law itself as much as issues of procedural propriety in its application in demonstrating law's fairness in terms of outcomes under the law. Despite the open-ended presentation of the common law as an apparatus with sufficient flexibility to achieve substantively just outcomes (and prevent miscarriages of justice) through the use of equitable principles where necessary, limitations inherent in the law's institutional structure, how its content is populated, its reliance on agents for its dispensation, and its value-laden interpretive and analytical methodologies carve out an underclass of claimants for whom substantive equal justice remains unachievable. Law's capacity to fulfill its function to deliver meaningful justice rests on its capacity to recognize the full range of complex legal subjects that may present themselves before it and to assess, understand, and interpret their claims and actions meaningfully by acknowledging the impact of the varied contexts within which human activity occurs.*

*This paper critiques law's purported neutrality in the field of contract law. It uses the doctrine of undue influence as a vehicle for investigating and understanding the implications of law's entrenchment in a particular cultural context. Reviewing courts' analyses of the factors grounding a successful claim of undue influence in guarantee contracts involving individuals of minority background, this paper examines the law's capacity to identify and incorporate broader contextual factors to protect minority claimants against unfairly procured contractual liabilities in a range of jurisdictions. The paper's critique of the courts' analyses and framing of cultural factors in relation to the doctrine presents the imperative for a critical re-examination of modern jurisprudence developing judicial doctrine and its capacity for dispensing justice for subjects situated within plural normative orders.*

*In doing so, the Article breaks ground with traditional rule of law analyses which ground conversations about law's impartiality on law's principled commitment to equality or, alternatively, seek an essentialized brand of justice. Instead, it*

*offers practical approaches towards decision-making which avoid essentialism while placing burdens for due diligence where they are likely to be met. Building on this model, the Article offers arguments for incorporating considerations informed by a variety of social and human conditions in efforts to deliver substantive justice for all people regardless of their race, color, religion, or other background. This proposal bears notable implications for devising bespoke analytical tools which may well be specific to a legal field to ensure that legal understandings are rooted in the lived realities of those seeking law's justice. Such an approach has the potential for development and application in a range of other areas of law such as violence against women and children's rights.*

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## I. INTRODUCTION

Legal philosophers, jurists and political theorists have long reflected on the source and purpose of legal norms, the nature of legal rules, the role and character of law as an institution, and its relationship with other social actors. These issues have engaged leading philosophers to ponder and discuss the normativity of law, the relationship between law and morality as well the dangers and limitations of legal positivism.<sup>1</sup> As societies have evolved, so has the role of law and its body of rules.

One strand of this debate has centered on an inquiry into whether all law has normative or moral content. This question has been closely linked to philosophical explorations into the meta-framework of law as an institution to understand law's instrumentalism and its use as a vehicle to achieve a variety of social or political ends. For example, legal positivism and the rule of law both

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<sup>1</sup> Legal positivism and proponents associated with its philosophy propound that laws are the expression of the will of the authority as found in the decisions of a law-making body or person. Proponents of this school of thought (legal positivists) were of the view that law is a manifestation of social facts and human intentions and behaviours. It is distinct from morality and bears no necessary nexus with it. Legal positivists argue that law's existence or authority is not dependent on its moral content. Jeremy Bentham first presented this theory in the 18<sup>th</sup> Century, which was further developed by John Austin, Hans Kelsen and H. L. A. Hart. Hart's work remains one of the most influential restatements of legal positivism in the 20<sup>th</sup> Century and has inspired much debate among opponents and proponents of legal positivism. See H. L. A. HART, *THE CONCEPT OF LAW* 244 (2d ed. 1997); see generally H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 593–629 (1958). Legal positivism has been the subject of extensive debate particularly between proponents of the natural law theorists who argue that normative content is inherent in the law. Moreover, legal positivists have debated among themselves over inclusive (or soft) and exclusive positivism in determining the source of law's legitimacy in the context of rules of recognition, which were the focus of Hart's *THE CONCEPT OF LAW*. The Hart-Dworkin exchanges are particularly well-known in raising important questions about the validity of legal rules in terms of their normative force rather than their presentation as mere artefacts of procedures (i.e. the legislative process). See Scott J. Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed*, in RONALD DWORKIN 22–55 (Arthur Ripstein ed., Contemporary Philosophy in Focus Ser. No. 11, 2007); see generally JULES L. COLEMAN, *HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW* (2001). For a brief, clear exposition of the historical developments around these debates pertaining to law and morality and the nature and source of legal rules and their legitimacy, see generally Leslie Green, *Legal Positivism*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2003).

encompass normative conditions, compliance with which imbue a norm with the character of “legal force” or “legality.” Compliance with such embodied rules signal the law’s legitimacy, which became rooted in the institutionalization of law as legal process and the protection it offers against the arbitrary exercise of power.

Apart from the recognition of embodied rules and norms as being representative of the corpus of laws created and applied by the sanctioned procedures<sup>2</sup>, the rule of law comprises a coherent framework through which to understand the core function of law as a legal system in society, representing a substantive set of values and goals which assist in the advancement of these functions, including the protection of rights and liberties, maintaining social order, dispute resolution and establishing standards of behavior. In the 19<sup>th</sup> and 20<sup>th</sup> centuries, theorists characterized the rule of law based on their varying views on legal institutionalism<sup>3</sup> ranging from legal autonomy and law’s totality as a framework of relevant principles to law as an institution of governance with social, economic and political goals and which reflected both, formal *and* substantive visions of justice.<sup>4</sup>

Whilst rule of law virtues such as certainty, clarity and predictability which emphasize the law’s procedural safeguards to ensure a fair outcome are highly valued, justice is more than fairness in this narrow sense.<sup>5</sup> While some

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<sup>2</sup> According to A. V. Dicey, the rule of law required that all authority be subject to and constrained by law. He outlined three core values to capture the essence of the rule of law: the lack of arbitrariness, the supremacy of the law, and equality before the law. See ALBERT VENN DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION*, 185-93 (10th ed., London: Macmillan 1959).

<sup>3</sup> See generally TOM BINGHAM, *THE RULE OF LAW* (2010); *id.*; K.D. EWING, *BONFIRE OF THE LIBERTIES: NEW LABOUR, HUMAN RIGHTS AND THE RULE OF LAW* (2010); FRIEDRICH A. HAYEK, *LAW, LEGISLATIONS AND LIBERTY, VOL. 1: RULES AND ORDER* (1973); KARL MARX, *A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY* (1859); ROBERTO MANGABEIRA UNGER, *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* (1976) (defining the rule of law in light of the functional purpose that the law, as an institution, was intended to achieve in a given society at that time); MAX WEBER, *MAX WEBER ON LAW IN ECONOMY AND SOCIETY* (Max Rheinstein ed., Max Rheinstein, trans., 1954); Peter Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, PUB. L., Autumn (1997); Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1 (2008); Jeremy Waldron, *The Rule of Law in Contemporary Liberal Theory*, 2 RATIO JURIS 79 (1988); Jeremy Waldron, *Legislation and the Rule of Law*, 1 LEGISPRUDENCE 91 (2007); Alison L Young, *The Rule of Law in the United Kingdom: Formal or Substantive?*, 6 VIENNA J. INT’L CONST. L. 259 (2012).

<sup>4</sup> See Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, P.L. AUT., 467-487 (1997); see also DAVID DYZENHAUS *RE-CRAFTING THE RULE OF LAW: THE LIMITS OF LEGAL ORDER* (1999).

<sup>5</sup> See *Jetivia SA v. Biltal (UK) Ltd.* [2015] UKSC 23, [2015] 2 W.L.R. 1168 [13] (appeal taken from Eng.) (Lord Neuberger explaining cases arise which sometimes characterize the “familiar tension between the need for principle, clarity and certainty in the law with the equally important desire to achieve a fair and appropriate result in each case.”). See generally WERNER F. MENSKI, *COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA* (2000); JOHN RAWLS, *A THEORY OF JUSTICE* (Oxford: Clarendon Press, 1972); JOHN RAWLS, *JUSTICE AS FAIRNESS*

theorists have insisted on law's claim to neutrality, arguing that the law is devoid of any moral content<sup>6</sup>, others have maintained that the law and law's character is inextricably linked to society and social mores.<sup>7</sup> Advocates of the mirror theory of law<sup>8</sup> have argued that the law mirrors social values and that the standards internalized by the law are reflective of societal aims and expectations, and facilitate social organization and behavior in accordance with these values. This has fueled challenges against claims of law's purported neutrality. If the law is not value-neutral, it recognizes, affirms, and advances certain values at the expense of others.<sup>9</sup> Concerns abound in terms of the implicit 'biases' manifest within its structure and the implications of the advancement of particular agendas through the law but also, in terms of the viability of law's legitimacy given its projections of neutrality.<sup>10</sup> Additionally, questions surrounding the representativeness of these normative values loom large given the pluralism inherent in legal orders and their subjects in the twenty-first century. However, the internationalization of the rule of law—or

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(2001); AMARTYA SEN, *THE IDEA OF JUSTICE* (2009) (a more recent engagement with Rawls's theory of justice).

<sup>6</sup> HERBERT LIONEL ADOLPHUS HART, *THE CONCEPT OF LAW* (3rd ed., 2012).

<sup>7</sup> One of the most popularized accounts is characterized by the Hart and Devlin law and morality debates. See Patrick Devlin, *The Enforcement of Morals* (1965) (critiquing the role of law in society and examined the relationship between law and morality. A somewhat different strain of the same argument was advanced by scholars of the Critical Legal Studies movement); H.L.A. HART, *THE MORALITY OF THE CRIMINAL LAW* (1965) (same); ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986); Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 *J. L. EDUC.* 591 (1982) (challenging the very foundations of modern legal institutions and schools of legal thought. The critique levelled the charge that the legal system, including legal education and practice of law and the accompanying institutions were driven by particular value frameworks and hierarchies which were couched as necessary for the organization of society as we know it. In essence, however, these structures excluded alternative constructions of sites of power and marginalized certain voices, thereby perpetuating the status quo, which served a distinct ideological core and those who held prominent roles under this structure).

<sup>8</sup> See William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 *AM. J. COMP. L.* 489 (1995); see also Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37(1) *MOD. L. REV.* 27 (1974); Pierre Legrand, *What "Legal Transplants?"*, in *ADAPTING LEGAL CULTURES* 57 (D. Nelken & J. Feest eds., 2003).

<sup>9</sup> Leslie Green, *Legal Positivism*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed. 2003); see also NGAIRE NAFFINE, *LAW AND THE SEXES: EXPLORATIONS IN FEMINIST JURISPRUDENCE* (1990).

<sup>10</sup> For example, Mari Matsuda, a critical race theory scholar, challenges and unpacks the ideological neutrality purportedly encompassed in law. Matsuda describes critical race theorists' understanding of law as a powerful system which, through its ideologies, supports various forms of inequalities, conferring wealth, power and even life. Critical race theory scholars have sought to demonstrate the distortions of the law, unveiling the falsehoods law is laced with, as well as how and why these have remained compelling. Importantly, this work has presented approaches to resisting law's purported ideological neutrality. See generally PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1992); Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 *WOMEN'S RTS. L. REP.* 297 (1992).

its export through colonization, financial or other aid<sup>11</sup>—in combination with the adoption of the liberal democratic constitutional framework incorporating fundamental human rights principles enshrined in various international human rights treaties<sup>12</sup> and their accompanying normative framework, such as an enterprising nature of the law and its universal normativity in core aspects has come to be widely accepted, and even necessary in international politics.

The mirror theory of law, therefore, has been helpful in foreshadowing the law's substantive use as a vehicle through which to shape the conduct of individuals, institutions, and states in *particular ways*. However, the historical impact of colonialism and the more recent impact of globalization and technological advances, presents a robust challenge to the mirror theory of law. Legal transplantation through colonization, mass migration and more recently, norm convergence in an age of international and regional governance covering trade, the environment, and human rights, has long been the under the microscope of scholars, anthropologists, and lawyers among others, who have sought to better understand the workings of the law in contexts foreign to its place of origin. However, recent work has sought to address the impact of norms on minorities, cultural, religious or indigenous—those who are unrepresented or underrepresented in the legal order.<sup>13</sup> This quest for

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<sup>11</sup> See John C. Reitz, *Export of the Rule of Law*, 13(2) *TRANSNAT'L L. & CONTEMP. PROBS.* 429 (2003); see also John V. Orth, *Exporting the Rule of Law*, 24 *N.C.J. INT'L L. & COM. REG.* 71 (1998-1999).

<sup>12</sup> In the aftermath of World War II, the General Assembly of the United Nations passed the Universal Declaration of Human Rights in 1948, which enshrined the principles of human dignity, equality, and non-discrimination on grounds such as sex, race, religion, ethnicity, color, nationality or place of origin, among others. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948). Subsequent decades saw the proliferation of international human rights treaties. The Universal Declaration of Human Rights and two subsequent treaties are collectively referred to as the International Bill of Rights. See U.N. Office of the High Commissioner, Fact Sheet No.2 The International Bill of Human Rights (Rev. 1) (June 1996), <https://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>; G.A. Res. 2200A, International Covenant on Civil and Political Rights (Dec. 16, 1966); G.A. Res. 2200A, International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966). The enshrining civil and political rights and economic, social and cultural rights were opened up for subscription by state parties to the United Nations. These were followed by numerous others protecting against specific forms of discrimination, unlawful treatment and to protect particular groups including minorities, refugees, migrant workers, etc. See e.g., G.A. Res. 2198, Convention on the Status of Refugees (July 28, 1951); G.A. Res. 2106, International Convention for the Elimination of All Forms of Racial Discrimination (Dec. 21, 1965), G.A. Res. 44/25, The Convention on the Rights of the Child (Dec. 21, 1965); International Convention for the Elimination of All Forms of Discrimination Against Women (Dec. 18, 1979); G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (Dec. 10, 1984); Convention on the Rights of Persons with Disabilities (2006).

<sup>13</sup> This work has mostly centered on examining the behavior of legal transplants in a foreign context but has only very rarely explored the impact of competing normative orders on minority populations within a society. Although the field of legal pluralism examines the formal coexistence of multiple legal orders in a given geographical context, its foray into how minorities under a unitary legal order experience the law especially when the law conflicts with informally operative normative systems which minorities are simultaneously subjected to, is much more recent. Scholarship on legal transplants largely examines the interaction between coexisting normative

understanding the relevance and operationalization of law in different contexts is part of the broader discourse of legal pluralism, which encompasses the study of the role of formal and informal normative values and institutions and the interaction between them as alternative, overlapping or conflicting systems of relational ordering in diverse socio-political contexts.

The law's effectiveness as a tool for responsive justice is brought into sharp focus as a result of implicit biases given its grounding in a dominant cultural framework which leaves minorities outside its legal lens.<sup>14</sup> When the legal order delivers differential justice by overlooking or distorting the lived realities of those who fall outside law's original frame of reference, it befits a critical inquiry about the law's commitment to equality and non-discrimination in a plural legal order.<sup>15</sup> The increasing convergence of legal systems cannot on its own be taken as determinative of an on-the-ground shift in values among all populations, communities and peoples.<sup>16</sup> Without an accompanying shift at the societal level, the law risks marginalizing and excluding minorities from an accessible and more importantly, relevant framework for substantive justice.

Indeed, equality scholars have long argued that justice requires more than equal treatment and warrants a review of the substantive law itself as much as issues of procedural propriety in its application in demonstrating law's fairness in terms of outcomes under the law.<sup>17</sup> The common law system has prided itself for its capacity for seamless and incremental decision-making to fill out the mosaic of legal principles which holds the patchwork of common law together<sup>18</sup> whilst tempering the common law web with a dose of equity now and then to mitigate the casualties of formal justice.<sup>19</sup> Despite the open-ended

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orders, formally recognized and regulated by the state, whereas the study of plural legal orders delves into the interrelationship between state and non-state systems for the dispensation of justice.

<sup>14</sup> See *infra* Parts IV & V.

<sup>15</sup> See BRIAN Z. TAMANAHA, *A GENERAL JURISPRUDENCE OF LAW AND SOCIETY* (2010); Daniel Adler & So Sokbunthouen, *Towards Equity in Development When the Law is Not the Law: Reflections on Legal Pluralism in Practice*, in *LEGAL PLURALISM AND DEVELOPMENT: SCHOLARS AND PRACTITIONERS IN DIALOGUE* (BRIAN Z. TAMANAHA, ET AL. EDS., 2012); Brian Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 375, 375–411 (2008); see also ROGER COTTERRELL, *LAW, CULTURE AND SOCIETY: LEGAL IDEAS IN THE MIRROR OF SOCIAL THEORY: LEGAL PHILOSOPHY AND LEGAL PLURALISM* (2006).

<sup>16</sup> Olivier Galland & Yannick Lemel, *Tradition vs. Modernity: The Continuing Dichotomy of Values in European Society*, 49 REVUE FRANÇAISE DE SOCIOLOGIE, 153, 153–186 (2008).

<sup>17</sup> See Rosemary Hunter, *Alternatives to Equality*, in *RETHINKING EQUALITY PROJECTS IN LAW: FEMINIST CHALLENGES*, 81–101 (Rosemary Hunter ed., 2008). See generally MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM*, (1991) [hereinafter *THE ILLUSION OF EQUALITY*]; SANDRA FREDMAN, *DISCRIMINATION LAW* (2nd ed. 2011); *infra* Part III.A (discussing the work of Martha Fineman).

<sup>18</sup> See *Kleinwort Benson Ltd. v. Lincoln City Council* [1999] 2 A.C. 349 (HL) (appeal taken from Eng.).

<sup>19</sup> Formal justice refers to the principled application of legal rules in a manner that treats all subjects before the law in an equal manner, regardless of their social, political, economic or other

presentation of the common law as an apparatus with sufficient flexibility to achieve substantively just outcomes (and prevent miscarriages of justice) through the use of equitable principles where necessary, limitations inherent in the law's institutional structure, how its content is populated, its reliance on agents for its dispensation, and its value-laden interpretive and analytical methodologies, carve out an underclass of claimants for whom substantive equal justice remains unachievable.

The law's ability to fulfill its function to deliver meaningful justice rests on its capacity to recognize the full range of complex legal subjects that may present themselves before it and to assess, understand, and interpret their claims and actions meaningfully by acknowledging the impact of the varied contexts within which human activity occurs. Necessarily, the law's reach, insofar as it is predicated on classifications of identities, acts or omissions, depends on the accuracy, relevance and sensitivity of its taxonomy and mechanisms and the underlying factors which influence law's dispensations of justice. When legal principles are applied to all persons falling within a category in like manner, without due consideration of how contextual factors may invariably distort such applications, the law's capacity for substantial justice is potentially inhibited. In such circumstances, the law's blind faith in the notion that procedural justice outcomes are invariably and substantively just, is inherently misplaced.

This paper critiques the law's purported neutrality in the field of contract law<sup>20</sup>, which remains relatively unscathed by critiques of ethnocentrism or the kind of legal moralism apparent in other areas of law, such as family law or public law.<sup>21</sup> This paper uses the doctrine of undue influence as a platform for

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status. The term often invokes the image of the Greek Goddess of Justice Themis or lady justice today, in her blindfold so that she dispenses justice equally among subjects without allowing her judgment to be coloured by 'irrelevant' factors, which may corrupt outcomes by allowing 'external' criteria seemingly irrelevant to the case to affect judgment. The focus of this form of justice is procedural where the requirement that the rule be followed and applied consistently yields a conclusion that justice has been served. However, when we consider the term formal justice as used in juxtaposition to the principle of substantive justice, the latter term is broader than the concept of formal justice. Substantive justice encapsulates the guarantees of procedural justice but also, just outcomes. Here, justice is evaluated in terms of the outcomes delivered and whether they are manifestly fair and just in terms of their impact on the particular people before the law. Substantive justice is concerned with the particular circumstances in the case and having regard to those, whether the process of legal interpretation and application of relevant precedents result in outcomes which are responsive to such circumstances. This infuses flexibility into the process to allow for due consideration of what would be fair in a given case rather than conditions that arise under the constraints imposed by a formal conception of justice. *See generally* David Lewis Schaefer, *Procedural Versus Substantive Justice: Rawls and Nozick*, 24(1) SOC. PHIL.& POL'Y 164 (2007) (discussing the debate between Rawls and Nozick on the subject).

<sup>20</sup> *See* ANTHONY T. KRONMAN & RICHARD A. POSNER, *THE ECONOMICS OF CONTRACT LAW* (1979).

<sup>21</sup> Increasingly, however, as contracts are entered into in realms where their role was, until more recently, limited, for example, surrogacy, genetic sampling, stem-cell recovery and storage, the limits of legal regulation of the body for reasons of privacy, autonomy, and a general aversion to

investigating and understanding the implications of this critique in assessing the law's capacity for contextualized justice and ultimately, to stimulate a broader conversation about the need for jurisprudence to include considerations defined by a variety of social and human conditions to convey the realities of those seeking the law's justice. The law needs to adapt and become a receptacle for lived human experience and work beyond textbook categories defined by relying on a narrow selection of meta-principles to explain and justify judicial outcomes.

Critiquing law's purported value-neutrality in the field of contract law,<sup>22</sup> using the equitable doctrine of undue influence as a lens, this paper examines the law's capacity to identify and incorporate broader contextual factors through a review of judicial decisions to ascertain the factors grounding a successful claim of undue influence in guarantee contracts or other unfairly procured contractual liabilities involving individuals of minority background in a range of jurisdictions.

As the free market has witnessed an evolution in terms of individuals and groups participating in the economy, the equitable doctrine has modified the categories of relationships triggering a presumption of undue influence, enabling a defendant to evade contractual liabilities based on the transaction being impugned by the conduct of the procurer or related third party.<sup>23</sup> This

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the law's moral policing in the personal sphere which has accompanied modernity, has collided head-on with freedom of contract and market liberalism.

<sup>22</sup> Contract law's emergence around the time when the theory of natural rights and the divine right of kings was in decline presented its domain as one which was characterized by functionality and rationality. The legal rules pertaining to the enforcement of contracts were considered to be neutral in that there were merely there to facilitate exchanges in the liberal state without state interference to work towards the maximisation of economic goals of the agents freely engaged. However, in more recent years, this has been translated into the principle of wealth-maximisation when the law gives effect to the freedom of contract in voluntary exchanges. See ANTHONY T. KRONMAN & RICHARD A. POSNER, *THE ECONOMICS OF CONTRACT LAW* (1979). Various other normative principles have since emerged which are used to present the ideological or normative foundations of particular principles of contract law as distinct from the aforementioned market-individualist conception. For example, Adams and Brownsword identify formalism; consumer-welfarism and market-individualism as three competing ideologies which range from rule-application without consideration of impact on outcomes to a deliberate consideration of factors impacting vulnerable individuals in the market sphere and the importance of economic certainty and predictability in a liberal economy. See ROGER STONE, *THE MODERN LAW OF CONTRACT*, 15–16 (6th ed., 2005) (explaining specific cases as examples of the three approaches).

<sup>23</sup> In response to the critique levelled by legal realists on the formalist and rationalist underpinnings of law and economic analysis of the freedom of contract, there has been growing recognition that when the law is resorted to for the enforcement of contracts voluntarily entered into, where there are circumstances of unconscionability and duress or other factors which impugn such freedom, the law refuses to enforce these contracts. This refusal is grounded in certain policy choices and is informed by concerns of distributive and substantive justice, among other issues. As such, the market-individualist theory gives way to principles other than the freedom of contract within a framework which is not normatively neutral, as initially perceived and argued by law and economics theorists. See *Efficiency and a Rule of Free Contract: A Critique of Two Models of Law and Economics*, 97 HARV. L. REV. 978, 996 (1984).

shift has been motivated in part by anti-essentialist discourse as well as the doctrine's evolution from its earlier approach which characterized certain relationships of trust and confidence as dispositive in establishing an inference of undue influence. The examples drawn on for the purposes of analysis focus on guarantee contracts signed by minority women and illustrate how the analytical framework can be significantly enriched with a more nuanced and contextualized application of the doctrine in recognition of the lived realities informing decision-making among these communities of women. The paper's critique of the courts' analyses and framing of cultural factors in relation to the doctrine presents the imperative for a critical re-examination of modern jurisprudence and the development of common law with a view to enhance law's competence and capacity to dispense justice for subjects situated within plural normative orders. Acknowledging and understanding the implications of law's entrenchment in a cultural context for outcomes of substantive justice provides a compelling impetus to reframe existing categories in various domains of law and to apply a multidimensional lens to assess and evaluate legal issues when presented with complex legal subjects whose identities are structured and constrained by hierarchies of power as a result of social and cultural forces.

In doing so, the paper breaks ground with traditional rule of law analyses which ground conversations about the law's impartiality on its principled commitment to equality or alternatively, seek an essentialized brand of justice. Instead, it offers practical approaches towards decision-making which avoids essentialism<sup>24</sup> while placing burdens for due diligence where they are likely to be met. Building on this model of 'critical intersectional inquiry', the Article offers arguments for incorporating considerations informed by a variety of social and human conditions in efforts to deliver substantive justice for all people regardless of their race, color, religion or other background. This proposal bears notable implications for devising bespoke analytical tools which may well be specific to a legal field to ensure that legal understandings are rooted in the lived realities of those seeking law's justice. Such an approach has the potential for development and application in a range of other areas of law such as violence against women and children's rights.

Part II of this Article presents a brief overview of the development of contract law and theory, examining the principles of market individualism and the seminal reframing of contract law through a relational theory of contract. Part III briefly recounts the nature of law and its relationship with other social phenomena advocating the importance of investigating and understanding the implications of the law's entrenchment in a particular cultural context for

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<sup>24</sup> Essentialism is a view that characterizes an object, person or group as having certain fundamental properties, core values or essence, which define them in their entirety. Essentialism is also suggestive of the universality of these traits in all objects, persons or groups within a particular category. In this context, an essentialist approach to characterizing gender and minority women and their agency would reflect the law's continued paternalism towards these groups on the basis of their shared vulnerability or subordinate position, for example.

those differently situated in terms of outcomes of justice from a perspective of substantive equality. In particular, it articulates the imperative for the law's characterization of legal subjects in all their complexity as opposed to the deployment of seemingly universal legal frames which potentially distort or exclude implications of subject identities from an experiential perspective. This requires reimagining law's subjects as embedded within their distinct sociocultural contexts and incorporating the full breadth of their life experiences and complex identities to conceptualize their experiences holistically given their relative social and legal positioning.

Part IV uses the proposed framework of critical intersectional inquiry to interrogate contractual theory's capacity to capture cultural nuances influencing lived realities in the context of the invocation of undue influence by claimants of minority background in the courtroom. Part V outlines core literature on the nature of legal transplants and examines the application of the doctrine of undue influence in three jurisdictions applying the common law tradition. Examining recent jurisprudence on undue influence applied to minority claimants, this Part analyses the law and identifies the fundamental slippages in the jurisprudence in terms of the framing of substantively just outcomes, exposing the law's limitations in applying the doctrine satisfactorily to persons with cultural value frameworks that do not neatly fit within the doctrine's original interpretive framework. The section highlights examples where the doctrine has been applied in a manner that further entrenches intended beneficiaries of the equitable doctrine in their hierarchized and impoverished decision-making contexts. It demonstrates the various ways in which legal meaning elides the lived realities claimants find themselves ensnared in.

Part VI investigates how present imbalances resulting from the doctrine's misplaced burdens can be redressed. It examines whether the Australian approach of unconscionability provides a more suitable framework for analyzing issues through a culturally inclusive lens. It draws on comparative approaches in determining how parties entering into contracts of guarantee can be better positioned and incentivized to comply with the principles of substantive fairness. It concludes with recommending that the risks of such transactions be absorbed by the party in the strongest position to guard against the operative vulnerabilities of claimants. Part VII concludes the paper arguing that the law's exclusion of the meaning of actions as understood from within cultural contexts dominating the lived experiences of claimants singles out particular groups for less than equal protection under the law. Worse still, it risks marginalizing such groups further by entrenching them in their hierarchized social structures without relief. In conclusion, the paper calls for the application of the critical intersectional framework to reexamine the law's allegiance to the idea of justice for all and to work towards unpacking the inherent inequalities legal doctrines across a range of fields are imbued with.

## II.      THE DEVELOPMENT OF CONTRACT LAW AND THEORY

A. *Market Individualism*

A number of theorists have attempted to define the theoretical principles undergirding contract law.<sup>25</sup> One of the foremost goals of classical contract law has been identified as safeguarding the freedom of contract, a view that was historically accounted for (inaccurately according to Beatson and Friedmann) by the newfound conditions of economic activity that were made possible in the aftermath of the industrial revolution.<sup>26</sup> Economic and social conditions empowered individuals as agents for economic activity and the winds of market liberalism beckoned the state to perform a facilitative role and uphold expressions of individual will.<sup>27</sup> The powerful influence of this narrative lay in the novelty of bestowing individuals with the power to govern their own relations with others and to have the terms they committed to enforceable through the law. Of commensurate value was the notion that individuals were free from any obligations unless they had voluntarily and freely contracted to undertake or perform certain acts. Both of these ideas, one recognizing the creative agency of the individual and the other, limiting the imposition of obligations or interference with one's obligations without one's consent, were entrenched in the notion of freedom of contract.<sup>28</sup> These ideas have broadly been characterized as the "will theory"<sup>29</sup> or the "consent-based" theory of contract.<sup>30</sup>

Given its roots in the market-individualist ideology prevalent in the 19<sup>th</sup> century,<sup>31</sup> classical contract theory entrenches the notion of personal autonomy by treating the individual's will as supreme and limiting state intervention.<sup>32</sup> It promotes efficient and rational market exchanges by facilitating economic

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<sup>25</sup> For a clear and concise account detailing and critiquing the theorization of the law of contract, see Melvin A. Eisenberg, *Why There is No Law of Relational Contracts*, 94 NW. U. L. REV. 805 (2000).

<sup>26</sup> Jack Beatson & Daniel Friedmann, *From 'Classical' to Modern Contract Law*, in GOOD FAITH AND FAULT IN CONTRACT LAW 7 (Beatson & Friedmann eds., 1995).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 7–8; see also EDWIN PEEL & GUENTER H. TREITEL, *THE LAW OF CONTRACT* (13th ed., Sweet & Maxwell 2011).

<sup>29</sup> CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION*, (Harv. U. Press, Revised Ed. 2015).

<sup>30</sup> Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986); see also Randy E. Barnett, *Contract Is Not Promise; Contract Is Consent*, SUFFOLK U. L. REV. 647 (2012).

<sup>31</sup> For a detailed analysis of the impact of 'market-individualism' and 'consumer-welfarism' on classical and modern contract law, see John N. Adams & Roger Brownsword, *The Ideologies of Contract Law*, 7 LEGAL STUD. 205 (1987).

<sup>32</sup> JACK BEATSON & DANIEL FRIEDMANN, *GOOD FAITH AND FAULT IN CONTRACT LAW* 8–9 (1995).

certainty and predictability.<sup>33</sup> With little supervision over the terms of contract, it is not surprising that “[c]lassical contract law embodied a number of features which offered considerable advantages to the powerful and the knowledgeable, while posing substantial risks to the ignorant and the unwary.”<sup>34</sup>

As the 20th century saw a shift from positive non-intervention to proactive market regulation, corresponding changes in the role and function of the law became apparent.<sup>35</sup> Modern contract law is characterized by increasing state intervention and statutory control over the process of contract formation and content.<sup>36</sup> Equitable doctrines can “vitiolate” an otherwise valid contract, using defenses such as frustration, economic duress, undue influence, and illegality, recognized as presenting compelling reasons for the law to intervene in the contract. These doctrines have undergone a significant evolution in the last quarter of the twentieth century.<sup>37</sup> The courts are now more willing to reject the enforcement of contracts on grounds of fairness and public policy despite the fulfilment of other criteria signaling the formation of a valid legal contract. For example, “consent” is now construed more broadly as the law requires obligations arising out of contractual relations to reflect respect for important social values such as considerations of fairness or “the encouragement of due care.”<sup>38</sup>

With the decline of liberal individualism and the rise of altruism as an alternative pillar gaining credence under the law, modern contract law no longer condones every pursuit of self-interest and requires “people with power to have a due regard for the interests of others,”<sup>39</sup> to share, and to sacrifice even, in situations where there is no pre-existing agreement, especially when

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<sup>33</sup> However, freedom of contract and commercial certainty as envisioned in classical contract law were often at odds with the broader goals of the law. Beatson and Friedmann for example, identify how the quest for commercial certainty might grate against the law’s desire to protect the vulnerable against unscrupulous individuals who take advantage of them. *See* Beatson & Friedmann, *supra* note 26 at 10. Here, the primacy of the will of the contracting party must give way to an inquiry, preferably as narrowly constructed as possible to be in keeping with the goal of certainty, into whether consent was real or induced. *Id.*

<sup>34</sup> *Id.* at 11.

<sup>35</sup> For a fuller examination of the relationship between free market ideology (*laissez-faire* philosophy) and law, *see generally* UNGER, *supra* note 3; WEBER, *supra* note 3.

<sup>36</sup> Beatson & Friedmann, *supra* note 26, at 12–15; *see, e.g.*, Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (Eng.); Unfair Contract Terms Act 1977, c. 50 (Eng.); Consumer Credit Act 2006, c. 14 (Eng.); *Australian Consumer Law 2011* (Cth) sch 2 (Austl.); Contracts Review Act 1980 (NSW); Sales of Goods Ordinance, (1977) Cap. 26 (H.K.); Control of Exemption Clauses Ordinance, (1989) Cap. 71 (H.K.); Supply of Services (Implied Terms) Ordinance, (1994) Cap. 457 (H.K.); Unconscionable Contracts Ordinance, (1995) Cap. 458 (H.K.).

<sup>37</sup> EWAN MCKENDRICK, *CONTRACT LAW: TEXT, CASES, AND MATERIALS* 6–7 (4th ed. 2010).

<sup>38</sup> *Id.*; *see also* Beatson & Friedmann, *supra* note 26, at 15.

<sup>39</sup> Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1719 (1976).

there is a shared sense of solidarity arising from the parties' intimacy.<sup>40</sup> The courts, armed with legislative edicts or public policy considerations, have tasked themselves with intervening to guard against the exploits of powerful entities who may take advantage of unsuspecting, less powerful, ignorant, imprudent, or commercially un-savvy persons. In this sense, modern contract law is underlined by strong egalitarian values and a commitment to substantive justice.<sup>41</sup> The use of the doctrine of undue influence in guarantee cases is illustrative of modern contract law's response to the changing socio-economic landscape to safeguard fairness in market transactions.

### *B. Back to Basics: Grounding Law and Contractual Theory*

As the aforementioned discussion illustrates, whilst classical contract law is said to have concerned itself primarily with the normative value of giving effect to individual autonomy by enforcing promises to give effect to the will of the parties regardless of the nature or content of the bargain unless it violated public policy principles or was grossly unjust or fraudulently secured,<sup>42</sup> modern contract law theory has reflected its desire to achieve a broader set of normative goals such as fairness and good faith, whilst giving effect to individual autonomy and principles of efficiency. In this sense, it has long recognized instances in which bargains may not have been entered into as an expression of one's own free will.<sup>43</sup> In such cases, contract law resorts to alternative normative principles such as substantive fairness and good faith to single out factors which would render a contract void or voidable. These principles have typically found a voice in the court's application of equitable doctrines.<sup>44</sup>

As Schwartz and Scott observe, contract law lacks a single descriptive or normative theory that covers the full expanse and hybridity of contractual manifestations that present themselves<sup>45</sup> for analysis and decision-making in the courts. The application of the normative principle of freedom of contract, for example, has routinely seen courts attempt to balance this goal with other objectives inspired by a commitment to principles underlying the rule of law,

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<sup>40</sup> *Id.* at 1717–19.

<sup>41</sup> Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 *YALE L. J.* 472, 491–93 (1980); Stephen M. Waddams, *Unconscionable Contracts: Competing Perspectives*, 62 *SASK. L. REV.* 1, 12 (1999).

<sup>42</sup> Beatson & Friedmann, *supra* note 26, at 8–9 (citing J.L. Barton, *The Enforcement of Hard Bargains*, 103 *L.Q. REV.* 118, 143–44 (1987)) (comparing in particular, *Prees v. Coke* [1871] *LR* 645 (Eng.) and *Proof v. Hines* [1735] *ER* 690 (Eng.)).

<sup>43</sup> *Id.* at 10–11; see also Eisenberg, *supra* note 25, at 808–09.

<sup>44</sup> Beatson & Friedmann, *supra* note 26, at 10.

<sup>45</sup> Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 *YALE L.J.* 541, 541 (2003).

particularly substantive rule of law requirements<sup>46</sup> such as justice and fairness. In light of this, a “meta-principle” such as individual autonomy or freedom of contract, fails on its own to explain the broader manifestations of contract theory when other normative principles such as fairness or good faith dictate a particular outcome. This is especially so when normative values conflict with each other,<sup>47</sup> for example, autonomy, predictability, or efficiency.<sup>48</sup>

Since the market is no longer a realm exclusive to supposedly rational and calculating men<sup>49</sup> as it once was, the law has accordingly adapted its role in supervising market transactions to follow suit. With the changing perceptions and characterization of actors who previously lacked independent legal personality or capacity to enter into a contract, for example, children, women, and the elderly, courts have devised approaches to look beyond the traditional factors required for the formation of a binding legal contract and have even been prepared to query the substance of the terms. Beatson and Friedmann cite this increasing control over contracts as characteristic of modern contract law, highlighting the expanse of various contractual doctrines which have sought to address the gap between objectively determined “will” and genuine “consent,” noting in particular the breadth of the doctrine of undue influence as demonstrative<sup>50</sup> of the normative underpinnings of contract law to facilitate the avoidance of unfair contracts when necessary.

The relational theory of contract advanced by Ian Macneil lends significant insights into the inherent limitations of the classical and modern contract law approaches.<sup>51</sup> His primary critique centered around the lack of “realism”

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<sup>46</sup> This is in contrast to formal rule of law requirements which focus on certainty, predictability, and other procedural aspects pertaining to the doctrine.

<sup>47</sup> This paper will not discuss the hierarchies of normative values reflected by various fields of law or how these conflicting values are organized in the normative legal order as their ordering continuously evolves through jurisprudence and legislative acts.

<sup>48</sup> Schwartz & Scott, *supra* note 45, at 543.

<sup>49</sup> See Rosemary Auchmuty, *Men Behaving Badly: An Analysis of English Undue Influence Cases*, 11 SOC. & LEGAL STUD. 257, 267 (2002).

<sup>50</sup> Beatson & Friedmann, *supra* note 26, at 12–13.

<sup>51</sup> See HUGH COLLINS, *THE LAW OF CONTRACT* 3, 7 (4th ed. 2003). Indeed, Hugh Collins describes classical contract theory as a “doctrinal system of thought” whose underlying premise is essentially “a relatively small set of fundamental principles” whose “unity and simple analytical framework . . . established a closed system of thought which necessarily excluded inconsistent rules and doctrines.” *Id.* He goes on to recognize the limitations of this presentation of the law, which he describes as “stalled” while the market and its regulatory framework continues to evolve dramatically. *Id.* at 7. This, in turn, limits our understanding of the relevance of these evolutions in market conditions and individuals’ operative contexts, relegating them to irrelevance or worse still, distorting them. See also Ian Macneil, *Reflections on Relational Contract Theory after a Neo-Classical Seminar in IMPLICIT DIMENSIONS OF CONTRACT: DISCRETE, RELATIONAL AND NETWORK CONTRACTS* 207, at 208 (David Campbell, Hugh Collins & John Wightman eds. 2003). Modern contract law extends its scope to the incremental consideration of differentiating factors, it remains wedded to the need for international rationalization and thereby, embedded within the core

reflected in the doctrinal rules. He was particularly critical of the focus on the objective manifestation of consent and other contractual terms to discern the will of the parties, which, in his view failed to mirror the realities of the exchange between them.<sup>52</sup>

Critical of these limitations inherent in the doctrinal rules applied to determine contractual disputes pursuant to the classical model of the contract, Macneil's work emphasized the indispensable perspectives gained through applying a relational lens to understanding and analyzing all contracts.<sup>53</sup> Macneil sought to challenge the characterization of contractual exchanges as embedded within traditional economic theory which relied on models dependent on fixed rules about actors, markets, and institutions.<sup>54</sup> Given that these principles informed the perspectives applied in the legal regulation of economic activity, he challenged their fixity and reliability as predictors of motivation, intent, or likely behavior. He argued that the classical contract law model was misleading in that it failed to account for or contextualize the actual motivations of actors operating in the social sphere, including the relational dimensions which informed social interaction and could frame and analyze anticipated social behavior more reliably.<sup>55</sup> He posited that the dealings and relationships underlying the contracts were uniquely reflective of the dynamic and operative context governing the dealings between the parties.<sup>56</sup> To that end, he charged classical contract theory with being incoherent and irrelevant although fully recognizing its value until a better competing theory could be reliably tested and established as more useful or superior.<sup>57</sup>

However, his critique was more firmly cast against the social philosophy underlying classical contract theory. He saw the need for the articulation of an alternative philosophy of contractual relations.<sup>58</sup> This account underscores the drive behind Macneil's articulation of alternative core principles of contract law (cooperation, economic exchange, future planning, threat of external

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contractual theoretical framework, adopting an analogical reasoning as a model for understanding the behavior of legal actors, who are all assumed to be reasonable persons. *Id.* at 208. The method functions within a specific juridical and doctrinal framework that centralizes market individualism and liberalism and identifies the core function of the law as simply that of recognizing and regulating the privately created legal rights of autonomous parties against this backdrop. *Id.* at 212–14.

<sup>52</sup> Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978).

<sup>53</sup> See generally Ian R. Macneil, *Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus,"* 75 NW. U. L. REV. 1018 (1981).

<sup>54</sup> See Macneil, *supra* note 52; Macneil, *supra* note 53.

<sup>55</sup> *Id.*

<sup>56</sup> Macneil, *supra* note 53, at 1062; see also Macneil, *supra* note 52, at 887.

<sup>57</sup> Macneil, *supra* note 52, at 863; see also David Campbell, *The Undeath of Contract: A Study in the Degeneration of a Research Programme*, 22 H.K. L. J. 20 (1992).

<sup>58</sup> Macneil, *supra* note 53.

sanctions, social control, and manipulation), which constitute the essence of a contractual exchange and foreshadow a more systematic approach for the theorization and understanding of contractual relations.<sup>59</sup> Macneil's other work showcases his engagement in other domains of scholarship in order to formulate a more comprehensive theory of contractual relations.<sup>60</sup> This demonstrates the importance of enlarging the lens of the relational theory of contract to conceptualize other relational dimensions within society, human, structural, and institutional. Both, as individuals, units and groups, we are fundamentally constituted in relation to these dimensions, which impact our capacities and form the basis for understanding human pursuits and their underlying motivations.

Building on Macneil's proposition for understanding contracts (and legal relations more broadly) as relational endeavors underpinned by contextual factors which operate as motivating or constraining devices, the next section draws on feminist legal theory as well as critical race scholarship and its critique of law to expose the justice gap in the law's doctrinal framing. Applied in the context of the law on contractual dealings, the section outlines why a relational theory of contract alone does not offer a comprehensive perspective of the realities at play and falls short in its objective.

### III. LAW'S LIMITATIONS: IMAGINING SUBJECTS IN ITS OWN IMAGE

#### A. *Are Comprehensive Legal Doctrines Possible? Feminist and Critical Race Analyses Pave the Way*

The law's treatment of all persons as autonomous legal subjects without consideration of the situational context within which subjects of law are embedded creates an underclass of legal subjects already marginalized by society and rendered even more vulnerable by the law's exclusion of their realities. This critique has been levelled by scholars<sup>61</sup> working across a range of legal fields, examining the implications for gendered beings in male-centric legal doctrine.<sup>62</sup> While the first couple of waves of feminist theorizing focused on gender as the dominant category of analysis in this field, it has recently extended beyond gender to other identity vectors and their meeting points in various domains of law. More recently, this work has engaged numerous other socially constructed categories challenging the gender binary and the rigid applications and reproductions of heteronormative perspectives and realities

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<sup>59</sup> See generally Ian R. Macneil, *Contracting Worlds and Essential Contract Theory*, 9 SOC. & LEGAL STUD. 431 (2000).

<sup>60</sup> Macneil, *supra* note 53.

<sup>61</sup> See *infra* notes 63–64 and accompanying text.

<sup>62</sup> *Id.*

in law.<sup>63</sup> This work offers indispensable insights pertaining to law as theory, law as discourse, and law's multilayered experiential masculinity and ethnocentricity as it plays out in practice. It exposes the law's structural and substantive power to replicate and entrench power imbalances.<sup>64</sup> Indeed, law's objectivity and rationality has stripped legal subjects of their realities, rendering them abstract or hollow as legal actors. In the eyes of the law, they are simply delineated as *legal subjects* and nothing more, commanding their allegiance to the law as prioritized above all else. However, individuals are heavily embedded within specific social contexts, with multiple normative orders competing for their allegiance<sup>65</sup> and steering their actions while they

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<sup>63</sup> See generally FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER (Katharine T. Bartlett & Roseanne Kennedy eds., 1991); FEMINIST PERSPECTIVES ON CONTRACT LAW (Linda Mulcahy & Sally Wheeler eds., 2005); MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004) [hereinafter THE AUTONOMY MYTH]; MARTHA ALBERTSON FINEMAN & MICHAEL THOMSON, EXPLORING MASCULINITIES: FEMINIST LEGAL THEORY REFLECTIONS (2016) [hereinafter EXPLORING MASCULINITIES]; THE ILLUSION OF EQUALITY, *supra* note 17; INTEGRATING SOCIO-LEGAL STUDIES INTO THE LAW CURRICULUM, (Caroline Hunter ed., 2012); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989) [hereinafter TOWARD A FEMINIST THEORY OF THE STATE]; CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987) [hereinafter FEMINISM UNMODIFIED]; CAROL SMART, FEMINISM AND THE POWER OF LAW (1989); Rosemary Auchmuty, *Judgment: Royal Bank of Scotland Plc v Etridge (No 2)*, in FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE 155 (Rosemary Hunter et al. eds., 2010); Rosemary Auchmuty, *The Married Women's Property Acts: Equality Was Not the Issue*, in Hunter, *supra* note 17, at 13; Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 Am. U. L. Rev. 1065 (1985); Kennedy, *supra* note 39.

<sup>64</sup> See generally ANNE BOTTOMLEY, FEMINIST PERSPECTIVES ON THE FOUNDATIONAL SUBJECTS OF LAW (1996); FEMINIST PERSPECTIVES ON LAND LAW, (Hilary Lim & Anne Bottomley eds., 2007); Rosemary Auchmuty, *When Equality Is Not Equity: Homosexual Inclusion in Undue Influence Law*, 11 FEMINIST LEGAL STUD. 163 (2003); Rosemary Auchmuty, *The Rhetoric of Equality and the Problem of Heterosexuality*, in FEMINIST PERSPECTIVES ON CONTRACT LAW 51 (Linda Mulcahy & Sally Wheeler eds., 2005) [hereinafter *The Rhetoric of Equality*]; Mario L. Barnes, *Black Women's Stories and the Criminal Law: Restating the Power of Narrative*, 39 U.C. DAVIS L. REV. 941 (2006); Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L.J. 217 (2003); Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309 (1996); Lisa C. Ikemoto, *In the Shadow of Race: Women of Color in Health Disparities Policy*, 39 U.C. DAVIS L. REV. 1023 (2006); Adele M. Morrison, *Changing the Domestic Violence (Dis)Course: Moving from White Victim to Multi-Cultural Survivor*, 39 U.C. DAVIS L. REV. 1061 (2006); Jennifer C. Nash, *From Lavender to Purple: Privacy, Black Women, and Feminist Legal Theory*, 11 CARDOZO WOMEN'S L.J. 303 (2005); Reginald Oh, *Interracial Marriage in the Shadows of Jim Crow: Racial Segregation as a System of Racial and Gender Subordination*, 39 U.C. DAVIS L. REV. 1321 (2006); Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CAL. L. REV. 1647 (2005); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405 (2005).

<sup>65</sup> There has been a turn towards anti-essentialism in informing feminist movements as they continue to challenge the legal normative order's limited framing of issues based on the experiences of a singular identity factor. This discourse has called for a more incisive inquiry into the varied experiences of individuals living a particular identity and the impact of other cross-cutting identities on their experiences. See generally Puja Kapai, *Minority Women: A Struggle for Equal Protection Against Domestic Violence*, in FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES (Beverley Baines et al. eds., 2012). The author uses intersectionality theory to challenge the assumptions underlying law and policy in relation to how actors will behave and

calculate the moral, social, legal, and political imperatives of acting (or not) one way or another.

Having progressed from an era when women were treated as chattel under the law and lacked independent legal personality to a point in modernity where they are recognized as competent, autonomous agents with full legal capacity, the realization of substantive equality remains elusive as a result of an overly-simplified model that incompletely conceptualizes legal subjects. Law's structural injustice is rooted in and perpetuated through its doctrinal disembodiment of particular identities, the legal meaning it ascribes to all conduct using the normative content of laws and legal concepts which are applied rigidly to all persons with inadequate regard for their situational contexts and its systems and accompanying processes.

MacKinnon for example, has critiqued the conceptual and structural limitations of the law in failing to capture women's experiences.<sup>66</sup> Kimberle Crenshaw's seminal work in articulating the theory of intersectionality was groundbreaking.<sup>67</sup> Intersectionality, though framed as such by Crenshaw in the 80s was discussed earlier by leading scholars such as Bell Hooks,<sup>68</sup> MacKinnon,<sup>69</sup> and Fineman,<sup>70</sup> to critique law's characterizations and dependence on gender, race, class, and other categorizations used for its interpretive and analytical framing. These works have highlighted the inherent limitations of such categories as substance, process, and discourse. The framing implies numerous constraints in terms of its ability to accommodate the authenticity of modern-day identities especially considering

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respond to regulation in the context of intimate partner violence and in particular, the impact of immigrant and racialized identities on their competencies, motivations and capacities to turn to the law for protection and self-preservation, both highly controversial and culturally laden concepts given their focus on individualism. *Id.*; see also Puja Kapai, *Bringing Intersectionality Home: Delivering Contextualised Justice in Gender Based-Violence in Hong Kong*, in GENDER, VIOLENCE AND THE STATE IN ASIA 148 (Amy Barrow & Joy L. Chia eds., 2016). The author presents findings from a comparative, empirical study to demonstrate the significant limitations of law and policy in offering equal protection to minority against domestic violence due to the law's systemic exclusion of the considerations pertaining to the situational context within which abused women live out their realities. *Id.*

<sup>66</sup> See generally FEMINISM UNMODIFIED, *supra* note 63; TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 63.

<sup>67</sup> See generally Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STANFORD L. REV. 1241 (1991); Kimberle Crenshaw, *On Intersectionality: Essential Writings* (forthcoming Sept. 2020).

<sup>68</sup> See generally BELL HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* (1987).

<sup>69</sup> See generally FEMINISM UNMODIFIED, *supra* note 63; CATHARINE MACKINNON, *WOMEN'S LIVES, MEN'S LAWS* (2007) [hereinafter *WOMEN'S LIVES, MEN'S LAWS*]; see also *supra* text accompanying notes 63–64.

<sup>70</sup> See generally THE AUTONOMY MYTH, *supra* note 63; EXPLORING MASCULINITIES, *supra* note 63; see also accompanying text to *supra* notes 63–64.

identity's manifest hybridity or integrated nature.<sup>71</sup> The law routinely forces individuals into binary frames, seeking to view them as falling into *one* or the *other* categories in order to qualify for a certain *public good*. This has forced a distortion of various proportions, operating as a denial of identity, authorship, authenticity, and autonomy over oneself. However, the dominant frames created by the law in its mechanisms for justice are also a form of structural violence<sup>72</sup> and render the authentic identity of the person less visible or invisible in the eyes of the law. Recognition of legal persona and as a relevant subject of the law is *a priori* condition for justice. Where the law negates ontological realities by obscuring identities, it violates the prospects for and promise of equal justice.

Feminist critiques of the law, for example, have long railed against the law's veiled masculinity,<sup>73</sup> arguing that the law reinforces social constructions of identity and exclusion and reproduces patriarchy through the state and its instruments in myriad of ways.<sup>74</sup> Martha Fineman's work, for example, illustrates the disparate impact of equal laws on women in a number of circumstances—particularly in family law—betraying the law's inherent masculinity and its deployment in service of patriarchy.<sup>75</sup> Feminist legal studies as a field of scholarship has long investigated the differential treatment and outcomes under the law impacting women as a class.<sup>76</sup> Its significance lies in its analytic framing of law and legal issues which is informed by women's lived realities and experiences. This enables a rendering of perspectives that

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<sup>71</sup> See generally HYBRID IDENTITIES: THEORETICAL AND EMPIRICAL EXAMINATIONS (Keri E. Iyall Smith & Patricia Leavy eds., 2008).

<sup>72</sup> See Catia C. Confortini, *Galtung, Violence, and Gender: The Case for a Peace Studies/Feminism Alliance*, 31 PEACE & CHANGE 333 (2006); Johan Galtung, *Violence, Peace, and Peace Research*, 6 J. PEACE RES. 167, 167–191 (1969); Mark Vorobej, *Structural Violence*, 40 PEACE RES. 84, 84–98 (2008); see also IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE (1990) (providing a general theory on the impact of difference in structural terms in relation to political organization, accountability and systems of justice, which embed structures of power and marginalize minority identities and voices to perpetuate oppression).

<sup>73</sup> See generally FEMINIST LEGAL THEORY: FOUNDATIONS (D. Kelly Weisberg ed., 1993); FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER, *supra* note 63; FEMINIST JURISPRUDENCE (Patricia Smith ed., 1993); FEMINISM UNMODIFIED, *supra* note 63; GERDA LERNER, THE CREATION OF PATRIARCHY (1986); SMART, *supra* note 63; TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 63.

<sup>74</sup> For an excellent overview of feminist legal scholarship in particular and its engagement with the question of law's masculinity, see Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WISC. J. L., GENDER & SOC'Y 201 (2008). For a more in-depth treatment of the subject of law's masculinities, see also NANCY DOWD, THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE (2010).

<sup>75</sup> See generally THE AUTONOMY MYTH, *supra* note 63; EXPLORING MASCULINITIES, *supra* note 63; MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995) [hereinafter THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES]; THE ILLUSION OF EQUALITY, *supra* note 17.

<sup>76</sup> See *supra* notes 73 and 75.

are distinctly feminist in their unpacking of a historically patriarchal legal system while challenging the narratives of objectivity often attributed to it.<sup>77</sup> The main import of such a theory is to help bring into focus, validate, and legitimize in the eyes of the law, an alternative narrative informed by women's lived experiences.<sup>78</sup>

*B. Intersectionality: Possibilities for Enriched Outcomes of Equality in Doctrinal and Juridical Contexts*

Second and third wave feminist scholarship engaged with much of feminist legal theory, particularly, critical race theory and scholarship<sup>79</sup>, to critique feminist theory itself insofar as it presented a simplified narrative of patriarchy based on the experiences of subordination of one group of women as universal and characteristic of the experiences of all women.<sup>80</sup> Feminist critique entails an additional layer of complexity questioning the notion of a universal experience of womanhood which can adequately encompass the experiences of all women.<sup>81</sup> Angela Harris, for example, highlights the dangers inherent in essentializing women's experiences as unitary as they have invariably privileged the experiences of white, heterosexual, middle-class, and able women historically.<sup>82</sup> This renders invisible other categories of relevance pertaining to particular women's life experiences—for example, based on race, disability, gender identity, and religion, among others—obliterating them from the tapestry of feminist legal analysis. Debating between adopting the narrative of equality and sameness or difference (with men), feminist legal theorists have sought to construct a framework for understanding and incorporating complex human identities encompassing multiple life experiences in terms of power differentials,<sup>83</sup> recognizing that it is the marginalization of identities that sit on an axis together with gender in legal

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<sup>77</sup> See generally MACKINNON, *supra* note 63 (tracing the patriarchy embedded within political and legal structures and presenting feminist framings to unravel sexual politics which undergirds societal structures including the normative frameworks and their interpretations within specific institutional structures. See also Dowd (2010), *supra* note 74.

<sup>78</sup> Patricia A. Cain, *Feminist Legal Scholarship*, 77 IOWA L. REV. 19, 25–27 (1991).

<sup>79</sup> Mari Matsuda and Patricia Williams focus on critical race feminism. See generally PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 14 WOMEN'S RTS. L. REP. 297 (1992).

<sup>80</sup> Martha Minow, *Beyond Universality*, 1989 U. CHI. LEGAL F. 115, 134–35.

<sup>81</sup> Cain, *supra* note 78, at 28.

<sup>82</sup> See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); see also Cain, *supra* note 78, at 28 (citing both Harris and Williams); Susan H. Williams, *Feminism's Search for the Feminine: Essentialism, Utopianism, and Community*, 75 CORNELL L. REV. 700 (1990).

<sup>83</sup> Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986).

framing that oppresses and reproduces entrenched powerlessness among those excluded from the lens of the law.<sup>84</sup>

Feminist legal theorists, critical race scholars, and critical legal studies scholars have influenced a widespread redrawing and remapping of legal constructions. They have challenged the law's proclaimed neutrality from the broad lens of historical subjugation, class, economics, social relations, and unconscious bias. This has exposed the law's complicity in legitimizing, sustaining, and entrenching cultural and racial subordination through systematizing a particular type of society which empowered some groups over others. Critical legal studies and feminist legal scholarship have interrogated equality law and jurisprudence by drawing on the experiences of different voices to assess the impact of subordination of one form of marginality on those who experience subordination on other grounds in addition to gender—for example, race, religion, sexual orientation, class—and other socially and historically, if not legally, marginalized groups.<sup>85</sup>

The net effect of the interaction between multiple orders of subordination on particular identities (which could be the compound effect of (1) intersecting factors of subordination or (2) the unique experience of multiple subordinating factors cohering in one person's experience<sup>86</sup> to disadvantage them in a particular way or (3) the disparate impact of each subordinating factor on one person's experience or any combination of these three) is a phenomenon that has eluded the law's regulatory reach given the law's tendency towards categorical or differentiated, as opposed to, contextualized justice.

Catherine MacKinnon however, has challenged both a gender neutral approach—which treats both genders as androgynous and treats gender as insignificant insofar as the law's purview is concerned—and the difference based approach, which treats the genders differently on account of their varied experiences, but bears limited capacity to encompass a breadth of experiences within each gender group.<sup>87</sup> Instead, she has advocated the dominance

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<sup>84</sup> See BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 15 (1984); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324–26 (1987).

<sup>85</sup> See generally CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 2d ed. 2003); UNEQUAL SISTERS: A MULTICULTURAL READER IN U.S. WOMEN'S HISTORY (Vicki L. Ruiz & Ellen Carol DuBois eds., 2d ed. 1994); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Matsuda, *supra* note 79; see also FEMINIST LEGAL THEORY: AN ANTI-ESSENTIALIST READER (Nancy E. Dowd & Michelle S. Jacobs eds., 2003); THE BLACK FEMINIST READER (Joy James & T. Denean Sharpley-Whiting eds., 2000); SISTERHOOD IS FOREVER: THE WOMEN'S ANTHOLOGY FOR A NEW MILLENNIUM (Robin Morgan ed., 2003).

<sup>86</sup> Kimberlé Crenshaw coined the term “intersectionality” to characterize this experience of multiple vectors which create a unique experience of inequality where those vectors intersect. See Crenshaw, *supra* note 85.

<sup>87</sup> Catharine MacKinnon, *Difference and Dominance: On Sex Discrimination*, in FEMINIST THEORY: A PHILOSOPHICAL ANTHOLOGY 392–402 (Ann E. Cudd & Robin O. Andreasen eds., 2005).

approach which requires attention to the dynamics between the genders to account for the historical distribution of power and culturally constructed gender stereotypes.<sup>88</sup> Whilst the difference approach makes it possible for differentiated justice to correct the power imbalance, the dominance approach mounts a challenge to the institutions which sustain such power imbalances. The dominance approach is instructive and casts new light on the analytical frameworks which ought to inform the law in its orientation towards substantive justice.<sup>89</sup> It presents a useful lens through which to examine power structures, their subordinating tendencies towards marginalized communities, and their perpetuating nature. For even a grandiose framework such as the rule of law is meaningless if it fails in the face of demands of contextualized implementation and scrutiny of its tenets to demonstrate its bottom-up value.<sup>90</sup>

Law's functionality seemingly depends on its ability to *classify* someone as within or outside of certain categories which are formed against the backdrop of particular social relations, experiences, and paradigms for justice. However, law as an institution is crippled by the presentation of an anomaly. Its response has been to either distort the experience of the anomalous presentation or mischaracterize it entirely given its roots in the discourse of a still fairly formal conception of the rule of law, which emphasizes equality, predictability, and certainty as opposed to more substantive applications envisioned by an ideal theory of substantive rule of law.<sup>91</sup>

However, this is not to say that the law has universally neglected such anomalies. The common law legal system has long incorporated principles of equity as part of its institutional pillars for delivering justice.<sup>92</sup> Many equitable principles originated in the Courts of Chancery, and are now administered concurrently with common law.<sup>93</sup>

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<sup>88</sup> *Id.* at 90–91.

<sup>89</sup> MacKinnon, *supra* note 87.

<sup>90</sup> Naresh Singh, *Civil Society and the Challenge of Changing Power Relations Between the Poor and the Elite*, in *ENGAGING CIVIL SOCIETY: EMERGING TRENDS IN DEMOCRATIC GOVERNANCE* 77–89 (G. Shabbir Cheema & Vesselin Popovski eds., 2010).

<sup>91</sup> See Peter Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, *PUB. L. AUTUMN* 467, 468–70 (1997); Jeremy Waldron, *Legislation and the Rule of Law*, 1 *LEGISPRUDENCE* 91, 91–93 (2007).

<sup>92</sup> These principles have been traced as far back in time as the reign of Henry VIII. See FREDERICK W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 221–26 (1908).

<sup>93</sup> The term “common law” here is used in its narrow sense to refer to the body of law developed in the courts. Historically, the courts of common law and equity were distinct in that the courts of the King’s Bench and Common Pleas used to develop and administer common law whereas the Exchequer administered equity through the Court of Chancery. The Judicature Reform Acts of the 1870s fused these two streams of law such that they were now administrable through all courts of law. Despite this fusion, however, in both academic and jurisprudential settings, the distinction between legal and equitable doctrines and remedies remain prevalent in material terms. In many

The purpose of equity was to respond flexibly to evolving social conditions and contexts. This was challenging to do under the common law, given its underlying foundational commitment to the doctrine of binding precedent.<sup>94</sup> Equitable doctrines enable claimants to engage with a range of remedies which operate on the conscience of a particular respondent who may be a “wrongdoer” or “defendant” in the context of a given claim.<sup>95</sup> Once triggered, equity allows the court to determine if certain legal remedies, which the respondent might not otherwise be entitled to, should or should not be granted.<sup>96</sup>

Equitable remedies are wide-ranging in seeking to deliver specific relief from the inequities faced by a party in the context of a court dispute. They include injunctions, specific performance, equitable or promissory estoppel, equitable damages, rescission, rectification, express, resulting or constructive trusts, account of profits, equitable set-off and tracing.<sup>97</sup> Paradoxically, the availability of these remedies might be constrained by equitable principles themselves. For example, the requirement that the claimant of the remedy comes to the court with clean hands,<sup>98</sup> does not unduly delay his pursuit of the legal enforcement of an equitable claim or equitable remedy.<sup>99</sup> Another example is the oft-applied principle that equity will not act against a bona fide purchaser for value without notice (often referred to as “equity’s darling”).<sup>100</sup>

In essence, these principles are premised on a sense of morality inherent to legal norms and their underpinning structures. This inherent morality does not sanction the law’s utilization as a tool to perpetrate wrongdoing or to allow individuals to benefit from their wrongful acts. However, there remains slippage between the ways in which different equitable doctrines are applied and the extent to which they require actual “wrongdoing” as opposed to a

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instances, certain equitable doctrines have been codified and continue to be administered with a statutory basis. *See generally* R. P. MEAGHER ET AL., *EQUITY: DOCTRINES AND REMEDIES* (1992).

<sup>94</sup> *See generally* MICHAEL ZANDER, *THE LAW MAKING PROCESS*, ch. 4 (7th ed. 2015).

<sup>95</sup> *See generally* SNELL’S *EQUITY* (John McGhee ed., 2018).

<sup>96</sup> The maxims of equity are applied to preclude a wrongdoer from benefiting from his actions. *See id.*

<sup>97</sup> There are other areas of equitable remedies which have been significantly developed and are now considered as significant areas of law with their own guiding principles and nuances. These include, for example, the law of unjust enrichment or law of fiduciaries.

<sup>98</sup> The court will not allow itself to be used as a vehicle for wrongdoing or impropriety. *Gray v. Thames Trains* [2009] 3 WLR 167.

<sup>99</sup> This is referred to as the doctrine of laches, which views inordinate or unreasonable delay in the pursuit of a legal claim in equity or equitable remedy as a form of prejudice and a party against whom a delayed equitable claim is made, may use the doctrine in defense to persuade the court to exercise its discretion against granting the remedy or enforcing the claim.

<sup>100</sup> The *bona fide purchaser for value without notice* is considered to be an innocent party who has acquired property on fair terms for value and without any actual, constructive or imputed notice of any other party’s claims or equitable interests as long as they can demonstrate reasonable exercise of due diligence to ascertain the same. *See Akers & Ors v. Samba Financial Group* [2017] UKSC 6, [51] (appeal taken from Eng.).

broader approach which treats certain acts or omissions as constructive or imputed “wrongs” or “inequities.”<sup>101</sup> These varying approaches to construing the “wrong” find common grounds in a central principle—that the law cannot be complicit in assisting the “wrongdoer”—and this is where equity plays its distinct role.

Despite the seemingly coherent application of equitable doctrines, an age-old challenge arises where the subjects of the law are not mirrored by the legal framework which presides over them because the common law legal system presumes the homogeneity of its subjects. Contract law has largely remained free from the discourse of multiculturalism, the accommodation of cultural and religious rights, or conflicts between rights internal to constitutions or human rights instruments, which have pervaded other fields of law.<sup>102</sup> However, even contract law prioritizes certain values and ascribes specific motivations to individuals engaged within its domain.<sup>103</sup> Principles of contract law are indeed value-laden and governed by internal moral diktats of the applicable legal norms. Insofar as the norms are presented as universal, they are inherently characteristic of *particular* cultural subjects, and are bound to exclude alternative subjects with foreign cultural motivations from their analyses. Understanding these alternative realities operative on the minds of “other” subjects of the law engaged in the formation of contractual relations is indispensable to determining the applicability of equitable principles in given circumstances. And this is precisely why a relational theory of contract by itself is unable to plug this conceptual gap. Rather, a critical intersectional inquiry drawing on the frameworks of feminist and critical legal studies is required for a more comprehensive delineation of the operative dynamics and relevant factors underlying a particular contractual context. This would greatly enhance the perspective gained from the application of relational contract theory.

Together, feminist legal theory and critical legal studies offer a strong imperative for the adoption of tools that better serve the law’s claim to being servant to no particular culture or dominant worldview. They also help the law’s objective of serving all communities who seek respite from injustice and, (more importantly) the protection and enforcement of their rights.

#### IV. CULTURE IN THE COURTROOM: THE LAW’S ‘OTHER’

##### A. *Legal Transplants: Taking Root in Foreign Worlds*

Against this beckoning for a contextualized construction of contracts inspired by MacNeil’s relational theory, (using what Crenshaw defines as

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<sup>101</sup> SNELL’S EQUITY, *supra* note 95, ¶¶ 24, 326.

<sup>102</sup> See *infra*, notes 121–134 and accompanying text.

<sup>103</sup> This is extensively captured in the works of Adams and Brownsword, Anthony Kronman, Richard Posner and William MacNeil. See *generally supra* note 22 and accompanying text.

intersectionality), there is one further dimension that calls into critical focus the use of particular legal doctrines to determine contractual claims using (classical or modern) “mono-dimensional framing.” This is the impact of migration (of people, ideas, values, and institutions) on legal transplants.<sup>104</sup>

As the global legal order has evolved over time, there have been numerous movements of legal principles across borders in multiple directions as well as the indigenization of particular “foreign” concepts in unique ways.<sup>105</sup> These movements can be variously described, as “legal transplantation” or more broadly as the “reception of law.”<sup>106</sup> Legal scholars, jurists and historians have extensively studied these phenomena and have sought to understand the adoption and application of comparative law in different contexts. Some of these processes are the consequence of colonial rule, the development and harmonization of international law norms in various realms of global cooperation, for example, economic, health, or environmental, whereas in other contexts, such processes are predicated on principles of efficacy.<sup>107</sup> In most instances, the law as it develops in any given jurisdiction is by imitation, borrowing or mirroring legal developments in other societies.<sup>108</sup> It is only very

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<sup>104</sup> These processes refer variously to the reception or adoption of a single section of a legislative code, or the entire code itself or an individual legal ruling or to the import of an entire legal system. Moreover, it may be a complete, partial or modified borrowing of the norm or system as a whole. *See generally* ESIN ORUCU, *THE ENIGMA OF COMPARATIVE LAW: VARIATIONS ON A THEME FOR THE TWENTY-FIRST CENTURY* (2013); VLAD F. PERJU, *CONSTITUTIONAL TRANSPLANTS, BORROWING AND MIGRATIONS* (2012); Alan Watson, *Aspects of Reception of Law*, 44 *AM. J. COMP. L.* 335 (1996); *see also infra* notes 125–26 and accompanying text.

<sup>105</sup> *See* ORUCU, *supra* note 104; *see also* Matteo Solinas, *The Nature of Legal Transplants—Inspirations from Postcolonial Scholarship*, 22 *N.Z. ASS’N COMP. L.* 179 (2016). *See generally* ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (1993); *Contra* Pierre Legrand, *What Legal Transplants*, in *ADAPTING LEGAL CULTURES* 57 (David Nelken & Johannes Feest eds., 2003); Prakash Shah, *Globalisation and the Challenge of Asian Legal Transplants in Europe*, *SING. J. LEGAL STUD.* 348, 349 (2005); Watson, *supra* note 104; Alan Watson, *From Legal Transplants to Legal Formants*, 43 *AM. J. COMP. L.* 469 (1995).

<sup>106</sup> The discussion of the movement of legal norms and entire systems from one context to another has largely occurred under the discourse where cross-fertilization of legal norms are referred to as processes of “legal transplantation” without more. However, more nuanced descriptions are beginning to emerge and are necessary to reconceptualize these movements for the sophisticated processes they represent as well as the different ways in which their historical, political and legal emergence signify the intricacies surrounding the evolution of legal norms and systems. For example, enforced importation or application of such norms bear a divergent legacy for the legal “transplant” when compared with norms which are voluntarily adopted or modified to suit the receiving jurisdiction. In other instances, while the legal norm may purportedly be coopted, in substance it does not deliver outcomes in the manner it was designed to in its originating context. These are all rich nuances which are essential to capture in any attempts to accurately theorize the evolution of law and legal processes in diverse contexts and their prospects for cross-pollination. *See* Solinas, *supra* note 105 (applying postcolonial theory to complicate and refine our understanding of the reception of law in different contexts and advocating the use of the notion of hybridity as applied in postcolonial theory to reconceptualize legal evolutions in different contexts).

<sup>107</sup> *See generally* STROUD F. C. MILSOM, *HISTORICAL FOUNDATIONS OF COMMON LAW* (2d ed. 1981).

<sup>108</sup> ORUCU, *supra* note 104, at 107–171.

rarely an entirely original system or set of rules crafted *de novo* to apply to any given situation or context.<sup>109</sup>

The enterprising nature of the common law is apparent given its development in an order and context completely foreign to the breadth of jurisdictions it has been applied to since its inception. All common law was largely incorporated across colonial domains through the reception of English law at a given date. There were initially areas where subjects were governed by their indigenous laws and customs, until English common law was developed more suitably to apply in that context.<sup>110</sup> This essentially meant that English public law was applicable to all subjects, whereas private law and family law matters were to be governed in accordance with the principles of the relevant customary or personal law.<sup>111</sup> There are varying views on the motivations behind such an approach to governance of colonized lands and their peoples. A more benevolent reading is that the British colonial government was desirous of maintaining stability and respect for customary, religious or traditional norms particularly in the governance of personal affairs was presumed to go a long way towards this.<sup>112</sup> On the other hand, others surmised that the British were considering the prospects of effective implementation of the common law over diverse population groups across its

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<sup>109</sup> Franz Wieacker, *The Importance of Roman Law for Western Civilization and Western Legal Thought*, 4 B.C. INT'L & COMP. L. REV. 257, 259-262, 270-275 (1981); see also, ORUCU, *supra* note 104, at 93-107.

<sup>110</sup> One may observe the application of English law ordinances and acts in various colonies, including Hong Kong, Singapore, and Malaysia among others. See generally, PETER WESLEY-SMITH, SOURCES OF HONG KONG LAW 85-201 (1994); Peter Wesley-Smith, *The Reception of English Law in Hong Kong*, 18 H.K. L. J. 183 (1988); Goh Yihan & Paul Tan, *An Empirical Study on the Development of Singapore Law*, 23 SING. ACAD. L.J. 176 (2011). More generally, see also Geoffrey W. Bartholemew, *Developing Law in Developing Countries*, LAWASIA: J. L. ASSOC. ASIA & WESTERN PACIFIC (1979-80); Geoffrey W. Bartholemew, *The Reception of English Law Overseas*, 9 ME JUDICE 1 (1968); Abdul H. Mohamad & Adnan Trakic, *The Reception of English Law in Malaysia and Development of the Malaysian Common Law*, 44 COMMON L. WORLD REV. 123 (2015).

<sup>111</sup> This was not an original arrangement but one which predated the era of British colonialism. For example, it was applied in a fairly sophisticated manner through the millet courts in the Ottoman Empire, and the Delhi Sultanate administered personal laws in the sixteenth century whereby community members from the relevant religious communities would sit on the courts and administer justice in respect of non-settler or religious subjects. See, e.g., Karen Barkey, *Islam and Toleration: Studying the Ottoman Imperial Model*, 19 INT'L J. POL., CULTURE, & SOC'Y 1, 5-19 (2005).

<sup>112</sup> See FLAVIA AGNES, LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN'S RIGHTS IN INDIA 59 (1999); INDIRECT RULE AND THE SEARCH FOR JUSTICE: ESSAYS IN EAST AFRICAN LEGAL HISTORY (H.F. Morris & James F. Read eds., 1972); David Killingray, *The Maintenance of Law and Order in British Colonial Africa*, 85 AFR. AFF. 340, 411-437 (1986). See generally, Damen Ward, *A Means and Measure of Civilisation: Colonial Authorities and Indigenous Law in Australasia*, 1 HIST. COMPASS 1-23 (2003), where although the practice varied depending on the indigenous custom under scrutiny and whether it was considered civilized enough to be recognized under the guise of "gradual assimilationism", in theory, British colonization processes projected the impression (through specific legal provisions, no less) of tolerance for customary norms and adjudicatory processes in some areas of life.

growing empire and the costs of achieving legal uniformity in particular contexts versus whether such outcomes would have longer-term benefits for the British empire.<sup>113</sup> Over time, however, as the reception of English law took hold over ever-expanding areas of life, beyond the public into the private realms, the application of indigenous and customary laws were mostly phased out.<sup>114</sup>

Although the term legal transplants has predominantly been used to characterize the transplantation of a legal norm into a foreign context,<sup>115</sup> Masaji Chiba has expanded this concept to the transfer of legal norms by migrants<sup>116</sup> who carry their own cultural and religious norms across state boundaries. Given the complex and rich history of migration, particularly in the wake of colonial expansion and the advent of globalization in its aftermath, the discourse surrounding the behavior of legal transplants has mainly

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<sup>113</sup> See generally LAW IN COLONIAL AFRICA (Kristin Mann and Richard Roberts eds., 1991); SALLY FALK MOORE, SOCIAL FACTS & FABRICATIONS: "CUSTOMARY LAW" IN KILIMANJARO, 1880-1980, (1986); TANIKA SARKAR, HINDU WIFE, HINDU NATION: COMMUNITY, RELIGION AND CULTURAL NATIONALISM (2001); Killingray, *supra* note 112; Morris & Read, *supra* note 112.

<sup>114</sup> It is noteworthy that in India, there were other mechanisms in place for governance predating British rule that were influenced by the Indo-Islamic state-building process which introduced secularism in India. For example, in some rural contexts, the *Panchayati Raj* system was introduced for governance and dispute resolution to strengthen democratic legitimacy and structures in rural villages. These have varying forms and structures serving different functions. The dispute resolution arm has recently been referred to as the Lok Adalat system with mediation or arbitration systems at the village level described as *Nyaya-Panchayat*. While the system was widespread in India prior to its colonization, it was reinvigorated in the decades post-independence in the 1950s and 1960s to strengthen local self-government in rural India. Panchayati Raj was further strengthened by its institutionalization under the 72nd and 73rd amendments to the Indian Constitution under the 72nd and 73rd Constitutional Amendment Acts of 1992 and 1996 respectively, which concretized these structures for grassroots political participation and decision-making through this process of decentralizing power. See INDIA CONST., amended by The Constitution (Seventy-Second Amendment) Act, 1992; INDIA CONST., amended by The Constitution (Seventy-Third Amendment) Act, 1993; INDIA CONST. However, there is a wide diversity of models of Panchayati Raj institutions in effect across different states in India, with varying degrees of success. These mechanisms and processes have had a significant bearing on the development of legal norms in these contexts, which have not always shared the same trajectory as other colonies of Britain. This underlying historical context preceding the reception of legal norms and systems is important to note as it lends significant insights into the journey, shape and form taken by said legislation. See generally Manzoor Elahi Laskar, Lok Adalat System in India (Nov. 18, 2012) (unpublished manuscript) (<https://ssrn.com/abstract=2420454>); Vipin Kumar Singhal, Dynamics of Panchayati Raj Institutions—Problems and Prospects (Nov. 17, 2015) (unpublished manuscript) (<https://ssrn.com/abstract=2692119>); Vipin Kumar Singhal, An Overview of Panchayati Raj Institutions in India (Nov. 15, 2015) (unpublished manuscript) (<https://ssrn.com/abstract=2692135>).

<sup>115</sup> WATSON, *supra* note 105; see also E. Örucü, *A Theoretical Framework for Transfrontier Mobility of Law*, in TRANSFRONTIER MOBILITY OF LAW 5 (R. Jagtenberg, et al. eds., 1995) (setting out a comprehensive list of term to analogise the process of legal transplants).

<sup>116</sup> Shah, *supra* note 105 (quoting MASAJI CHIBA, at note 4).

examined the transplantation of legal norms and structures.<sup>117</sup> The legal norms and structures that migrants bring to new countries have been understudied, especially in relation to their impact on foreign legal systems.<sup>118</sup>

Global migration has long stimulated the flow of norms. These apply in vastly varying dimensions and degrees. The process is influenced by the time of migration, and the availability of formal or informal structures to monitor, police and enforce 'legal' or 'customary' norms of migrant communities in a foreign setting. This largely depends on the specific community concerned as well and the extent to which the community has become "established" in the "host" jurisdiction.<sup>119</sup> Migrants readily learned to replicate the structures of their new "homes," while at the same time adapting and evolving their own personal and economic dealings with the economic and social frameworks of their new "homes."<sup>120</sup> As the communities of migrants interacted with their "host" cultures, receiving jurisdictions saw an unprecedented degree of norm hybridization and plurality.<sup>121</sup> Migrants regularly negotiate and restructure their cultural norms as they find new roots in and navigate a foreign context, as part of an ongoing process of cultural reconstruction.<sup>122</sup>

The unprecedented degree of migration that has characterized much of the late 19th and 20th centuries and continues into the 21st Century, has presented a particular challenge for "host" jurisdictions which are now home to a multicultural population which continues to grow.<sup>123</sup> The legal traditions and operative norms of receiving countries and the assumptions underlying them have hitherto found it challenging to govern the foreign "subject."<sup>124</sup> The

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<sup>117</sup> The work has mostly focused on studying legal transplantation in a unidimensional direction—when law is transplanted from the West into a "foreign," typically Eastern or Southern context. However, it has also been recognized that the process is seldom a one-way street, but rather a multi-layered process involving a globalized exchange of people, laws, activities, institutions and processes. See H. PATRICK GLENN, *LEGAL SYSTEMS OF THE WORLD* 47–50 (2000); Shah, *supra* note 105, at 349 (quoting Werner F. Menski at note 5).

<sup>118</sup> In general, the common law narrative surrounding the reception of "foreign norms" has rallied around the term of "legal irritants." These are aptly named because the insertion of foreign principles may result in a wide range of unpredictable outcomes on the continuing function and impact on the current functioning legal system. Therefore, the term "legal irritants" implies a certain aversion to the insertion of foreign principles. Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 *MOD. L. REV.* 11 (1998).

<sup>119</sup> Shah, *supra* note 105 (quoting CHIBA at note 4); see also *id.*

<sup>120</sup> See Shah, *supra* note 117 (quoting Werner F. Menski).

<sup>121</sup> *Id.*

<sup>122</sup> Shah, *supra* note 105.

<sup>123</sup> Mathias Czaika & Hein de Haas, *The Globalization of Migration: Has the World Become More Migratory?*, 48 *INT'L MIGRATION REV.* 283 (2014).

<sup>124</sup> Teubner, *supra* note 118. Modern day challenges abound in terms of governing aspects of cultural and religious life where these conflict with the general law or values of the host country. *Id.* In recent years, Islamic religious dress has specifically come under scrutiny in many European,

discourse of difference has primarily cast diasporic communities as the “other,” whose integration into the receiving jurisdiction is expected to be linear and mono-directional leading to linguistic, cultural, and national assimilation as a prerequisite for the gradual consolidation of their citizenship.<sup>125</sup>

The juxtaposition of the “other” in a legal context predicated on homogeneity and principled universalisms buttressed by a particular vision for the rule of law which prioritizes legal certainty, predictability, and equality before the law and espouses cultural neutrality whilst invariably being embedded in a particular cultural context seemingly leaves very little room for the accommodation of cultural difference. In such circumstances, the question of what is a morally compelling and politically legitimate model for the governance and the dispensation of justice for migrant populations and their descendants (referred to collectively as “minorities”) who consider themselves bound by multiple normative orders simultaneously looms large.<sup>126</sup>

This question has been the subject of extensive debate and discussion in the context of multicultural citizenship<sup>127</sup> and legal pluralism<sup>128</sup> in various areas of law including criminal law,<sup>129</sup> family law, constitutional law, human rights law,<sup>130</sup> child law, and health law, among others.

Increasingly, such questions arise in the context of constitutional and human rights cases before apex courts in countries and regional mechanisms,

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Australian and Canadian jurisdictions. Where these cases have ended up in court, judges have had to deliberate the outcomes in what have been termed “conflict of rights” cases. *Id.*; see also discussion *infra* notes 122–333.

<sup>125</sup> Thus, diasporic presence is cast in terms of a preconceived model of integration with specific expectations oriented towards the eventual homogenization of identities with that of the host community as opposed to harmonization, which is more permissive of the concept of hybridized, or multicultural identities, which are more reflective of the status quo. Differentiation of any kind, whether it is linguistic, economic, legal, or geographical typically triggers a narrative which is dominated by negative terms instead of one which is characterized by positive terms that recognize the imperative for inclusion, plurality, diversity, and hybridity.

<sup>126</sup> See KATAYOUN ALIDADI & MARIE-CLAIRE FOLETS, PUBLIC COMMISSIONS ON CULTURAL AND RELIGIOUS DIVERSITY: NATIONAL NARRATIVES, MULTIPLE IDENTITIES AND MINORITIES (2018) (examining the relationship between public inquiry bodies and their problematization of issues concerning minority rights and governance in Britain).

<sup>127</sup> WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1995); WILL KYMLICKA, POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM, AND CITIZENSHIP (2001); TARIQ MODOOD, STILL NOT EASY BEING BRITISH: STRUGGLES FOR A MULTICULTURAL CITIZENSHIP (2010); REMAKING CITIZENSHIP IN MULTICULTURAL EUROPE: WOMEN'S MOVEMENTS, GENDER AND DIVERSITY (Beatrice Halsaa et al. eds., 2012).

<sup>128</sup> MIREILLE DELMAS-MARTY, TOWARDS A TRULY COMMON LAW: EUROPE AS A LABORATORY FOR LEGAL PLURALISM (Naomi Norberg trans., 2002); WARWICK TIE, LEGAL PLURALISM: TOWARD A MULTICULTURAL CONCEPTION OF LAW (1999).

<sup>129</sup> MARIE-CLAIRE FOLETS & ALISON DUNDES RENTELN, MULTICULTURAL JURISPRUDENCE: COMPARATIVE PERSPECTIVES ON THE CULTURAL DEFENSE (2009); ALISON DUNDES RENTELN, THE CULTURAL DEFENSE (2004).

<sup>130</sup> EVA BREMS, HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY (2001).

which are emerging as cases in which multiple constitutional or human rights are in a state of conflict.<sup>131</sup> The manner in which the cases are pleaded, how the judgements present the issues and navigate considerations underlying the arguments made by parties, as well as the outcomes in each case, delineate the normative precedence allocated to a particular right over others; these judgments are increasingly being scrutinized to ascertain the preordained dispositions inherent in the analytical frameworks adopted in determining the outcomes, which place certain ideals at the core of constitutional and human rights practice (as though there is an internal hierarchy of rights within the constitution or international human rights conventions) while relegating other values to the periphery.<sup>132</sup> The jurisprudence and volume of academic scholarship around constitutional and human rights decisions reveal the continued challenges minority populations face in securing outcomes of justice in ways that bear meaning and significance for them.

The right to cultural and religious beliefs and practices and cultural identity are recognized in international and regional treaties as well as constitutions around the world.<sup>133</sup> Various scholars have recently begun to examine the cultural competence of courts as an indication of their receptivity to cultural diversity given the increasing need for courts to navigate claims stemming from cultural, traditional, or religious legal roots.<sup>134</sup> These questions

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<sup>131</sup> EVA BREMS, *CONFLICTS BETWEEN FUNDAMENTAL RIGHTS* (Eva Brems ed., 2001); *see also* PRAKASH SHAH, *LEGAL PLURALISM IN CONFLICT: COPING WITH CULTURAL DIVERSITY IN LAW* (2005).

<sup>132</sup> MARIE-CLAIRE FOBLETS ET AL. (EDS.), *PERSONAL AUTONOMY IN PLURAL SOCIETIES: A PRINCIPLE AND ITS PARADOXES* (2018); Anna Katzmann, *Pleadings and Case Management in Civil Proceedings in the Federal Court of Australia*, 23 *FED. J. SCHOLARSHIP* (Nov. 5, 2015), <http://classic.austlii.edu.au/au/journals/FedJSchol/2015/23.html>.

<sup>133</sup> Multiple international treaties protect the right to freedom of thought, conscience and religion, such as Article 18 of the UDHR, Article 18 of the ICCPR, and Article 9 of the European Convention on Human Rights. G.A. Res. 217 (III) A, art. 18, Universal Declaration of Human Rights (Dec. 10, 1948); G.A. Res. 2200A (XXI), art. 18, International Covenant on Civil and Political Rights (Dec. 16, 1966); European Convention on Human Rights art. 9, Dec. 10, 1948, treaty source. Article 15 of the ICESCR safeguards the right to participate in cultural life and the right to benefits of science and culture. G.A. Res. 2200A (XXI), art. 15, International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966) (safeguarding the right to participate in cultural life and the right to benefits of science and culture). Article 27 of the ICCPR protects group rights of particular groups, especially historically marginalized communities. G.A. Res. 2200A (XXI), art. 27, International Covenant on Civil and Political Rights (Dec. 16, 1966) (protecting group rights of particular groups, especially historically marginalized communities). Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Eur. T.S. No. 5, 213 U.N.T.S. 221; *see also* Res. 36/55, art. 1-3, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Nov. 25, 1981) (prohibiting discrimination on grounds of racial or ethnic origin in relation to a number of economic, social and cultural rights); G.A. Res. 1904 (XVII), International Convention on the Elimination of All Forms of Racial Discrimination, (Nov. 20, 1963) (prohibiting discrimination on grounds of racial or ethnic origin in relation to a number of economic, social and cultural rights). In terms of examples of constitutional protections, *see* XIANGGANG JIBEN FA Art. 32 (H.K.); CONST. Art. 15 (Singapore).

<sup>134</sup> COTTERRELL, *supra* note 15; FOBLETS & RENTELN, *supra* note 129; PASCALE FOURNIER, *MUSLIM MARRIAGE IN WESTERN COURTS: LOST IN TRANSPLANTATION* (2010) (providing examples of the

have more commonly been addressed in human rights jurisprudence where a constitutionally, regionally, or internationally guaranteed right is claimed to have been violated by a state, its representative, or other institutions bound by obligations under their constitution, treaties, or other legal provisions requiring equality and non-discrimination obligations.<sup>135</sup> Alternatively, however, courts increasingly see claims involving religious or cultural rights or customs which are in conflict with general norms or legal provisions contested in courts across Europe and the common law world in private law contexts.<sup>136</sup> The examination of cultural, interpersonal norms, and value systems has received particular attention in family law contexts in light of the impact of such normative structures and traditions on obligations involving husbands and wives, their offspring, the distribution of property in family or religious contexts and rites.<sup>137</sup>

This foray into examining the impact of alternative legal traditions and structures, predominantly on the common law framework, signals the need for a closer look in the private law realm to more critically examine the

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broad range of work being done to examine the treatment of culturally diverse legal traditions in “Western” courts); SHAH, *supra* note 131; Ralph D. Grillo, *Cultural Diversity: Challenge and Accommodation*, in *LEGAL PRACTICE AND CULTURAL DIVERSITY* 9–30 (Ralph D. Grillo ed., 2009).

<sup>135</sup> *R v. Headteacher of Denbigh High School*, [2006] UKHL 15 (appeal taken from Eng.); *The Queen v. D* [2013] reporter (Crown Court at Blackfriars) (Eng.) (Murphy, H.H.J.) (relating to wearing of Niqab by defendant during proceedings in Crown Court).

<sup>136</sup> See SHAH, *supra* note 131; see also PRAKASH SHAH and MARIE-CLAIRE FOBLETS ET AL. (EDS.), *FAMILY, RELIGION AND LAW: CULTURAL ENCOUNTERS IN EUROPE* (Cultural Diversity and Law in Association with RELIGARE), Routledge Prakash Shah et al. eds., 2014); FOBLETS ET AL., *supra* note 132. These works detail various examples of claims based, for example, on religious rights pertaining to family law, especially divorce proceedings, or issues concerning the recognition or validity of customary or religious marriages. Renteln’s work looks at the applicability and effect of the cultural defense in the context of criminal proceedings, such as those involving murder or the defense of provocation. Renteln, *supra* note 133. The observation that such cases before the courts are on the rise is largely anecdotal and inferred from the growing body of jurisprudence we now have which documents courts across different countries and contexts adjudicating such claims. However, in the context of the European Court of Human Rights, as noted in Effie Fokas & James T. Richardson (2017) *The European Court of Human Rights and Minority Religions: Messages Generated and Messages Received*, *RELIGION, STATE AND SOCIETY*, 45:3-4, 166-173, at note 3, there has been no comprehensive mapping to date of claims submitted, those screened out and those ultimately adjudicated on grounds of religion in the courts. As article notes, to date, between 1959 and 2016, 65 claims of violation on grounds of religion pertaining to Article 9 of the European Convention of Human Rights (ECHR) was found out of a total of 25,959 claims before the court. See *ECHR OVERVIEW 1956-2016* 6 (2017) 6 available at [http://www.echr.coe.int/Documents/Overview\\_19592016\\_ENG.pdf](http://www.echr.coe.int/Documents/Overview_19592016_ENG.pdf). Moreover, there were a total of 267 religion-related claims triggered by other articles of the ECHR.

<sup>137</sup> See, e.g., *Ghai v. Newcastle City Council*, [2010] EWCA (Civ) 59 (Eng.); *G & D (Risk of forced marriage: Forced marriage protection order)* [2010] NIFam 6, (N. Ir.); Máiréad Enright, *Choice, Culture and the Politics of Belonging: The Emerging Law of Forced and Arranged Marriage*, 72 *MOD. L. REV.* 331 (2009); Siobhán Mullally, *Civic Integration, Migrant Women and the Veil: At the Limits of Rights?*, 74 *MOD. L. REV.* 27 (2011); Prakash Shah, *An Unhelpful Approach to the Validity of South Asian Marriage*, 16 *IMMIGR. ASYLUM & NAT'LITY L.* 32–34 (2002); Prakash Shah, *Ethnic Minorities and the European Convention on Human Rights: A View From the United Kingdom*, in *COMPARATIVE LAW IN GLOBAL PERSPECTIVE* 387–410 (Ian Edge ed., 2000).

applications of doctrines in light of their interaction with alternative legal traditions and the potential impact on the “justness” of legal outcomes for those concerned. For the purposes of the application of a doctrine of equity, such as undue influence, a tool which appropriately frames relevant needs, capacities, and motivations assist the law in its examination of the dynamic interplay between various considerations that lead to the formation of contractual relations. With these factors accurately contextualized, the law’s response would be better informed and positioned to secure an appropriately just outcome. Importantly, it would also comply with a stricter standard of authenticity in discourse insofar as the representation of legal arguments and reasoning in the application of doctrine and jurisprudential outcomes are concerned. Against the backdrop of the historical evolution of legal norms, and their transportation beyond geographical boundaries, and before presenting the case for a corrective course for the doctrine of undue influence in respect of applications in minority surety contexts, a comparative law analysis of recent jurisprudence on undue influence involving minority sureties is instructive to illuminate the nuances masked by the doctrine’s current applications.

The following sections examine the development of the doctrine of undue influence and its application in its original context as well as in its transplanted iterations in three jurisdictions.

### *B. From History to Modernity: An Evolving Doctrine of Undue Influence*

In the 19th century, security over family home was not as prevalent.<sup>138</sup> But, after a series of government initiatives to encourage small-scale businesses and changes in the format of home ownership after the Second World War,<sup>139</sup> executions of property guarantees for the purpose of funding small family business became standardized, everyday transactions. Until 1833, the common law did not even recognize a married woman having an independent and separate title in land,<sup>140</sup> but now wives, together with other individuals that were previously not as active in the market, such as elderly parents, young adults, and immigrants, commonly stand as sureties for the business of their loved ones.<sup>141</sup> They charge or mortgage their family home, typically not standing to benefit financially from the transaction in any way

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<sup>138</sup> *The Mortgage, Its Origin and History—Principles Presiding over Its Application to Real and Personal Property—Remedies*, 4 A.L.R. 449 (1856).

<sup>139</sup> *Garcia v. Nat’l Austl Bank Ltd.* [1998] HCA 48, ¶79 (Austl.) (Kirby J., dissenting); see also Belinda Fehlberg, *The Husband, the Bank, the Wife and Her Signature*, 57 MOD. L. REV. 467, 475 (1994).

<sup>140</sup> P. Millet, *The Husband, the Wife and the Bank*, 4 PRIV. CLIENT BUS. 238, 242 (2001).

<sup>141</sup> See Fiona R. Burns, *The Elderly and Undue Influence Inter Vivos*, 23 LEGAL STUD. 251 (2003); *The Rhetoric of Equality*, supra note 64, at 51–72. On ethnic minority sureties, see Puja Kapai, *Multiple Influences: Courting Culture in the Doctrine of Undue Influence*, in RECIPROCITY IN CONTRACT 34 (Puja Kapai ed., 2010).

but, mostly, because they are motivated by other factors, including a range of subtle emotions that become operative in such circumstances where the materialization of the risk seems unlikely or distant (if understood) and the immediacy of reward, gratitude, or platitudes for such actions is coveted.<sup>142</sup> These emotions are myriad ranging from a sense of obligation, trust, and confidence to natural love and affection, a belief in the intertwined fates of the debtor and the guarantor, and fear of reprisals for refusal.<sup>143</sup> However, when the debtor eventually defaults on payment and the bank turns to the family home to service the debt, the surety looks to the protection of the law and argues that she should be discharged from liability on the ground that she was laboring under the undue influence of the debtor at the time of transaction.<sup>144</sup> This is the paradigm scenario invoking the law's equitable doctrine of undue influence in defense against the bank's enforcement as recognized by Lord Brown-Wilkinson in *Barclays Bank v. O'Brien*:

The large number of [non-commercial guarantee cases] coming before the courts in recent years reflects the rapid changes in social attitudes and the distribution of wealth which have recently occurred. . . . Because of the recognition by society of the equality of the sexes, the majority of matrimonial homes are now in the joint names of both spouses.

. . . .

The number of recent cases in this field shows that in practice many wives are still subjected to, and yield to, undue influence by their husbands. Such wives can reasonably look to the law for some protection when their husbands have abused the trust and confidence reposed in them.<sup>145</sup>

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<sup>142</sup> This phenomenon has been widely referred to as the “emotionally transmitted debt” and more specifically, the “sexually transmitted debt” in the case of women who stand as sureties for their intimate partners. See BELINDA FEHLBERG, *SEXUALLY TRANSMITTED DEBT: SURETY EXPERIENCE AND ENGLISH LAW* (1997).

<sup>143</sup> Barry Allan, “*Trust me, I’m Your Husband*”: *Undue Influence and Royal Bank of Scotland v. Etridge*, 11 OTAGO L. REV. 247, 258 (2006); Martin Dixon, *The Special Tenderness of Equity: Undue Influence and the Family Home*, 53(1) CAMBRIDGE L. J. 21-24 (1994).

<sup>144</sup> Belinda Fehlberg, *The Husband, the Bank, the Wife and Her Signature—the Sequel*, 59 MOD. L. REV. 675 (1996).

<sup>145</sup> *Barclays Bank PLC v. O’Brien* [1994] 1 A.C. 180, 188 (HL) (Eng.);

Because times have changed new situations have arisen in which it may be appropriate to invoke the underlying principle [of unconscionability]. . . . A bank, though not guilty of any breach of its limited duty to make disclosure to the intending surety, may none the less be considered to have engaged in unconscionable conduct in procuring the surety's entry into the contract of guarantee.

*Commercial Bank of Austl. Ltd. V. Amadio* (1983) 151 CLR 447, 463–64 (Austl.).

Undue influence, as the judicial response to the fill the legal vacuum in “protect[ing] vulnerable members of society from oppression or exploitation” against debtors and lenders,<sup>146</sup> has rapidly evolved in the 20th century to circumscribe the situations under which the sureties can be excused from their contractual obligations. Its evolution is all the more remarkable when taking into account how the English court’s conceptualization and assessment of undue influence has changed in the course of thirty years—from its focus on quality of consent underpinned by financial motivation in the days of *Morgan*<sup>147</sup> to the discerning, analytical approach towards relational norms underpinning the courts’ most innovative efforts at distributive justice in the field to date.<sup>148</sup> This is evidenced in the judgments in *O’Brien*<sup>149</sup> and more recently, in *Etridge (No. 2)*.<sup>150</sup> Its template of due diligence obligations to be undertaken by banks<sup>151</sup> if the enforcing party wishes to avoid being seen as complicit in the wrongdoing, an unusual departure from contractual enforcement norms, is an example of the significance of the court’s recognition of relational contexts in dispensing justice.<sup>152</sup>

Historically, the doctrine of undue influence has protected parties to a contract against claims of enforcement based on the presence of influence at the time of entry into the contract, either exerted overtly or implicitly due to the existence of a relationship of trust and confidence between the procurer of the contract and the party who enters into the transaction, usually to his or her own detriment. The seminal House of Lords judgment in the case of *O’Brien v. Barclays Bank PLC*, determined that where undue influence was raised as a vitiating factor, the party seeking to set the transaction aside was required to show either actual or presumed undue influence based on the facts of the case.<sup>153</sup> In doing so, the party could avail of an evidentiary advantage by demonstrating that the party falls within one of the “protected class[es]” established by the judgment. In this case, the existence of a relationship of trust and confidence would strongly suggest the procurer had exercised influence in securing the transaction and the burden of proof to defend against

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<sup>146</sup> *Royal Bank of Scotland v. Etridge (No.2)* [2001] UKHL 44, [2002] 2 AC 773, [98].

<sup>147</sup> *Nat’l Westminster Bank PLC v. Morgan* [1985] 1 All ER 821 (Eng.).

<sup>148</sup> See Mindy Chen-Wishart, *Undue Influence: Vindicating Relationships of Influence*, 59(1) CURRENT LEGAL PROBLEMS 231-261 (2006); Mindy Chen-Wishart, *Undue Influence: Beyond Impaired Consent and Wrongdoing towards a Relational Analysis*, Ch. 11, in *MAPPING THE LAW: ESSAYS IN MEMORY OF PETER BIRKS* 202–03 (Andrew Burrows & Alan Rodger eds. 2006.).

<sup>149</sup> *Barclays Bank*, [1994] 1 A.C.180.

<sup>150</sup> *Etridge* [2001] UKHL44.

<sup>151</sup> *Id.*

<sup>152</sup> See *Barclays Bank*, [1994] 1 AC 180 (HL) (holding that Mrs. O’Brien is entitled to have a judgement against her set aside because she was influenced and misrepresented by Mr. O’Brien); *Royal Bank of Scotland* [2001] 2 AC 773 (UKHL) (discussing the doctrine of undue influence in relation to women who claimed that they were influenced by their husbands).

<sup>153</sup> *Barclays Bank*, [1994] 1 AC 180 (HL).

the claim that undue influence tainted fair dealing would fall on the party seeking to enforce the obligations.<sup>154</sup> Where the transaction was shown to be to the party's manifest disadvantage or there was other evidence of wrongdoing, for example, the party who stood to benefit was complicit in or fixed with knowledge of these circumstances, the influence was found to be "undue."<sup>155</sup> The classes of relationships outlined in the judgment included the husband and wife relationship as one in which trust and confidence is reposed,<sup>156</sup> noting in particular the situation of wives who act as sureties for their partners as vulnerable<sup>157</sup> to being unsuspecting of such transactions and the underlying motivations of their husbands in procuring the same.

In the case of *Etridge (No. 2) v. Bank of Scotland*,<sup>158</sup> the House of Lords revisited the classifications of relationships indicative of trust and confidence, namely the categories, which would trigger the evidentiary presumption. Specifically, the categorization of the husband and wife relationship as falling within the class of relationships in which trust and confidence was presumed was removed.<sup>159</sup> Although classes of individuals who may historically have lacked legal capacity to enter into contracts (such as women and the elderly) now have full legal capacity to execute transactions of all kinds, their personal attributes and contexts may still be constitutive of particular vulnerabilities, rendering them susceptible to being taken advantage of.

Moreover, post-*Etridge*, demonstrating wrongdoing or manifest disadvantage is no longer strictly required.<sup>160</sup> Since then, the courts have applied the lens of equity more broadly and concerned themselves primarily with elements of substantive fairness surrounding the transaction, rather than dwelling on the formalities which led to the formation of an apparently valid contract.<sup>161</sup>

This requires that the law continue to take a "complex" view in determining substantive fairness underlying the transaction. For it is in these circumstances that classical contract theory, the will theory in particular, fails to capture the influence of personal and contextual factors that lead to the manifestation of objective consent. This leaves vulnerable groups exposed to liability in circumstances that impose considerable hardships on them. As such, these circumstances have exacted the concern of the law and relevant

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<sup>154</sup> *Id.* ¶ 189 (creating a rebuttable evidentiary presumption).

<sup>155</sup> *Id.* ¶ 191.

<sup>156</sup> *Id.* ¶ 190.

<sup>157</sup> *Id.* ¶ 188.

<sup>158</sup> See *Etridge* [2001] UKHL 44.

<sup>159</sup> *Id.* ¶ 107.

<sup>160</sup> *Id.* at 796.

<sup>161</sup> Beatson & Friedmann, *supra* note 26.

legal defenses to protect them against unfair disadvantage. Historically, such contracts might have been voided on grounds of incapacity or public policy,<sup>162</sup> but recently doctrines of undue influence, duress, or unconscionability have been invoked to vitiate contracts that violate the principles which undergird the notion of consent or free will and fair dealing, relieving vulnerable parties of the obligations imposed on them in suspicious circumstances. However, the emphasis in recent jurisprudence has increasingly been on the question of fairness all things considered.<sup>163</sup>

Various theories have been advanced to identify the basis on which the contract is to be impugned, with some centered on the vulnerable party's consent having been impaired,<sup>164</sup> whilst others focus on the actions of the procurer or party seeking to enforce the contract<sup>165</sup> for their "wrongful actions" (stemming from some breach of trust, abuse of power or impropriety).<sup>166</sup>

Most undue influence cases are indeed two-fold—it is the abuse of position of influence and the betrayal of confidence that leads to situational vulnerability, and thus, the lack of voluntary and independent consent of the

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<sup>162</sup> *Id.* at 10.

<sup>163</sup> Taking reference from the judgment in *Etridge*, subsequent jurisprudence has put fairness of dealings at the heart of their considerations in individual cases. See *Etridge* [2001] UKHL 44.

<sup>164</sup> In the sections that follow, this party is referred to as the "claimant" given that they are typically the party seeking to claim undue influence vitiates the contract.

<sup>165</sup> In the sections that follow, this party is referred to as the "wrongdoer" given that they maintain an interest in ensuring the contract is performed by the claimant.

<sup>166</sup> There is an on-going academic debate as to whether the doctrine of undue influence concerns itself with the quality of the weaker party (the donor/the surety's) consent, or the "wrongdoing" of the stronger party (the donee/the debtor). On the operational level, the lack of consistency in the case law has meant that neither camp can satisfactorily explain all the key cases in this area. On the conceptual level, it has been suggested even though the two approaches have a different angle to the issue and have a different starting point, both routes essentially arrive at the conclusion that there is defective consent—the consent/wrongdoing distinction is in fact a false dichotomy. Excessive impairment of consent can come from the stronger party's wrongful conduct as well as the weaker party's own susceptibility; see Rick Bigwood, *Contracts by Unfair Advantage: From Exploitation to Transactional Neglect*, 25 OXFORD J. LEGAL STUD. 65, 70–72 (2005); Rick Bigwood, *Undue Influence: 'Impaired Consent' or 'Wicked Exploitation'?*, 16 OXFORD J. LEGAL STUD. 503, 511–12 (1996); Peter Birks & Chin Nyuk Yin, *On the Nature of Undue Influence*, in GOOD FAITH AND FAULT IN CONTRACT LAW 57, 67 (Jack Beatson & Daniel Friedmann ed., 1995); David Capper, *Undue Influence and Unconscionability: A Rationalisation*, 114 L. Q. REV. 479, 497 (1998); Mindy Chen-Wishart, *Undue Influence: Vindicating Relationships of Influence*, 59 CURRENT LEGAL PROBS. 231, 236–37, 239 (2006); see also *Royal Bank of Scotland v. Etridge (No.2)* [2001] UKHL 44, [2002] 2 AC 773 [7] (according to Lord Nicholls: "If the intention was produced by an unacceptable means, the law will not permit the transaction to stand. The means used is regarded as an exercise of improper or 'undue' influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will. It is impossible to be more precise or definitive. The circumstances in which one person acquires influence over another, and the manner in which influence may be exercised, vary too widely to permit of any more specific criterion.").

victim.<sup>167</sup> On an even broader theoretical and justificatory level, both approaches are framed under a classical liberalism construct. For the consent-based camp, the contract is vitiated because the “consent” given by the person under influence is excessively impaired—he either lacks the capacity of self-management or is acting under false consciousness due to the high level of trust and confidence he reposes in the party in a position to exercise influence.<sup>168</sup> Similarly, proponents of the “wrongdoing”-based theory premise their analysis on the liberal conceptual foundations of contractual freedom, condemning the donee’s (in)action, which unwittingly manipulates the donor into entering into a transaction in violation of their rights, freedoms and reasonable expectations of fairness. Ultimately, this lack of fairness and breach of good faith renders the transaction voidable on grounds of public policy.<sup>169</sup>

As Chen-Wishart notes, the court’s language appears to require that certain elements be present before an inference of undue influence is established, yet, the terms that are used to describe these requirements obscure what the courts are in fact looking for.<sup>170</sup> For example, the courts have required that the party seeking to set aside a transaction show that the transaction calls for an explanation and that the defendant has behaved unconscientiously.<sup>171</sup> This combination suggests that the court is looking for factors that serve to undermine the quality of the consent, thereby impacting the contract’s viability or enforceability.<sup>172</sup> However, courts have in many such cases set aside a transaction that is perfectly explicable objectively but one which would be unacceptable to enforce.<sup>173</sup> Moreover, the requirement that the defendant have acted unconscientiously seemingly implies the need for

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<sup>167</sup> Bigwood, *supra* note 166, at 511–12.

<sup>168</sup> Birks & Yin, *supra* note 166, at 67.

<sup>169</sup> Bigwood, *Contracts by Unfair Advantage*, *supra* note 166, at 66; Bigwood, *Undue Influence*, *supra*, note 166, at 508–09. This is part of a broader debate concerning the perspectives drawn on in assessing the circumstances overall, namely, whether one takes a claimant-oriented or a defendant-based perspective. For example, a claimant perspective would frame the transaction’s surrounding circumstances in terms of the presence of consent on part of the claimant, focusing on the propriety of circumstances surrounding the obtaining of consent in the first place and whether there were any factors which might have subsequently negated or invalidated it. However, it has been argued that even this apparently dichotomous representation of the issues can be whittled down to a simple issue of consent (and therefore, the claimant’s perspective). This would review the quality of the claimant’s consent as well as the presence of any factors or (in)action on the part of the defendant or such other relevant party, who was obliged to act or to refrain from acting, in a particular manner which was causative of the impugned consent. See Chen-Wishart, *Beyond Impaired Consent and Wrongdoing*, *supra* note 148.

<sup>170</sup> Chen-Wishart, *supra* note 169, at 202.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* (“Courts have deemed the claimant’s consent to be defective, but only because the defendant’s conduct has fallen short of the standard required.”).

<sup>173</sup> *Id.*

wrongdoing, ill intent, abuse or bad faith.<sup>174</sup> Alternatively, transactions have been set aside where none of these elements are present or entirely activated by the defendant, meaning that the court has been willing to imbue certain transactions with a quality of “less than fair dealing” where circumstances warrant doing so despite the lack of bad faith, wrongdoing, impropriety or abuse, generally thought to undergird the concept of “influence” being exercised unduly.

These limitations in the jurisprudential discourse arise from the failure to appreciate the broader contextual underpinnings of contract formation. As Chen-Wishart outlines in her seminal work on the relational analysis of undue influence, “a doctrine regulating transactions between parties in a relationship of trust and confidence should be concerned with the conduct and motivation of *both* participants *and* with the outcome of the transaction, all judged against the *norms* of the *relationship* between the parties.”<sup>175</sup> (original emphasis).

Despite the advancement of arguments underscoring the normative premises underlying the court’s broader considerations, judgments in such cases reveal that the courts routinely continue to pay lip service to these established criteria by framing the issue in terms of the presence of a relationship of trust and confidence, wrongdoing or manifest disadvantage (although less so in more recent cases insofar as manifest disadvantage is concerned) to determine whether the transaction was procured as a result of undue influence.<sup>176</sup> In this sense, the court continues to draw on criteria derived from a structural framework relying on modern contract law, which is prepared to look beyond the strict letter of the contract and examine context. However, the lack of clarity in the extent to which normative values underscore the court’s approach when applying the doctrine of undue influence, invariably singles out particular individuals and groups for less effective protection under the law.

To assess the effectiveness of the protective function of the doctrine for all groups equally, the next section examines the court’s reasoning in these cases.

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<sup>174</sup> *Id.*

<sup>175</sup> Chen-Wishart, *Undue Influence supra* note 148. It is for this reason that undue influence scholars have found MacNeil’s work instructive in deconstructing the underlying rationale behind contract law’s doctrine of undue influence. In his relational theory of contract, he strongly propounded the indispensability of considering the transaction as part of an ongoing, continuing and dynamic relationship between the actors. In this sense, the single contractual exchange between the parties must be seen as against the larger backdrop of an ongoing relationship which has come to be characterized by expectations of mutual advancement and gains. This enables a consideration of the transaction as part of an ongoing, continuing and dynamic relationship between the actors which helps situate it in the broader course of dealings between the parties concerned.

<sup>176</sup> See the court’s consideration of the totality of the evidence in *Davies v. AIB Grp. (UK) PLC*, [2012] EWHC (Ch) 2178, [17]–[19], presenting a contextual approach, which enables a relational analysis to better gauge the circumstances and likely motivations underlying the transaction sought to be set aside.

It looks at whether, in the process of determination, the court has properly taken into account the objectively assessable (a) “constitutional vulnerability” of the surety (including age, infirmity, acumen, level of education, dependency); and (b) the subtler situational vulnerability of the surety (the special difficulties encountered by immigrants and ethnic minorities due to their circumstances often coupled with their constitutional vulnerability). Both variables of vulnerability will also entail a consideration of other contextual factors, including (i) their bargaining power, (ii) the complexity of the transaction; (iii) the nature of relationship with the debtor; and (iv) the impact of intersectional factors such as cultural and religious background on aggravating constitutional and situational vulnerabilities;<sup>177</sup> (v) wrongdoing of the debtor (including neglect of the surety’s interest, and other behaviors transcending relational norms); and (vi) the wrongdoing of the bank (including its “notice” or other “bad” and “unfair” practices which lead to the court fixing it with notice).

*C. From Invisibility to Irrelevance: Transplanted Norms and Value Frameworks under the Doctrine of Undue Influence*

In order to achieve substantive justice and provide adequate and equal protection to all individuals, modern contract law, undue influence in particular, needs to be reconceptualized. First and foremost, in this context, is the need to recognize that a lot of the time; private sureties do not assume the “rational economic man” persona and his usual attributes. Rather, they have other relational, cultural and religious ties that are not cut off when they step into the market as an economic actor. Their consent—the conscious choice to assume contractual obligations—is informed and affected significantly by their constitutional and situational vulnerabilities. These factors critically impact the subjective and objective realms of consent-formation and propriety of actions on all accounts and, therefore, ought to be properly understood, contextualized, and considered in the court’s review of the circumstances surrounding consent.

An analysis of interest, motive, and consent that is based on individualism and the objective behaviors and circumstances surrounding the immediate signing of the document neglects the relational context. This potentially distorts the reading of “consent” as determined objectively in the circumstances. This, in turn, ignores the constitutional and situational

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<sup>177</sup> John Philips, *Protecting Those in a Disadvantageous Negotiating Position: Unconscionable Bargains as a Unifying Doctrine*, 45 WAKE FOREST L. REV. 837, 840–41 (2010) (discussing “constitutional disadvantages” and “situational disadvantages” in context of finding surety’s “special disability” against the bank in the Australian unconscionability approach. The two terms are adapted here and the meaning of “situational vulnerability” is expanded to include the nature of relationship between the surety and the debtor as well as their cultural and religious background. This is to reflect the focus on undue influence in the context of the common law doctrine as it emerged in the United Kingdom as primarily between the surety and the debtor.).

vulnerability of the sureties and the specific, subjective factors that inform their decision to enter into the transaction.

Rather than focusing on judicial expressions and statements that indicate whether the approach is surety/consent or debtor/wrongdoing-based, the analysis below examines the legal reasoning underlying the court's decision—factors that have been considered or emphasized, how those factors are contextualized and evaluated by the court, and how they support or undermine a finding of undue influence.

1. *Allcard v. Skinner*: A Case of Circumstantial Undue Influence

In the classic case of *Allcard v. Skinner*,<sup>178</sup> a young novice nun gave all of her worldly possessions to the Mother Superior of the sisterhood. Absolute submission to the Mother Superior, who was regarded as the “voice of God,” was demanded, and the seeking of outside advice was prohibited.<sup>179</sup> The novice nun later left the sisterhood and sought to have her gifts returned on the ground that she was under the undue influence of the Mother Superior at the time of transaction.<sup>180</sup> The court, in finding for the nun, expressly pointed out that the Mother Superior in the case had not done anything wrong and that the finding of undue influence did not impute to her any impropriety. It was understood that she received the donor's gift as a natural benefactor given the underlying spiritual context and teachings,<sup>181</sup> and it was noted that the donation was attributable to the *voluntarily* and willing submission and enthusiastic devotion of the nun.<sup>182</sup>

In this case, therefore, neither the moral propriety of the donee nor the quality of consent of the donor was ever called into question. Rather, the transaction was rendered tainted by the nun's situational vulnerability which derived from her state of spiritual commitment and inability to be counselled by way of professional advice (as the court would ordinarily consider as part of the circumstances of substantive fairness) under the influence of such a commitment, which was understood here to be natural.<sup>183</sup>

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<sup>178</sup> *Allcard v. Skinner* [1887] 36 Ch D 145.

<sup>179</sup> *Id.* at 146.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 157.

<sup>182</sup> *Id.* at 184.

<sup>183</sup> Chen-Wishart, *Beyond Impaired Consent and Wrongdoing*, *supra* note 148, at 238; Kapai, *supra* note 141, at 34.

## 2.      *Morgan* and Pre-*Etridge* Cases: the Role of Independent Capacity, Conduct and Financial Benefit and Detriment

In pre-*Etridge* cases, the court has often drawn conclusions about consent or the lack thereof in cases of presumed undue influence from factors determinative of the surety's constitutional vulnerability, for example, age,<sup>184</sup> literacy and intelligence,<sup>185</sup> and lack of business experience<sup>186</sup> as well as factors signaling situational vulnerability such as blind trust and submissiveness.<sup>187</sup> These have been considered as constitutive evidence reflecting an overborne will. However, in the case of wife sureties today, where many women do "not fit the outmoded picture of the subservient wife who was unable to understand financial matters or take practical business-like decisions,"<sup>188</sup> courts consider a woman's high level of education, financial independence, and engagement in entrepreneurial or working life as indicators of the strength of her capabilities for independent decision-making. Depending on other evidence adduced, the court may profile her as a person with strong personality traits which countenance against any assertion she makes that she has been unduly influenced.<sup>189</sup>

The working premise of the trajectory of the court's jurisprudence over time is that consent is less likely to be materially impaired when the individual's capacity to exercise independent judgment (independent capacity quotient) is demonstrably strong based on the factors impacting situational and constitutional vulnerability outlined above. However, such an approach characterizes women into an artificial binary which pits women sitting at one end of the spectrum of constitutional capacity as the antithesis to the other, who is marked out as displaying extreme constitutional and situational vulnerabilities. This dichotomization ignores the prevalent forces of social and relational norms such as the desire to develop or maintain particular ties;<sup>190</sup> to

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<sup>184</sup> *Inche Noriah v. Shaik Allie bin Omar* [1929] AC 127 (UKPC); *Lancashire Loans Ltd. v. Black* [1934] 1 KB 380; *c.f. Re Estate of Brocklehurst* [1978] Ch 14; *O'Sullivan v. Mgmt. Agency and Music Ltd.* [1984] 3 WLR 448; *Avon Fin. Co. v. Bridger* [1985] 2 All ER 281.

<sup>185</sup> *Inche Noriah* [1928] UKPC at 76; *Chetwynd-Talbot v. Midland Bank Ltd* [1978] C No 77 (Eng.).

<sup>186</sup> *Tufton v. Sporni* [1952] 2 TLR 516 (Eng.); *O'Sullivan v. Mgmt. Agency & Music Ltd.* [1984] 3 WLR 448 (Eng.).

<sup>187</sup> *Bank of Montreal v. Stuart* [1910] UKPC 53 (Eng.).

<sup>188</sup> *Hurley v. Darjan Estate Co.* [2012] EWHC (Ch) 189, [41] (Eng.).

<sup>189</sup> *See, e.g., Barclays Bank PLC v. O'Brien* [1992] EWCA (Civ) 11 (Eng.), and particularly post-*Etridge* cases including, but not limited to, *Bank of Ir. v. Bongard* [2003] EWHC (QB) 612 (Eng.); *Dailey v. Dailey*, [2003] UKPC 65 (appeal taken from Virgin Is.) (U.K.); *Bank of Scot. v. Nassarpour* [2005] EWHC (Ch) 3428, [20] (Eng.); and *Hurley*, [2012] EWHC (Ch) 189, for cases relying on strong personality traits.

<sup>190</sup> *Chen-Wishart*, *supra* note 148, at 253.

avoid conflicts or dealing with the impact of spurning a loved one's request;<sup>191</sup> or other cultural, traditional, or religious values which dictate particular ethical or moral imperatives in the name of respect, loyalty, obedience, or submission to orient decision-making towards what is more appropriate or desirable. Overlooking the relevance of the relational context which informs the surety's decision-making thus fails to fully contextualize the apparently voluntary consent, even in cases where wife sureties are considered to be constitutionally invulnerable.<sup>192</sup>

The alternative criteria in determinations of impairment of consent concern an evaluation of the surety's financial interest in the transaction itself. The surety or donor had to establish that the transaction concerned was to their "manifest disadvantage" to raise the presumption of undue influence.<sup>193</sup> However, the test for what constitutes detriment and benefit in the context of such transactions has been considered largely ambiguous<sup>194</sup> involving fine balancing on the part of the court and has often presented challenges in application and a resultant lack of consistency. Often, the court would assess the surety's economic interest in or financial benefit to be derived from the transaction.

For example, in *Bank of Credit and Commerce International Societe Anonyme v. Aboody*,<sup>195</sup> the court weighed both the liabilities and the risks assumed by the surety wife against her hopes that the family's business would be able to survive as it was their principal means of support. The court

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<sup>191</sup> Empirical research has suggested that, even for western surety wives, the susceptibility to pressures mainly stem from the fear of having to living with the consequences of refusing to help their husbands rather than any defective capacities on their own part in terms of understanding the transaction or its consequences. See Belinda Fehlberg, *The Husband, the Bank, the Wife and Her Signature-the Sequel*, 59 MOD. L. REV. 675, 679 (1996).

<sup>192</sup> This assumption ignores the fact modern women shuttle between public and private sphere. A woman can be strong and independent in the business world but still labor under traditional, cultural or religious norms and expectation at home. It is ill-advised therefore, for courts to treat constitutional and situational vulnerabilities as antithetical to apparently 'modern' women. See Kapai, *supra* note 141.

<sup>193</sup> Nat'l Westminster Bank PLC v. Morgan [1985] 1 All ER 821 (Eng.) (Scarman, L.); see also Bank of Credit & Commerce Int'l Societe Anonyme v. Aboody, [1992] 4 All ER 955 (Eng.); Goode Durant Admin. v. Biddulph [1995] 1 F.C.R. 196 (Eng.); Banco Exterior v. Mann [1995] 27 HLR 329 (Eng.); Barclays Bank PLC v. Coleman [2001] QB 20 (Eng.); *Bongard* [2003] EWHC (QB) at 612, for cases that highlight the need to show manifest disadvantage as part of the circumstances when adducing a claim of undue influence.

<sup>194</sup> The term has been given vague, abstract, and somewhat circular definitions. *Aboody*, [1992] 4 All ER at 974 (Slade, L.J.), (considering it a manifest disadvantage "if it would have been obvious as such to any independent and reasonable person who considered the transaction at the time with knowledge of all the relevant facts"); *Nat'l Westminster Bank*, [1985] 1 All ER at 827 (Scarman, L.) (defining it as "a disadvantage sufficiently serious to require evidence to rebut the presumption that in the circumstances of the relationship between the parties it was procured by the exercise of undue influence").

<sup>195</sup> *Aboody* [1992] 4 All ER 955.

concluded that the prospects of this meant it conferred a significant advantage to the surety. This can be read in contrast with the court's finding in *Goode Durant Administration v. Biddulph*,<sup>196</sup> where the court was of the view that the surety wife's substantial liability was a "manifest disadvantage" given that she was unlikely to obtain financial benefit or economic interest beyond her nominal shareholding in the company.

Such an approach however, is fairly individualistic in that it assumes that individuals would generally not act in a manner that is inconsistent with their own interests and certainly, they would not do so willingly. Where facts arise, which appear to challenge this presumption, the court infers that there has either been deception; some other wrongdoing; or a lack of knowledge, capacity, or a combination of all these which, it then concludes, demonstrate that undue influence has been applied in the procurement of the transaction. The fact that the transaction entered into goes against the surety's own interests is seen as an important indicator of undue influence because the assumption is that one would not, exercising their independent and free capacity, enter into such a transaction.<sup>197</sup> Moreover, since the formulation of what counts as financial benefit or disadvantage is predicated on a largely economic calculus, it ignores other drivers incentivizing the parties. These may derive from personal, social, and emotional bonds, the calculus for which may not lend as easily to a universal cost-benefit analysis. Yet, depending on the context, these ties and the costs of strengthening or damaging them by acceding to or refusing to enter into the transaction, may serve as an even more potent currency than the purely financial costs or economic benefits presented therein.

In ignoring the relevance of this "emotional currency," the approach ignores the imperatives of communitarianism which locates the wellbeing and worth of the individual within the broader context of the community and its values, goals, and orientation.<sup>198</sup> Centrally, a communitarian perspective suggests that an individual's actions can only have meaning within the broader

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<sup>196</sup> *Goode Durant Admin.* [1995] 1 F.C.R. at 674.

<sup>197</sup> Liberal individualism celebrates the moral worth of the individual and his pursuit of a good and meaningful life. This philosophy of political liberalism is supported through the protection of individual rights and the state's role in facilitating individual capacities for decision-making and access to requisite resources to enable these pursuits for all individuals in equal measure. See JOHN RAWLS, *POLITICAL LIBERALISM* (1993); Chen-Wishart, *supra* note 148, at 240–41 (referring to this autonomous person as "the Super-Detached Man" who is detached from personal relationships and suggests that s/he is fictional and does not exist).

<sup>198</sup> For various political philosophers who have contested the classical account of liberal individualism and presented communitarianism as an alternative organizing principle for societies, see in particular, DANIEL A. BELL, *BEYOND LIBERAL DEMOCRACY: POLITICAL THINKING FOR AN EAST ASIAN CONTEXT* (2006); DANIEL A. BELL, *EAST MEETS WEST: HUMAN RIGHTS AND DEMOCRACY IN EAST ASIA* (2000); SEYLA BENHABIB, *SITUATING THE SELF: GENDER, COMMUNITY AND POSTMODERNISM IN CONTEMPORARY ETHICS* (1992); BENG-HUAT CHUA, *COMMUNITARIAN IDEOLOGY AND DEMOCRACY IN SINGAPORE* (1995); AMITAI ETZIONI, *RIGHTS AND THE COMMON GOOD: THE COMMUNITARIAN PERSPECTIVE* (1995); CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (1989).

context of the community and that actions should be understood and interpreted accordingly as individual experiences and ends are invariably bound up with those of the communities within which they live.<sup>199</sup> Ignoring the relational dimension eclipses relevant considerations endemic to contextualizing the transaction in all its complexity, especially where cultural or religious values emphasize collectivism and notions of hierarchy in family-oriented decision-making—particularly in relation to gender, age, sibling birth or marriage order, and other factors—influence normative obligations of and decision-making by sureties. Viewed from within the strictures of this internal value-framework, calculations premised on materialistic gains or risk of liabilities would not necessarily figure in the same manner as considered to be the norm in the law’s representations of social and normative ordering.

### 3. *Etridge*: The Politics of Decision-Making: From Market Individualism to the Relational Paradigm

In *Etridge*,<sup>200</sup> the House of Lords emphasized the importance of context over and above the presence or absence of any specific factors. Lord Scott reiterated that the establishment of “manifest disadvantage” was not a “divining-rod” constitutive of a discrete test of undue influence on its own.<sup>201</sup> Instead, the language used by the courts in earlier jurisprudence which examined whether the transaction called for an explanation “on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act”<sup>202</sup> and whether it is explicable “on the totality of evidence”<sup>203</sup> were illustrative of the significance of examining the broader context underlying the transaction to ascertain the presence or absence of undue influence.

Although this restatement of the law should have assisted in underpinning future applications of the doctrine of undue influence and the interpretation of relevant facts with an appropriate measure of flexibility that looked beyond purely financial interests in understanding the surety’s motivations and behavior, it appears that subsequent jurisprudence of lower courts continued to characterize transactional “benefit” in traditional, fairly material terms. The court in *Bongard*,<sup>204</sup> for example, held that for a wife to voluntarily undertake a major financial burden in order to alleviate or potentially mitigate an impending financial catastrophe did not signal anything out of the ordinary and in trusting her husband’s unstinting optimism, she stood equally to gain

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<sup>199</sup> DANIEL BELL, *COMMUNITARIANISM AND ITS CRITICS* (1993).

<sup>200</sup> *Royal Bank of Scotland v. Etridge (No.2)* [2001] UKHL 44, [2002] 2 AC 773.

<sup>201</sup> *Id.* ¶ 220 (Scott, L.).

<sup>202</sup> *Id.* ¶ 22 (Nicholls, L.) (citing *Allcard v. Skinner*, [1887] AC 145 at 185 (Eng.) (Lindley, L.J.)); *id.* ¶ 220 (Scott, L.).

<sup>203</sup> *Id.* ¶ 219 (Scott, L.).

<sup>204</sup> *Bank of Ir. v. Bongard* [2003] EWHC (QB) 612 (Eng.).

if the financial crisis which threatened the family's principal source of income could be averted.<sup>205</sup>

In *Macklin v. Dowsett*<sup>206</sup> however, the Court of Appeals reiterated that the two tests, "a transaction which calls for an explanation" and the presence of "manifest disadvantage," are not the same thing.<sup>207</sup> Manifest disadvantage to the surety does not equate to and is not the threshold for establishing that the transaction calls for an explanation. In reorienting the court's analytical focus in this manner to consider the totality of the evidence, although the constitutional vulnerability<sup>208</sup> and nature of the surety's interest in the transaction are relevant considerations in understanding the quality and fact of her consent, they are to be assessed in light of other relevant facts, for example, conduct or assurances preceding consent and entry into the transaction<sup>209</sup> as well as the surrounding circumstances underlying it, the parties' personalities to determine who wields power, influence or a measure of ascendancy in the relationship, the personality of the parties, <sup>210</sup>the nature and history of their relationship,<sup>211</sup> and any wrongdoing on the part of the

<sup>205</sup> *Id.* at [12].

<sup>206</sup> *Macklin v. Dowsett*, [2004] EWCA (Civ) 904 (Eng.).

<sup>207</sup> *Id.* ¶¶ 15–19, 30 (Auld, L.J.).

<sup>208</sup> See *Davies v. AIB Grp. (UK) PLC*, [2012] EWHC (Ch) 2178, [17] (Eng.), where the surety wife's business experience, education and financial independence were not dispositive of the claim of undue influence. Rather, the court, having considered the broader relational context, concluded that although the surety wife was very capable, she exhibited an emotional "blind spot" in her marriage. *Id.* at [19]. Moreover, the court held that the husband had not exceeded the boundaries of what a reasonable husband might do in procuring the transaction. *Id.* This approach seems also to have moved away from the need to identify a specific "act" of wrongdoing or a wrongdoer to warrant a finding of undue influence. *Id.* Similarly, in *Royal Bank of Scot. PLC v. Chandra*, although the surety wife was the nominal director as well as the shareholder of the company and was found to be independent in various aspects of her personal life, she displayed a strong sense of loyalty and was very reliant on her husband in financial aspects, especially for information pertaining to the guarantees. [2010] EWHC (Ch) 105 (Eng.). In *Turkey v. Awadh*, the court rejected the argument that the transaction called for an explanation. [2005] EWCA (Civ) 382, [11–12] (Eng.). It determined that the parties had not put their minds to consider the actual value of the property nor was the "consideration" provided by the donee father significant by any measure. *Id.* at [28]. However, the transaction was one with a quality of "family element" and was thereby explicable on the ground that the donee father was seeking to get them "out of the hole into which they had dug themselves." *Id.* at [22–32].

<sup>209</sup> *Chandra* [2010] EWHC (Ch) 105.

<sup>210</sup> See *Randall v. Randall* [2004] EWHC (Ch) 2258 (Eng.), where the court found the donee harbored "all the hallmarks of a bully" and was a strong-willed and dominating figure. On the other hand, the donor was difficult, self-interested, strong-willed, independent and loved her donkeys and therefore, was unlikely to part with a donation in the interests of the donee. *Id.* In *Daniel v. Drew* [2005] EWCA (Civ) 507 (Eng.), the court remarked that the donor was "a vulnerable person, unversed in business, anxious to avoid confrontation and eager to comply," while the donee had a forceful personality.

<sup>211</sup> In *Bank of Scot. v. Nassarpour*, the court found that the debtor father had previously paid for the surety daughter's property and related expenses out of good will so that she and her siblings would have a place to live. [2005] EWHC (Ch) 3428, [6] (Eng.). It seemed therefore, only natural

procurer or the defendant.<sup>212</sup> While judicial discourse has begun to look beyond consent, there remain cases in which judges continue to look for factors highlighting wrongdoing on the part of the donee, particularly acts or omissions that are exploitative or unconscionable.<sup>213</sup> However, as the case of *Allcard v. Skinner* made very clear early on, the “wrongdoing-based” camp, which sees this as a requisite ground for invoking equity, is irreconcilable with cases where there has been no morally reprehensible conduct on the part of the donor. This is especially so where he is a “passive” recipient of the “gift,” does not exploit the vulnerability of the donee and does not willfully act in a manner that would call his motives into question.<sup>214</sup> Yet, such a contract may be set aside on grounds of undue influence as a matter of public policy.

Mummery LJ’s judgment in *Pesticcio v. Huet*<sup>215</sup> is cited most often to emphasize that wrongdoing is not a prerequisite and the frequent references alluding to the need to establish this is a misconception of the law. His judgment, in unequivocal terms, states as follows:

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in the context of this relationship that the surety daughter would be willing to help him out in his business by releasing some of the money leveraged through the property. *Id.* at [16–17]. In *Thompson v. Foy*, the court examined in great depth the history of the relationship between the mother and daughter and its underlying dynamic, including their living arrangement. [2009] EWHC (Ch) 1076 (Eng.). In *Davies v. AIB Grp. (UK) PLC*, the court found that the wife surety and the debtor were in a loving relationship where she genuinely reposed trust in him whereas the debtor husband took various steps to ensure that the surety’s interests were protected. [2012] EWHC (Ch) 2178 (Eng.). In *Mortg. Bus. v. Green*, however, the court was unable to determine the issue of undue influence due to the lack of evidence adduced as to the relationship between the mother who acted as surety for her debtor son. [2013] EWHC (Ch) 4243, [54] (Eng.). This was despite the judge’s expression of sympathy and concerns for the mother’s situation and plight given that the circumstances seemed to suggest she was presented with remortgaging her property as the only option available if she wishes to continue residing in her home. *Id.* at [26]. He remained “very concerned that this might well be a case where [the son] did abuse his relationship with his mother to obtain funding for his business. . . It is also entirely possible, and indeed quite likely, that [the mother] did not feel able to stand up to her son.” *Id.* [24].

<sup>212</sup> In *Randall and Abbey Nat’l Bank*, the procuring parties were found to have acted unacceptably, exploiting the vulnerability of their sureties to secure entry into the transaction. *See* *Abbey Nat’l Bank PLC v. Stringer*, [2006] EWCA (Civ) 338 (Eng.) (addressing a debtor son who took advantage of his elderly Italian immigrant mother who did not understand any English and took the transaction to be something to support her son’s business but did not realize that she was mortgaging her only property); *Randall* [2004] EWHC (Ch) 2258 (addressing a donee nephew who kept the transaction a secret from the rest of the family while arranging for a solicitor to visit the surety, his aunt, to receive instructions but not to obtain independent legal advice).

<sup>213</sup> For example, in *Etridge*, Lord Nicholls reiterated that the doctrine of undue influence was not limited to cases of abuse of trust and confidence but was also applicable in cases where “a vulnerable person has been *exploited*”, *Royal Bank of Scotland v. Etridge (No.2)* [2001] UKHL 44, [2002] 2 AC 773, [11]; *see also* *R v. Attorney Gen. for England and Wales* [2003] UKPC 22, [11] (holding that undue influence concentrates “in particular upon the unfair exploitation by one party to a relationship which gives him ascendancy or influence over the other”); *c.f.* *Nat’l Commercial Bank (Jamaica) Ltd. v. Hew* [2003] UKPC 51, [29] (holding that undue influence provided equitable redress “where there has been unconscionable conduct on the part of the defendant”); *Bigwood* (1996), *supra* note 166; *Capper* (1998), *supra* note 166.

<sup>214</sup> *Allcard v. Skinner* [1887] 36 Ch D 145, 157.

<sup>215</sup> *Pesticcio v. Huet* [2004] EWCA (Civ) 372 (Eng.).

[The submission that the defendant] had “done nothing wrong” is an instance of the “continuing misconceptions” . . . about the circumstances in which gifts will be set aside on the ground of presumed undue influence. Although undue influence is sometimes described as an “equitable wrong” or even as a species of equitable fraud, the basis of the court's intervention is not the commission of a dishonest or wrongful act by the defendant, but that, as a matter of public policy, the presumed influence arising from the relationship of trust and confidence should not operate to the disadvantage of the victim, if the transaction is not satisfactorily explained by ordinary motives.<sup>216</sup>

Mummery LJ reiterated the importance of recognizing and correcting this confusion, which he said was operative within and outside the legal profession, so that parties involved could better understand when courts will step in to protect those who are vulnerable in dealings pertaining to their property.<sup>217</sup> In doing so, he singled out the importance of circumstantial evidence surrounding the transaction and the continuing relationship between the parties, rather than any specific act or conduct which impugns the transaction. In his Lordship's view, demonstrating that the trust and confidence reposed by the donor in relation to the donee remained intact was paramount.<sup>218</sup> This reformulation of the doctrine of undue influence requires going beyond the plaintiff- or defendant-sided debates, which have hinged on the quality or impairment of consent by the donee or wrongdoing by the donor. Instead, with regard to “the nature of the continuing relationship” between the parties, Mummery LJ highlights the need to examine the behavior of both parties against the broader context of their relationship and dealings.

In the case before him, Mummery LJ noted the donor brother was old and mentally and physically disadvantaged. He had a continuous relationship with his donee sister, on whom he depended to take care of his affairs.<sup>219</sup> Although she had appointed a solicitor to advise her brother, the court found that the solicitor's advice to the donor brother that the transaction was in his interests was plainly incompetent.<sup>220</sup> Given that the solicitor was on friendly terms with the sister, the court implicitly ruled that the sister was not a passive beneficiary in these circumstances.<sup>221</sup>

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<sup>216</sup> *Id.* ¶ 20.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* ¶ 18.

<sup>220</sup> *Pesticcio v. Huet* [2004] EWCA (Civ) 372 (Eng.).

<sup>221</sup> *Id.*

In *Etridge*, the House of Lords explicitly recognized that, in certain circumstances, fairness and “equitable duty” would not permit a donee to prioritize his own interests without proper regard to concomitant interests of the donor.<sup>222</sup> Although in passing Lord Nicholls opined that, “statements or conduct by a husband which do not pass beyond the bounds of what may be expected of a reasonable husband in the circumstances should not, without more, be castigated as undue influence.”<sup>223</sup> This “cautionary note” has been repeatedly cited and applied as one of the guiding principles in evaluating the debtor husband’s conduct in subsequent cases.<sup>224</sup> In *Royal Bank of Scotland plc v. Chandra*,<sup>225</sup> the court was critical of the debtor husband’s concealment of the need to execute the guarantee until the last minute, leaving his surety wife with virtually no time to consider her interests or other professional advice she had received. This put the surety under unnecessary pressure when signing the guarantee. In *Davies v. AIB Group (UK) Plc*,<sup>226</sup> because the husband took steps to ensure that his wife was independently and fully advised before signing the guarantee, the court found that the husband’s behavior did not go beyond the actions of a reasonable husband in the circumstances.

This “relational approach” to undue influence,<sup>227</sup> most evident in the passive receipt cases, reveals how the court is slowly distancing itself from the will theory and an “individualistic, self-interested, self-maximizing economic man” construction of surety identities. They are instead beginning to frame the transaction considering relational ties and the broader underlying context which bookend them. This turn towards the relational context to evaluate dealings and norms and imposing an “equitable duty” on certain actors to safeguard the welfare, interests, or legitimate expectations of the surety have not yet been incorporated into the corpus of work represented by proponents of the market-individualist paradigm or the will theory of contract. However, the evolution and flexibility of the equitable doctrine of undue influence towards covering this broader range of circumstances and relationship dynamics is indicative of English contract law’s concerns beyond liberal individualism and associated classical contract theory, both of which prioritize freedom of

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<sup>222</sup> *Royal Bank of Scotland v. Etridge (No.2)* [2001] UKHL 44, [2002] 2 AC 773, [11], [104]–[107].

<sup>223</sup> *Id.* ¶ 34.

<sup>224</sup> *Hewett v. First Plus Financial Group* [2010] EWCA (Civ) 312 [26] (Eng.); see *Royal Bank of Scotland Plc v. Chandra* [2010] EWHC (Ch) 105; *Hurley v. The Darjan Estate Co.* [2012] EWHC (Ch) 189 [28]; *Davies v. AIB Group (UK) Plc* [2012] EWHC (Ch) 2178 [11].

<sup>225</sup> *Royal Bank of Scotland Plc v. Chandra* [2010] EWHC (Ch) 105.

<sup>226</sup> See generally *Davies v. AIB Group (UK) Plc* [2012] EWHC (Ch) 2178.

<sup>227</sup> See Chen-Wishart (2006), *supra* note 148, 259 (arguing that a finding of undue influence is a pronouncement of the violation of relational norms). Bigwood proposed a similar but distinct construct of transactional negligence—a failure to observe an objective standard of conduct without any mental element. However, Bigwood, in this instance, did not articulate the standard against which the conduct was to be judged, such as whether it was that of a reasonable economic person or a reasonable person in the particular relationship. See Bigwood (2005), *supra* note 166.

contract and the free economic agent's rights and capacities. These espouse equal if not greater concern for substantive fairness in such dealings and upholding standards of care, especially towards those bounded in relationships where dynamics spill over into other spheres of interaction, such as contracts. The most well-elaborated application of the relational paradigm is found in the case of *Hewett v. First Plus Financial Group*.<sup>228</sup> One of the issues considered by the court was whether the husband's affair was something that "his obligation of fairness and candor towards his wife required him to disclose, in connection with his request that she charge her interest" in their home as security for his debts.<sup>229</sup> The court held that given the difficulty of the choice confronting her, she acceded to his request on the understanding and expectation that he was as committed to their marriage and family life as she was. Therefore, there was no doubt that his affair should have been disclosed,<sup>230</sup> as she would not have been willing to be bound under such a contract had she known of the affair. The failure to disclose this materially impacted and undermined the substantive fairness of the deal. The trial judge specifically found that it was not her consent that was problematic, stating that, "[A] reluctant choice, an unenthusiastic choice, a horrible choice are nevertheless choices. I am unable to say that she was not exercising her own will."<sup>231</sup> The courts must recognize the broad array of considerations surrounding the decision to enter into a suretyship contract. These include indicators that a surety blindly submitted to the request without exercising independent judgment, or that she entered into the transaction against her own better judgment. All of these are relevant factors in assessing contractual validity and are vital to ground justification for the application of the doctrine of undue influence in any given case.

For example, in *Dailey v. Dailey*, the court held that it was necessary to show that the surety wife complied with the husband's wishes without exercising independent judgment.<sup>232</sup> Similarly, in *Daniel v. Drew*,<sup>233</sup> the threshold test adopted was "[t]his is not my wish but I must do it."<sup>234</sup>

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<sup>228</sup> See generally *Hewett v. First Plus Fin. Group* [2010] EWCA (Civ) 312 [26] (Eng.).

<sup>229</sup> *Id.* ¶ 31.

<sup>230</sup> *Id.* ¶ 33.

<sup>231</sup> *Id.* ¶ 14.

<sup>232</sup> See *Dailey v. Dailey* [2003] UKPC 65 [19] – [20].

<sup>233</sup> See generally *Daniel v. Drew* [2005] EWCA (Civ) 507.

<sup>234</sup> *Id.* ¶ 36.

The courts recognize a sense of boundedness and loyalty,<sup>235</sup> obliged submission,<sup>236</sup> or fear of repercussions, as motivations behind a surety's decision. In certain circumstances, the power of these emotions in dictating the surety's decision is sufficient to remove the transaction from the category of one which is explicable in the ordinary or natural course of the relational context.

In *Hurley v. The Darjan Estate Company*, the surety wife had previously intimated that she would not sign the guarantee and risk her property to support her husband's business venture.<sup>237</sup> One day, her husband "was making a fuss" about how "[s]he was standing in the way of his cherished dream,"<sup>238</sup> and after a heated argument in the kitchen, she decided to sign the papers immediately in order to appease her husband. While counsel for the surety argued that the husband's conduct amounted to "emotional blackmail,"<sup>239</sup> the court deemed it "just a facet of the heightened emotion generally displayed in the course of a domestic argument" and rejected the argument of undue influence.<sup>240</sup> However, the court failed to contextualize the transaction and the dynamics preceding it in terms of the wife's desire to maintain a happy marriage. Her eventual resignation to her husband's persistent badgering played a significant role in her decision to sign the guarantee despite her earlier expressions to the contrary. That the execution of the contract occurred in the "heat of the moment" should have taken the transaction out of the ordinary and called for an explanation or, at the very least, greater scrutiny.

While not all domestic arguments surrounding a contract should question the validity of the contract, there is a difference between decisions begrudgingly, (yet voluntarily) entered into, and those which follow periods of intense emotion or arguments, which uncharacteristically govern the parties' contractual decisions. It is the second category where the law's watchful eye can guard against bullying, the exercise of power or influence in favor of the party that stands to benefit, or other exploitative tactics which create unfairness. Going back to the test of substantive fairness surrounding the transaction, the court should concern itself with the emotional weight carried

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<sup>235</sup> In *Royal Bank of Scotland PLC v. Chandra*, a strong sense of the husband's loyalty and unreasonable behavior were sufficient to remove the transaction out of the "ordinary" category and into one which called for an explanation. *Royal Bank of Scotland PLC v. Chandra* [2010] EWHC (Ch) 105 [145], [2-5]. The law does not require blind faith before it steps in to assist.

<sup>236</sup> In *Barclays Bank Plc v. Coleman* (one of eight cases considered by the House of Lords together with *Etridge*), the surety's obligation not to second-guess her husband derived from the religious tenets of Hasidic Judaism, and this triggered a presumption of undue influence which was operative in the context of the transaction or the circumstances surrounding its execution. *Barclays Bank Plc v. Coleman* [1999] EWCA (Civ) 719 [284], [292].

<sup>237</sup> See generally *Hurley v. Darjan Estate Co.* [2012] EWHC (Ch) 189.

<sup>238</sup> *Id.* ¶ 39.

<sup>239</sup> *Id.* ¶ 38.

<sup>240</sup> *Id.* ¶ 39.

by the surety in the lead-up to the transaction. It should assess whether the circumstances were such that they would preclude the possibility of a rational decision or incentives consciously considered by the surety assess whether the debtor's conduct went beyond what would be reasonably expected of a husband.

The courts of the United Kingdom have also increasingly had to contend with motivations informed by cultural or religious norms. This further complicates relationship dynamics and makes it challenging for the court to properly analyze the transaction within an unfamiliar relational context. In *Barclays Bank Plc v. Coleman*,<sup>241</sup> a Hasidic Jewish wife, raised to be subservient to her husband's wishes, sought to set aside a legal charge against her matrimonial home.<sup>242</sup> In its assessment of the circumstances surrounding the transaction, Lord Scott discussed the issue of consent:

First, I agree that this was a case in which the relationship between Mr. Coleman and Mrs. Coleman, in the cultural context of the Hasidic community of which they formed a part, raised a serious question whether Mrs. Coleman's consent to the granting of the legal charge was a true consent. . . . The thrust of her evidence as to her relationship with her husband was that she was bound to defer to him in the judgment of what should or should not be done about family finances or with family assets.<sup>243</sup>

In analyzing the quality of Mrs. Coleman's consent, the court was not questioning the free exercise of her independent will to enter into the transaction. Rather, the court was cognizant of the fact that Mrs. Coleman was in fact consciously choosing to act in accordance with her husband's express wishes, because she had been taught that obedience was the proper course of action. The court, however, was looking into whether her expression of consent could be treated as the expression of her free will as a matter of fairness.<sup>244</sup> In Lord Scott's view, the transaction was taken out of the ordinary by the fact that Mrs. Coleman considered herself obliged to consent based on her background, upbringing, and the context of their Hasidic husband-wife relationship. Lord Scott said:

The presumption [of undue influence] arose, in my opinion, out of their relationship, in which Mrs. Coleman was not merely disinclined to second-guess her husband on matters of business, but appears to have regarded herself as *obliged* not to do so. In such a case, in my opinion, the rebuttal of the presumption would have needed legal advice from someone

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<sup>241</sup> *Barclays Bank PLC v. Coleman* [2001] QB 20.

<sup>242</sup> *Royal Bank of Scotland. v. Etridge (No.2)* [2001] UKHL 44, [2002] 2 AC 773, [284].

<sup>243</sup> *Id.* ¶ 291.

<sup>244</sup> *Id.* ¶ 7.

independent of the husband who could have impressed upon her that she should not sign unless she truly wanted to do so.<sup>245</sup>

Therefore, her consent was not determinative. Neither was the fact that the husband had not engaged in any untoward conduct in the procurement of the contract. Rather, his Lordship's concern stemmed from the excessive power imbalance in the relationship and the possibility that this imbalance was exploited here in a way that violated the standard of altruistic duty implied within such a relationship. This concern could only be defeated by a showing that the interests of the surety (who here was in the weaker position) were safeguarded by independent advice.

Regrettably, however, later courts have not always taken such an approach where similar cultural or religious norms affect the relationship dynamic and the context of the transaction. This is particularly so where gender and age coincide with certain relationship contexts such as marital, parental, or caregiver (in the case of a person with special needs or infirmity). In *UCB Corporate Services Limited v Kohli*, a traditional Sikh wife sought to raise undue influence as a basis for setting aside the guarantee.<sup>246</sup> She argued that the consequences of the legal charge were never explained to her.<sup>247</sup> Moreover, she described her relationship with her husband as one where she was reliant on him and would never question his decision or request, particularly in the context of the business, despite her role as company secretary and director.<sup>248</sup> Her roles as secretary and director were for the sake of convenience, empowering her to sign documents when her husband was away.<sup>249</sup> While the wife was aware that her signing the document would somehow help the business, (which was in the overall interests of the family) the wife submitted that she did not realize the nature of the guarantee and the obligations which ensued. At the time of entering into the transaction, the wife reiterated that she was a traditional Sikh wife who raised her two children and looked after her family home.<sup>250</sup> In the course of her evidence, she further insisted that she was not pressured or induced by her husband to sign the document.<sup>251</sup> In rejecting the defense of undue influence, the High Court noted:

[I]t is clear to me that there were no misrepresentations or any other form of inducement or pressure by Mr. Kohli to procure her signature to the guarantee. Mrs. Kohli was aware that the guarantee was given in connection with the purchase of a

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<sup>245</sup> *Id.* ¶ 292 (emphasis added).

<sup>246</sup> See *UCB Corp. Serv. Ltd. v. Kohli* [2004] EWHC (Ch) 1126.

<sup>247</sup> *Id.* ¶ 67.

<sup>248</sup> *Id.* ¶ 67.

<sup>249</sup> *Id.* ¶ 61.

<sup>250</sup> *Id.* ¶ 62.

<sup>251</sup> *UCB Corp. Serv. Ltd. v. Kohli* [2004] EWHC (Ch) 1126, ¶ 66.

property relating to the family business which was the source of her livelihood and that of her family. Even though she may not have been aware of the consequences, she freely and willingly signed the guarantee. In the light of her evidence, I think it likely that, in 1989, she would have signed even if the implications of the guarantee had been explained to her. Her will was in no sense overborne by her husband.<sup>252</sup>

This case illustrates the intricacies underlying relational contexts embedded in particular normative value systems, because factors like relationship dynamics, expectations of self and obligations to protect familial interest, provide an operative framework within which all decision-making is expected to occur. This context is the overarching frame through which any transactional activity involving sureties with emotional or other “ties of the conscience” ought to be considered. Moreover, this case, coupled with *Coleman*, highlights just how classical contractual elements such as “consent” or equity in the narrow terms of “wrongdoing” are actually vacuous within minority cultural and religious contexts, where (in minority cultures and religions) it is normal to have strict codes of conduct tied to certain actors in certain relationships. Indeed, the language of “wrongdoing” carries the onerous burdens and dangers of ethnocentrism and paternalism.

As *Coleman* and *Kohli* both demonstrate, there is no need for any action or inducement to procure the transaction since a request made by the husband in this context is sufficient motivation, grounded in norms akin to filial piety, which dictate only one course for the wife. This also renders any analysis of consent as superfluous because, as stated earlier, there is clearly a will to fulfill the debtor’s request stemming from a duty-based expectation centering on the specific relationship dynamic.<sup>253</sup> Consistent with Lord Scott’s critique of the continued focus on “wrongdoing” in the case of *Etridge*, his Lordship reiterated that the characterization that a transaction is wrongful is a verdict, a conclusion, rather than a criteria for the determination of a finding of undue influence.<sup>254</sup>

It would have been instructive for the courts in *Kohli* to apply a broader lens as it did in *Coleman*, where, upon finding the apparent voluntary consent and the absence of wrongdoing, the court was prepared to consider the substantive fairness underlying the transaction in light of the normative impositions of duty operative on the surety at the time of entry into the transaction. However, in *Kohli*, the court did not situate Mrs. Kohli’s actions in light of cultural framework and the hierarchy of power embedded therein, given her position as a wife and mother. The court would have likely arrived at a different conclusion had it evaluated the parties’ conduct and the run-up

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<sup>252</sup> *Id.* ¶ 74.

<sup>253</sup> See generally Kapai, *supra* note 141, 36–42.

<sup>254</sup> Royal Bank of Scotland v. Etridge (No. 2) [2001] UKHL 44, [2002] 2 AC 773, [155].

to the transaction against this wider cultural context and underlying value framework. To state that any contrary advice given to Mrs. Kohli would still not have influenced her to change her decision relegates Mrs. Kohli, and the class of women like her, to a category of sureties who are deemed unworthy of the law's protection on account of their (cultural) "choices."

It may be that the court here is setting a different bar to evaluate the influence of impositions of duty derived from culture as opposed to those derived from religion. However, the *Kohli* decision was decided *per incuriam*. Although the High Court in *Kohli* applied Lord Nicholls' and Lord Scott's statements on the general principles of undue influence in *Etridge*,<sup>255</sup> it failed to consider the House of Lords' decision in *Coleman* (as one of eight in *Etridge*), which ought to have been followed given the similarity between the material facts of the case, (barring any distinguishing features which sets the case apart). Under these circumstances, the fact is that the *Kohli* decision ought not to be followed in the future. Indeed, the broad lens applied by the House of Lords in *Etridge* and *Coleman* would serve adequately in cases involving cultural, religious, or other customary normative frameworks to determine whether the transaction was grounded in substantive fairness overall.

#### V. TRANSPLANTING THE DOCTRINE TO HONG KONG: THE RELEVANCE OF CULTURE AND MARKET PHILOSOPHY

While Hong Kong courts have largely adopted the restatements of the doctrine of undue influence<sup>256</sup> as set out by the House of Lords in *Etridge*<sup>257</sup> and earlier in *O'Brien*<sup>258</sup>, there are marked differences in their applications of the principles compared to jurisprudence emerging from United Kingdom courts.

In general, where the loan is found to have been obtained to support the family business or a principal source of the family's income, claims of undue influence invariably tend to fail. It appears to make little difference whether the sureties have been involved in the business in any way, for example, as a director or shareholder, an active participant and regardless of whether she derived any actual or substantive financial benefit from it.<sup>259</sup> This outcome is

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<sup>255</sup> *Id.* [71]–[72].

<sup>256</sup> See *Royal Bank of Scotland v. Etridge (No.2)* [2001] UKHL 44, [2002] 2 AC 773 (citing Hong Kong cases discussing these principles).

<sup>257</sup> See *Nat'l Westminster Bank PLC v. Morgan* [1985] 1 All ER 821 (Eng.).

<sup>258</sup> See *Etridge* [2001] UKHL 44.

<sup>259</sup> See generally *Bank of China (H.K.) Ltd. v. Wong King Sing*, [1998–2002] 1 H.K.L.R.D. 358 (C.F.I.); *Bank of China (H.K.) Ltd. v. Fung Chin Kan*, [2002] 5 H.K.C.F.A.R. 515 (C.F.A.); *Bank of China (H.K.) Ltd. v. Wong Yuk Ping*, [2003] 1 H.K.L.R.D. 1 (C.F.I.); *Wing Hang Bank Ltd. v. Liu Kam Ying*, [2002] 2 H.K.C. 57 (C.F.I.); *ABN Amro Bank NV v. Mody & Another*, [2002] H.K.E.C. 1545 (C.F.I.); *Re John Wang, Ex Parte Bank of China, Sing. Branch*, [2003] H.K.E.C. 866; *Bank of China (H.K.) Ltd. v. Wong Tang*, [2006] H.K.E.C. 1590 (C.F.I.); *Resona Bank v. Lam Oi Ching*,

usually undergirded by the reasoning that the survival, viability and success of the family business is in the collective interest of the family unit. Thus, the surety necessarily stands to benefit directly or indirectly in the circumstances.

In *Dah Sing Bank, Ltd. v. Sing Hai Handbags Mfg. Ltd.*, a wife who had issued a power of attorney in her husband's favor while she settled down in Canada with her children, sought to set aside a mortgage the husband had entered into on her behalf.<sup>260</sup> She had no involvement in the business, which was managed solely by her husband in Mainland China.<sup>261</sup> Moreover, she was never privy to any information about the financial health of the business.<sup>262</sup> In the court's view however, the husband's actions were explicable when considered in light of the families interests and well-being, which were bound closely together with the financial position of the business.<sup>263</sup> The business was the primary source of income and its success, determinative of the family's future. The court therefore construed the transaction to be as much in the interests of the wife as the husband's, although at first blush, it appeared to advance the sole personal and business interests of the husband.<sup>264</sup> As such, the claim of undue influence claim could not stand<sup>265</sup> on the basis of a "very adequate explanation" underlying the transaction [which was] "sufficient to demonstrate *that the wife had made a voluntary and fully informed decision.*"<sup>266</sup>

Although this approach may first appear to be an application of the "manifest disadvantage" test<sup>267</sup> and whether the transaction therefore, calls for an explanation (depending on the explanation, there may be evidence of undue influence). However, the language that the court uses in its reasoning is suggestive of the cultural context informing the court's application of the undue influence doctrine. In applying the test of manifest disadvantage, the court considered the transaction's impact on the surety's interests, framed not

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[2006] CACV 93/2006 (C.A.); *Dah Sing Bank, Ltd. v. Sing Hai Handbags Mfg. Ltd.*, [2008] H.K.E.C. 1917 (CACV 157/2007) (C.A.) (unreported); *DBS Bank (H.K.) Ltd. v. Hui So Yuk*, [2009] H.K.C. 913 (C.F.I.); *Bank of China (H.K.) Ltd. v. Leung Wai Man*, [2011] 4 H.K.L.R.D. 707 (C.F.I.); *Bank of China (H.K.) Ltd. v. Wong Kam Ho*, [2002] HCMP 3324/2002 (C.F.I.); *DBS Bank (H.K.) v. Yue Li, (H.K.) Eng'g Ltd.*, [2014] HCMP 165/2014 (C.F.I.).

<sup>260</sup> *Dah Sing Bank, Ltd.*, CACV 157/2007.

<sup>261</sup> *Id.* ¶ 21.

<sup>262</sup> *Id.* ¶ 21.

<sup>263</sup> *Id.* ¶ 81.

<sup>264</sup> *Id.* ¶ 81.

<sup>265</sup> *Dah Sing Bank, Ltd. v. Sing Hai Handbags Mfg. Ltd.*, [2007] CACV 157/2007 (C.A.), ¶ 81.

<sup>266</sup> *Id.* ¶ 82 (emphasis added); *see also* *Bank of China v. Wong Yuk Ping*, [2003] 1 H.K.L.R.D. 1 (C.F.I.); *Re Kasetsumpan Chiewcharn* [2005] H.K.C. 879 (C.F.I.); *Bank of China (H.K.) Ltd. v. Wong Tang*, [2006] H.K.E.C. 1590 (C.F.I.); *Manulife (Int'l) Ltd. v. Oh Chan Siu Ping Margaret*, DCCJ 16/2008 (D.C. 10 July, 2008); *Sun Hung Kai Inv. v. Quality Prince*, [2009] H.K.E.C. 67 (H.C.A. 1995/2008) (C.F.I.); *Dao Heng Bank Ltd. v. Ho Yin Yuk*, [2003] 1 H.K.L.R.D. 28 (C.F.I.).

<sup>267</sup> *Macklin v. Dowsett*, [2004] EWCA (Civ) 904 (Eng.), ¶¶ 15–19.

as her individual interest but rather, her interests as they were bound up in the collective interest of the family unit.<sup>268</sup> The court read her voluntary ascension as indicative of her natural inclination to fulfill her duty to the collective and there was nothing out of the ordinary in her doing so.<sup>269</sup> This cultural expectation that wives were inclined or expected to voluntarily engage in acts of self-sacrifice to protect the family (and to go to great lengths to do so) is often taken for granted. The normalization of the performance of such a “duty” in this context sets a much higher threshold for circumstances or conduct that would justify a finding of undue influence, making the ouster of such a defense the norm in most such cases.<sup>270</sup>

In *Bank of China (Hong Kong) Ltd. v. Wong Yuk Ping*, the court, in reviewing the evidence submitted by the wife surety seeking to set aside a mortgage contract on the grounds of undue influence, said that the evidence did not warrant a finding of undue influence.<sup>271</sup> The husband questioned the wife’s claim on the grounds that despite her claims that her husband had a stubborn personality and a history of perpetrating domestic abuse towards her she was bold enough to flatly refuse to mortgage the property when first asked.<sup>272</sup> Moreover, in her oral testimony, the wife “confirmed . . . that she did sign the Legal Charge and Guarantee willingly and voluntarily.”<sup>273</sup> This testimony seemed to stand up as a sufficient and binding expression of her will despite the history of abuse and the power imbalance in the relationship. However, contextualized against the cultural context of the husband-wife relationship, the history of abuse and the husband’s domineering personality, the testimony could be read as an expression of obligatory obedience, fear, or learned helplessness. More broadly, however, this interpretation portrays a common gender stereotype of how abused women behave in response to domestic violence. Reading the history of abuse without factoring in the wife’s initial refusal to execute the transaction perpetuates patriarchal systems and attitudes which see women’s performance of gender in a binary frame. Here, the wife was labeled ‘bold’ because a ‘real victim’ would be weak and demure and would not dare refuse. The corollary of the wife’s subsequent actions, including signing the document and giving evidence in court (that she signed willingly) were read to mean that there was no domestic abuse or that the abuse was not bad enough to compromise her agency and exercise of choice.

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<sup>268</sup> *Dah Sing Bank, Ltd. v. Sing Hai Handbags Mfg. Ltd.*, *supra* note 261, at ¶ 81.

<sup>269</sup> *Id.* ¶ 82.

<sup>270</sup> See *Bank of China (Hong Kong) Ltd. v. Wong Yuk Ping*, [2003] 1 H.K.L.R.D. 1 (C.F.I.); *Re Kasetsumpan Chiewcharn* [2005] H.K.C. 879 (C.F.I.); *Bank of China (H.K.) Ltd. v. Wong Tang*, [2006] H.K.E.C. 1590 (HCMP 4222/2003) (C.F.I.); *Manulife (Int’l) Ltd. v. Oh Chan Siu Ping Margaret*, DCCJ 16/2008 (D.C. 10 July, 2008); *Dah Sing Bank, Ltd. v. Sing Hai Handbags Mfg. Ltd.*, [2008] H.K.E.C. 1917 (CACV 157/2007) (C.A.).

<sup>271</sup> *Bank of China v. Wong Yuk Ping*, [2003] 1 H.K.L.R.D. 1 (C.F.I.), ¶ 68.

<sup>272</sup> *Id.* ¶ 68.

<sup>273</sup> *Id.* ¶ 68.

In *DBS Bank (Hong Kong) Ltd. v. Hui So Yuk*, the court accepted evidence presented by the surety sister regarding her upbringing in a family that was dominated by men.<sup>274</sup> She testified that she was ordered around since childhood and there was an expectation that she would unquestioningly obey all instructions regarding family matters.<sup>275</sup> Despite finding her evidence reliable, the court rejected the claim that the influence wielded by the surety's older brothers in this context was undue.<sup>276</sup> It said:

On such evidence, the evidence from the [surety sister], taken at its highest, may well show that the [debtor brothers] had some influence over her. But, as acknowledged by Lord Nicholls in *Etridge's* case, the mere existence of the influence is not enough. What has to be shown and proved is *undue* influence.

In the present case, even granted there may have been some influence from the [debtor brothers] over the [surety sister], nothing in the evidence even begin [sic] to show such influence to be undue when the [surety sister] signed the guarantee.<sup>277</sup>

In the case of surety wives Hong Kong, against the specific context of families bounded up relationships governed by hierarchies and behavioral norms dictated by culture, underlying the seemingly voluntary transaction is often a strong sense of obligation and loyalty derived from being duty-bound as a result of one's place in the relational hierarchy. In such instances, what may appear consensual and deliberate may seem like the only palpable option for the surety and as such, does not represent a "choice" in the ordinary sense of the word (where there exists a prospect of choosing between varied courses of action, uninhibited by constraints influencing the final decision). Indeed, these choices are better regarded as "non-choices" unless one is prepared to bear the costs of the ruptures with the cultural or filial expectations placed upon them. Of course, the extent to which this context, and the influence it wields on the decision to enter into the transaction, is operative in any given case would be a question of fact to be determined by the courts. The challenging question, however, is whether such a context, in and of itself, makes any operative influence undue.

If we examine this from the perspective of the dynamics underlying the relationship, an area the court is well-versed in examining under the doctrine, the relational hierarchy and the position held by the respective parties (debtor and surety) anoints one of them the designated powerholder—senior, superior, or more authoritative—in relation to the other. In turn, this entrenches a very

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<sup>274</sup> *DBS Bank (Hong Kong) Ltd. v. Hui So Yuk* [2009] H.K.C. 913 (C.F.I.).

<sup>275</sup> *Id.* ¶ 15.

<sup>276</sup> *Id.* ¶¶ 34–35.

<sup>277</sup> *DBS Bank (Hong Kong) Ltd. v. Hui So Yuk* [2009] H.K.C. 913, ¶¶ 34–35 (C.F.I.). (emphasis added).

particular power dynamic into the specific relationship (husband-wife; brother-sister; father-daughter; mother-son, etc.), which, by design exacts an unflinching loyalty, obedience, and degree of subordination in accepting requests and seeing that desires expressed are generally fulfilled. Deviations from these expectations are unacceptable and carry significant consequences and costs. Moreover, the consequences are reinforced (and systematized) through various family members, who rebuke or admonish those who stray from cultural expectations. This enabling mechanism helps keep everyone within the confines of their respective position in their cultural hierarchy. Under these circumstances, overt pressure from the debtor is unnecessary as the surety lacks hierarchical standing (culturally) to question or oppose the request or decision of the person in the more powerful position. Moreover, the unspoken code of etiquette prohibits those in a weaker position from saying “no”, especially where such refusal would be perceived as negatively impacting family interests as a whole. The expectation of total alignment with the family unit’s objectives requires foregoing any personal discomfort or anxieties with the hierarchy. The notion of self-sacrifice and putting the interests of others in the unit first is the paramount expectation. The surety’s voluntariness or “consent” is a hallmark of their loyalty, respect, trust and commitment towards the cultural codes of the debtor and family. Withholding consent, let alone questioning the request, would result in significant personal costs for transgressing filial and almost sacrosanct cultural expectations. These actions would attract community-wide condemnation from family members and possibly, those in extended family circles and beyond.

In *Bank of China v. Leung Wai Man*,<sup>278</sup> despite the evidence that the surety was generally submissive and conventional in her beliefs about family matters, (that financial considerations ought to be decided by the male “breadwinner” while she fulfilled her domestic obligations of educating the children,)<sup>279</sup> the judge did not find undue influence. The judge wrote:

In my judgment, the [surety wife]’s evidence does not show that the [debtor husband] had exerted any undue influence on her. Her testimony only shows that there was a mutual trust between her and [the debtor husband]. The fact that she let her husband handle and decide on financial matters of the family, at its highest, can only show that the [debtor husband] was influential to her, but it cannot prove that that the [debtor husband] had exercised *undue* influence on her. There is no evidence in the present case to prove that the [debtor husband] had ever abused the trust and confidence placed on him by the [surety wife], or that he had ever misled the [his wife] by

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<sup>278</sup> See *Bank of China (H.K.) Ltd. v. Leung Wai Man*, [2011] 4 H.K.L.R.D. 707 (C.F.I.).

<sup>279</sup> *Id.* ¶ 55.

improper means or had ever oppressed her in order to make her accede and agree to sign the legal charge.<sup>280</sup>

Similarly, in *Bank of China (Hong Kong) Ltd. v. Wong Kam Ho*,<sup>281</sup> the court did not find the influence to be “undue” although the wife blindly trusted her husband (it was considered the norm in any healthy marriage):

It seems to me that even if one accepts this evidence at face value, it does not demonstrate any undue influence exercised by Yeung [the debtor husband]. It is said that Lee [the surety wife] completely trusted Yeung, and that she signed the document because Yeung told her to do so, without knowing what it was that she signed. I accept there was a relationship of trust and confidence. But such trust is not unusual between husband and wife. It is as much in Hong Kong as in the United Kingdom “a part of every healthy marriage”. In my opinion, the transaction is not one that calls for explanation in the sense described in [paragraph 29] above. The business of Wing Fat was the business of Yeung (jointly with Wong), who was the breadwinner of the family. What Yeung earned from that business would be the income of the family. Lee had a real interest in seeing that business prosper, and therefore in providing her guarantee and security over the Property required for the borrowing necessary for the business. The Property, which they jointly held, was acquired with funds earned from the husband’s previous business and had been charged before more than once for bank financing to support to husband’s business. In the transaction in question, Yeung, the husband, also gave a guarantee for Wing Fat’s debts in favour of the bank. The fortunes of the husband and wife were tied together.<sup>282</sup>

It appears that the Hong Kong courts continue to look for wrongdoing or some conduct or act of deception, wrongdoing or breach of trust to find undue influence. This is at odds with the restatement of the principles, particularly by Mummery J.<sup>283</sup> In the United Kingdom, under *Coleman*, for example, such a culture of deference and submission would be sufficient cause to take the case out of the ordinary. The influence arising from the relational hierarchy embedded within the religious norms would be recognized as producing the underlying gendered-dynamics in the husband-wife relationship, where a wife who was a Hasidic Jew would be considered to have been operating under

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<sup>280</sup> *Id.* ¶ 56 (emphasis added).

<sup>281</sup> See *Bank of China (H.K.) Ltd. v. Wong Kam Ho*, [2014] 1 H.K.L.R.D. 41 (C.F.I.).

<sup>282</sup> *Id.* ¶ 34, (per Lam J) (citation omitted).

<sup>283</sup> *Contra supra* notes 215-222 and accompanying text.

influence that was “undue.”<sup>284</sup> In the view of the Hong Kong courts however, the high levels of submissiveness and deference displayed by the surety towards the debtor is characterized as natural love and affection to be expected in a healthy (Chinese) marriage (although this is also held up as the norm in the United Kingdom according Lam J in *Wong Kam Ho*).<sup>285</sup>

In one sense, the doctrine of undue influence, as transplanted to and applied in Hong Kong, is still based on the transgression of relational norms. It is just that a different set of norms are used as the benchmark for what constitutes influence that is “undue.” Under the dominant Confucian paradigm which underscores filial relationships in Hong Kong, it is deemed permissible, or at least understandable, that the head of the household would draw on their dominant position to seek support for their endeavors, since his actions are imbued with righteous obligations to the family’s interests. This circumstance warrants (and amply justifies) securing the surety’s consent to support the endeavor and no element of force, or fear ought to be inferred from such a willing acceptance of the transaction’s risks.<sup>286</sup>

Undue influence could still be established where the donee was acting in bad faith,<sup>287</sup> when a donor exploits a very vulnerable person<sup>288</sup> or when the debtor does not use the loan for the benefit of the family.<sup>289</sup> However, insofar

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<sup>284</sup> *Barclays Bank Plc. v Coleman* [2001] QB 20 [54].

<sup>285</sup> *See Wong Kam Ho* at ¶ 34. *Contra Barclays Bank Plc. v Coleman*, at ¶ 54. Judicial discourse in Hong Kong appears to be on par with that emergent in the courts of Singapore. For a comprehensive treatment and analysis of the transplantation and development of the doctrine of undue influence in that context, *see Mindy Chen-Wishart, Legal Transplant and Undue Influence: Lost in Translation or a Working Misunderstanding?*, 62 INT’L & COMP. L. Q. 1, 30 (2013).

<sup>286</sup> In this sense, the behavior of the transplant as it takes hold in the unique socio-cultural, political and legal context in terms of whether it is mirrored, adapted, or rejected to converge towards or diverge away from its original form, is to be interpreted in light of the underlying context which very much dictates its development and direction. *See Chen-Wishart, id.*

<sup>287</sup> *See Dao Heng Bank Ltd. v. Ho Yin Yuk*, [2003] 1 H.K.L.R.D. 28, ¶ 28 (C.F.I.) (describing how the godchild had deceived her old, childless, illiterate godmother who lived alone out of her monies and properties); *Pang Siu Hing v. Tsang Kwok Man*, [2006] CACV 195/2004 (C.A.) (describing how the son lied to his father and concealed the gift from the rest of the family).

<sup>288</sup> *See Dah Sing Bank, Ltd. v. Sing Hai Handbags Mfg. Ltd.*, [2008] H.K.E.C. 1917 (CACV 157/2007) (C.A.) (noting that the court found a clear case of undue influence, without any explanation, when the old, widowed, uneducated woman guaranteed the debt of her son-in-law, despite the finding that she had an interest in the success of the business.) However, in the same case, undue influence was not found in the brother-in-law’s case as he has a direct participation and interest in the family business. *See id.*; *Kwok Wing Kui v. Boxing Promotion Company*, [2013] H.K.D.C. 590 (holding that undue influence was established when a young singer with little business experience and command of English entered into an extremely imprudent contract under the instruction of her manager, whom she treated as father, without reading the document or seeking outside advice).

<sup>289</sup> *Sun Hung Kai Investment Services Ltd v. Quality Prince Ltd and Others* [2014] H.K.E.C. 1312 (HCA 1995/2008) (C.F.I.) (describing how the husband deceived the wife into a high-risk margin trading agreement on the pretense that that was for the purpose of capital investment for the family business).

as immediate family members, such as spouses, children, parents, and siblings are concerned, undue influence is unlikely to be established where the collective family interest is woven into the mix. In these circumstances, the debtor's attempts to further or support his business interests at the expense of the surety's interests or risk is not characterized as meeting the criteria for wrongdoing. It is instead seen as the norm and even laudable and worthy of support, given that it is seen as part of his fulfilment of his duty to provide for the family.<sup>290</sup> In such a case, the surety's submission to the debtor's demand or his or her voluntary consent is expected as par for the course. The cultural context itself offers the explanation. However, in cases where "habitual and total domination and subservience" is established,<sup>291</sup> the courts have found such influence to be undue although the standard demanded in terms of what constitutes "total domination and subservience"<sup>292</sup> remains exceedingly high, beyond that required by the House of Lords.<sup>293</sup> This raises a query as to whether such a high threshold can be met in any but the most extreme examples of marital relationships guided by strict hierarchies based on relational ties, gender, culture or religion.

If the standard is set so high that either bad faith or a total lack of independent will is required to prove undue influence, then the protective function of the doctrine will be significantly reduced, if not rendered entirely otiose, given the availability of other doctrines that adequately deal with these circumstances.<sup>294</sup> It is suggested that Hong Kong courts ought to take the broader contextual approach towards determining undue influence as advanced in the case of *Allcard v. Skinner*<sup>295</sup> and vitiate any transaction with signs suggesting that it should be set aside on grounds of public policy (instead of setting the bar at wrongdoing, which pushes the case into the arena of other doctrines of vitiation in any case).

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<sup>290</sup> Even where a surety provides an alternative source of income for the family as a result of her employment, her efforts are not viewed within the same lens of being duty-bound to provide as the breadwinner. And thus, the husband's needs and requests are to be catered to as they take priority given his laudable goals. See generally *DBS Bank (Hong Kong) Ltd. v. Hui So Yuk*, [2009] H.K.C. 913 (C.F.I.).

<sup>291</sup> *Bank of China (Hong Kong) Ltd. v. Wong Kam Ho*, [2014] 1 H.K.L.R.D. 41, ¶ 53 (C.F.I.). Note that although the judge referred to *Coleman* to outline the criteria for what constitutes "habitual and total domination and subservience." *Id. Coleman* itself does not require such a high standard of oppression. Rather, *Coleman* looks for evidence of an imbalanced hierarchal relationship. See *Royal Bank of Scotland. v. Etridge (No.2)* [2001] UKHL 44, [2002] 2 AC 773, [282]–[293] (discussing *Coleman*).

<sup>292</sup> *Bank of China (H. K.) Ltd. v. Wong Kam Ho*, [2014] 1 H.K.L.R.D. 41, ¶ 53 (C.F.I.).

<sup>293</sup> *Etridge* [2001] UKHL at [282]–[293].

<sup>294</sup> Examples include unconscionability or duress.

<sup>295</sup> *Allcard v. Skinner* [1887] 36 Ch D 145.

The expectation of due diligence on the part of the bank is also considerably different when comparing Hong Kong and the U.K. In the U.K., a non-commercial relationship, coupled with the fact that a transaction is not for the primary purposes of benefiting the guarantor, would be enough to trigger a series of obligations on the part of the bank to demonstrate the exercise of due diligence in procuring the transaction. In Hong Kong, however, actual or constructive notice of the existence of undue influence between the debtor and the surety is needed to impute fault to the bank.<sup>296</sup> In *DBS v. Hui So Yuk*, the court found no notice of the undue influence on the part of the bank.<sup>297</sup> It said:

Nothing in the evidence put forward by the [surety sister] when taken at its face value, even remotely suggest that the plaintiff bank would be put on inquiry, whether actual or constructive [sic], that undue influence was or might have been exerted upon the [surety] at the time when the personal guarantee was executed by her.

....

... [T]he allegation by the [surety] that she was brought up in a male dominated family and had always had to obey her brothers without question, even if true, there is no evidence that such was or could have been known to the [bank] . . .

....

Even if the [bank] knew that the [surety] was the sister of the [her brothers, the de facto owners of the company], this knowledge, without more, cannot put the [bank] on inquiry that undue influence may have been exerted upon her. It does not raise any presumption of such either.

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<sup>296</sup> See *Wing Hang Bank Ltd. v. Liu Kam Ying* [2002] 2 H.K.C. 57 (C.F.I.); *Re John Wang, Ex Parte Bank of China* [2004] H.K.C. 835 (C.F.I.); *Re Kasetsumpan Chiewcharn* [2005] H.K.C. 879 (C.F.I.); *Resona Bank Ltd. v. Lam Oi Ching* [2006] 3 H.K.L.R.D. 62; *Standard Chartered Bank (Hong Kong) Ltd. v. Chan Kwok Wah, Andy* [2009], H.K.C. 899; *DBS (Hong Kong) Ltd. v. Hui So Yuk* [2009] H.K.C. 913 (C.F.I.); *Bank of China v. Leung Wai Man* [2011] 4 H.K.L.R.D. 707; *Bank of China (Hong Kong) Ltd. v. Leigh Hardwick* [2013] H.K.C. 2098 (C.F.I.).

<sup>297</sup> *DBS Bank (Hong Kong) Ltd. v. Hui So Yuk* [2009] H.K.C. 913 (C.F.I.).

If [the surety] then agreed to sign such document by simply trusting her brother, then the blame for that cannot be laid at the [bank]'s door.<sup>298</sup>

Moreover, the bank was not expected to take any steps to enquire as to the actual participation of or the transactional benefit accrued to the surety.<sup>299</sup> Instead, it was entitled to rely on the fact that the surety was a registered director or shareholder of the company to conclude that the loan was in her interest.<sup>300</sup>

Likewise, the reason or basis behind which the [surety] became a shareholder, director and secretary of the Company was not something which was made known to the plaintiff or that the plaintiff would have knowledge of.

....

. . . [T]here is no evidence that the [bank] knew or could have known that the [surety] did not take part in the actual running of the Company . . .

....

The debtor is the Company. The relationship between the [surety] and the Company is one of director and shareholder of the Company. It simply cannot be a non-commercial relationship for which [sic] the plaintiff bank would be put on inquiry . . .

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As a director of the Company, a matter known to the [bank], [the surety] executing a personal guarantee to guarantee a loan

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<sup>298</sup>*Id.* ¶¶ 36–37, 41, 44.

<sup>299</sup> *Id.* ¶ 42.

<sup>300</sup> *Id.*; see also *Wing Hang Bank Ltd. v. Liu Kam Ying* [2002] 2 H.K.C. 57 (C.F.I.); *Re John Wang, Ex Parte Bank of China* [2004] H.K.C. 835 (C.F.I.); *Resona Bank Ltd. v. Lam Oi Ching* [2006] 3 H.K.L.R.D. 62; *Standard Chartered Bank (Hong Kong) Ltd. v. Chan Kwok Wah, Andy* [2009] H.K.C. 899.

or credit facilities [sic] to the Company can only be the most normal and ordinary commercial transaction imaginable.

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Once that premise is reached that the plaintiff bank was not put on inquiry, it becomes unnecessary to go further to look at whether any [sic] reasonable steps were taken by the plaintiff bank.<sup>301</sup>

In *Re John Wang, Ex Parte Bank of China, Singapore Branch*, the court stated that the bank could take the directorship and shareholding information at face value:

[The counsel] argues that [the sureties] were only nominee shareholders ... and even then their holdings were small in comparison to the companies' total share capital. That may be the case. But there is no explanation how the Bank ought to have known that [the sureties] were mere nominees for [the debtor]. Nor is it clear why, regardless of whether they were or were not nominee or nominal shareholders, the Bank could not take their directorships of [the companies] at face value.<sup>302</sup> *John Wang v. Bank of China* [2003] H.K.C. 1354 (unreported) (on file with author).

The differences between the Hong Kong and U.K. approaches demonstrate that the doctrine has undergone significant adaptations to the cultural context here since its transplantation. Different theories have been developed to understand the behavior of legal transplants.<sup>303</sup> At a conceptual level, on one end of the spectrum, Alan Watson has argued that legal transplantation, or borrowing, is often an easy and mindless process, whereby a set of rules can be applied to the needs of the receiving country just as they do in the source country as law is very often applied outside of its originating circumstances.<sup>304</sup> On the other end of the spectrum, Pierre Legrand argues that legal transplantation is impossible as the understanding and meaning of the rules, are informed by and "mirror" local culture and history.<sup>305</sup> Necessarily, implanted in a different context to that of their origination, the rules and how they take effect in the process would vary significantly depending on the

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<sup>301</sup> *DBS Bank (Hong Kong) Ltd. v. Hui So Yuk* [2009] H.K.C. 913, ¶¶ 38–39, 42, 45–46.

<sup>302</sup> *Id.*; *John Wang v. Bank of China* [2003] H.K.C. 1354, ¶ 86 (unreported) (on file with author).

<sup>303</sup> See *supra* notes 104–106 and 115–123 and accompanying text.

<sup>304</sup> See generally ALAN WATSON, *COMPARATIVE LAW: LAW, REALITY AND SOCIETY* (3rd ed. 2010).

<sup>305</sup> See Pierre Legrand, *The Impossibility of 'Legal Transplants,'* 4 *MAASTRICHT J. EUR. & COMP. L.* 111, 119–20, 123–24 (1997).

context. In these circumstances, the rules would likely evolve, take hold and work differently depending on the receptivity to the rules and the rendering of their contextual functionality in the first place.<sup>306</sup>

Others take an intermediate position and seek to study legal transplants not as a carbon copy of the original law, but as a reflective and learning process where the receiving jurisdiction adapts and refines the rules to locate their meaning in this particular context. Margit Cohn proposed that transplantation might operate with different degrees of transformation from “full convergence,” “fine-tuning”, “adaptation, through distortion and mutation,” to outright “rejection”.<sup>307</sup> Compatibility with local political and socio-economical values can sometimes be critical in determining the final outcome of transplantation/transformation. Different areas of laws might have different levels of receptivity to foreign legal rules. Constitutional law, family law and successional law, which have a close connection with cultural or political ideology and values, are among the most difficult areas for transplantation; whereas property law and contract law can usually be mechanically inserted into the receiving country.<sup>308</sup>

Even though undue influence is (on the face of it) a commercial law doctrine that should be readily transferrable, the foregoing analysis demonstrates its unique underpinnings in societal expectations of acceptable and unacceptable conduct in both commercial and non-commercial settings. Touching upon social, cultural and economic norms in the local community, undue influence is an “organic” doctrine which necessitates a degree of adaptation in the receiving country’s context.<sup>309</sup> In the Hong Kong experience, after the initial transplantation of the undue influence doctrine, its meaning and application has evolved in light of the local context.<sup>310</sup>

For the doctrine to take hold in the socio-legal landscape of Hong Kong, where the prevalence of the family business model has fostered the prosperity of the city, the doctrine of undue influence has been re-interpreted in a way that preserves the Confucian value framework, its underlying patriarchy and the selfless advancement of collective interest embedded within the governance of business and non-business contexts as the paradigm

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<sup>306</sup> *Id.*

<sup>307</sup> Margit Cohn, *Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom*, 58 AM. J. COMP. L. 583, 592 (2010).

<sup>308</sup> Kahn-Freund, *supra* note 8; Ernst Levy, *The Reception of Highly Developed Legal Systems by Peoples of Different Cultures*, 25 WASH. L. REV. 233, 236 (1950).

<sup>309</sup> Cohn, *supra* note 307, at 592; Kahn-Freund, *supra* note 8, at 13, 17 (1974); Otta Khan-Freund, *Common Law and Civil Law Imaginary and Real Obstacles to Assimilation*, in Mauro Cappelletti (ed.) *New Perspectives for a Common Law Europe* (1978).

model.<sup>311</sup><sup>311</sup> Moreover, it has been adapted for compatibility with *laissez-faire* economics<sup>312</sup> practiced by one of the freest economies in the world. . .<sup>312</sup> It is, therefore, perhaps unsurprising that the Hong Kong courts have modified the *O'Brien* principle and refrained from intervening with banking practices thus far by continuing to prioritize the certainty demanded by a leading financial center that Hong Kong is, by relying on objective “face value” cues for operational ease and efficiency.<sup>313</sup>

In its quest to prevent the doctrine from distorting the equilibrium of the local business context by introducing uncertainty, the doctrine as it is applied in Hong Kong seems to have lost its original normative compass in the process of transplantation/translation. The original objective to protect the weak and vulnerable from being exploited and to encourage altruistic behavior on the part of the dominant party to take steps to safeguard the interest of his dependents, has been distorted to mean wrongfully condemning the breadwinner for asking the rest of the family to support resource allocation and risks to buttress the family’s source of income or for expecting filial solidarity.<sup>314</sup> The attempt to restore a degree of balance in an otherwise unequal relationship through a finding of undue influence is seen here as unfair to the male patriarch. This only serves to reinforce patriarchy.

To say that law, as a cultural object, is a mirror reflection of the society and thus must adapt to local customs in the process of transplantation might be an oversimplification of the dynamics between law, culture, and society. First, the search for a “pure” set of cultural tenets to reflect through legal structures is often elusive given the realities of globalization<sup>315</sup> and the inherent and recurrent hybridity that manifests across societies as they continue to evolve. Hong Kong itself, for example, reflects intra-familial, interpersonal, and state-subject relationships which are concurrently governed by traditional Confucian values that further social harmony and collectivism

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<sup>310</sup> *Id.*

<sup>311</sup> Chen-Wishart, *supra* note 285.

<sup>312</sup> Garret W. Brown et al., A CONCISE OXFORD DICTIONARY OF POLITICS AND INTERNATIONAL RELATIONS (2018)

<sup>312</sup> See 2019 Index of Economic Freedom: Hong Kong, Heritage Foundation, (last visited Apr. 9, 2019), <https://www.heritage.org/index/country/hongkong>.

<sup>313</sup> This is evidenced in the court’s decision in *DBS Bank (Hong Kong) Ltd. v. Hui So Yuk* [2009] H.K.C. 913, ¶¶ 45–46 for example, where the bank is deemed entitled to take the information about shareholding and directorship at face value without inquiring further into underlying arrangements.

<sup>314</sup> Chen-Wishart, *supra* note 285, at 24.

<sup>315</sup> Elireia Bornman, *Struggles of Identity in the Age of Gloablisation*, 29 COMMUNICATION 24, 47 (2003).

as well as egalitarian values that promote individual rights and freedoms.<sup>316</sup> How can legal transplants be guided by one set of values but not the other? Secondly, the law is as much a framework that guides the development of social norms and practices as it is a reflection of existing social norms and practices.<sup>317</sup> In this sense, Hong Kong courts should break past the narrative of local culture and its influence in commercial dealings and consider how to offer the vulnerable surety, set against hardened cultural expectations, and entrenched power dynamics, to undertake contractual obligations that might have disastrous economical economic and personal consequences. The Hong Kong courts ought to rigorously police the implications of setting a particularly high threshold for a claim of undue influence here in the case where cultural or other factors appear to predominate relational dealings and reconsider its framing of the parties' behavior and considerations. The city's courts ought to adopt framings and classifications which appropriately reflect the rich complexities of the personal subjectivities that bind and complicate individuals' desires, interests, and obligations. Necessarily, there is hesitation around impugning such behavior as misconduct but that is precisely where the dicta from U.K. courts, which emphasize a broader reading of the circumstances which do not require wrongdoing, is most instructive. Such considerations are indispensable to introduce adequate safeguards against the perpetration or entrenchment of patriarchal power wielding pressure against a vulnerable surety in the matrix of culture, collective interest and *laissez faire* economics.

## VI.      BALANCING COMPETING INTERESTS AND EMBRACING SUBSTANTIVE FAIRNESS: A FAIR LENDER'S OBLIGATION

### A. *Policy Preference in the Three Jurisdictions*

The private surety dealing with a public commercial entity has positioned themselves within a zone where the private meets with or skirts the commercial setting.<sup>318</sup> The courts find themselves in the position of having to strike a balance between seemingly irreconcilable interests due to the prospects that ultimately, there may be no wrongdoer as such, but simply that on account of public policy concerns, a particular transaction should not be enforced. Much would depend on the paternalistic considerations of substantive fairness and how they weight in the mix against the need for certainty in the liberal market paradigm in order for Hong Kong to continue to thrive as an international business centre. The verdict in any given case

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<sup>316</sup> For example, individual rights and freedoms are entrenched in the Bill of Rights Ordinance and the Basic Law; egalitarian values are reflected in family law principles such as distribution of assets after divorce and maintenance obligations on the part of the party with higher income to former spouse; gender-based violence such as marital rape and domestic violence are also criminalized in Hong Kong.

<sup>317</sup> See generally COTTERREL, *supra* note 15, at ch. 2; CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS* (1973).

<sup>318</sup> MINDY CHEN-WISHART, *CONTRACT LAW*, 384 (3rd ed. 2010).

necessarily bears significant implications for all parties concerned. Those who are vulnerable or have had their goodwill or dutiful conduct exploited stand responsible for a great debt brought on by a transaction with little concern for their interests. Alternatively, the creditor involved will find itself out of a remedy against the donee due to the third party's conduct or stronghold of power within the context of the domestic relationship. The donor, too, may find themselves on the receiving end of the court's scrutiny of their private and commercial dealings and faulted for having overstepped somewhere along the way.

The demands of market individualism and a free market paradigm would necessitate that the bank be protected against uncertainties and be entitled to rely on a freely waged contract. The surety, on the other hand, should be held to their commitments and be accountable for protecting their own interests in the course of bargaining and, if found to have entered into a bad bargain, to deal with the consequences as part of the natural risks that come with these activities. From a free market point of view, the bargain of the bank should be protected to safeguard economic freedom and market certainty. However, these broad principles beckon elaboration as to the precise vision of substantive fairness that the court will uphold in any given circumstances. The courts cannot turn a blind eye to the sureties who are not following lock and step in terms of market expectations and therefore, imposing the standard caveat of 'buyer beware!' does not assist. The emotionally vulnerable surety, who is often outside of the contractual dealings between the debtor and the bank and is dependent on the debtor for information, relies on them for transparency and full knowledge to make any decision that can meaningfully be attributed to them, needs equity's special protection. As noted in the aforementioned sections, virtually all of the markers of a binding contract are present in many of the cases. The issues come down to one of fairness, the conscience of the court in determining who, of all the parties involved, carries the most 'blame' or should suffer from the vicissitudes of market politics. More specifically, it might ultimately be down to who the court sees as having the capacity to withstand the loss. Given the widespread cases where guarantees are procured in this manner, what are the arguments to allow banks to continue to accept guarantees from unprotected sureties without more and to foreclose the mortgaged properties in the event of default? Isn't the bank a "better loser" to book a deficit that is proportionately less austere than the potential loss that the surety must shoulder?<sup>319</sup>

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<sup>319</sup> [I]t is not really the right answer to evict the wife and family from their home and let them sue the solicitor for negligence. Surely it would be better justice to set the charge aside and let the bank sue the solicitor? Its interest, after all, unlike that of the wife, is purely financial. Millet, at 250;

The courts never compare the real losses to the mortgagor and mortgagee respectively. If the woman wins, the lender loses money – perhaps a few hundred thousand pounds – a lot to an individual, not so terrible for a bank. If the woman loses, she loses her home, [and] often her marriage. . .

Throughout the years, the courts have been juggling market-individualist ideology with consumer-protectionism to develop a series of rules to map out the reasonable boundaries for the bank's obligation while providing a suitable ring of safety for vulnerable actors in the market. The approaches vary with each jurisdiction. Sometimes "market-individualism" prevails over "consumer-welfarism"; at other times "consumer-welfarism" triumphs "market-individualism".<sup>320</sup>

While fairness and altruism underpin modern English and Australian contract laws, the extent to which Hong Kong contract law embraces such concepts has yet to be examined in greater detail. Insofar as undue influence is concerned; however, the courts' jurisprudence signifies that commercial certainty prevails over fairness to a large extent.<sup>321</sup> Not only is undue influence relatively difficult to establish given the family business model, which often imbues company boards with representations of family members in shareholdings and positions of responsibility, and coopts into the business sphere, a complex and "personal" cultural context which operates against the backdrop of another culturally informed business environment. Suffice it to say, the triggering point for the bank's obligation in such cases stands at the highest in Hong Kong considering prevalent practices in the U.K., and Australia. The bank would only be put on inquiry if it has knowledge-based notice of the exercise of undue influence. Therefore, in most instances, the court appears to silently condone the lending procedures of the bank.<sup>322</sup>

In contrast, in the U.K., there is a positive duty to take reasonable steps, which precedes any requirement to establish knowledge of undue influence. Lord Nicholls in *Etridge* noted that this duty is unique to classical contract law:

The law imposes no obligation on one party to a transaction to check whether the other party's concurrence was obtained by undue influence. But *O'Brien* has introduced into the law the concept that, in certain circumstances, a party to a contract may lose the benefit of his contract, entered into in good faith, if he *ought* to have known that the other's concurrence had been procured by the misconduct of a third party.<sup>323</sup>

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Auchmuty, *supra* note 49, at 272.

<sup>320</sup>MCKENDRICK, *supra* note 37.

<sup>321</sup> See *supra* notes 252–307 and accompanying text.

<sup>322</sup> The only two cases that demonstrate an alternative approach are *Well Lok* and *Quality Prince*, in which the courts adopted the U.K. 'duty-based notice' approach and took the opportunity to criticize the bank for not directly dealing with the wife and leaving everything to the husband, and relying on conveyancing clerk, who had no authority, to give advice (which he did by mechanically explaining the transaction).

<sup>323</sup> Royal Bank of Scotland. v. Etridge (No.2) [2001] UKHL 44, [2002] 2 AC 773, [40].

This transition from a knowledge-based to a duty-based concept of notice would require the bank to adhere to the procedural safeguards even if any inquiries would be fruitless.<sup>324</sup> This demonstrates the U.K. courts' willingness to stretch legal concepts to accommodate changing tides in terms of economic actors in the market landscape and to protect vulnerable groups.<sup>325</sup> However, in setting up these obligations, out of concern for economic certainty and consistent with its general approach towards equity,<sup>326</sup> the English courts have stopped far short of what might be required of banks in terms of a genuine engagement of due diligence obligations, which could take hold for certain sureties. In doing so, the courts have inadvertently given a nod to existing commercial practices that exacerbate circumstances of vulnerable sureties. The net result is again, a prioritization of the banking sector's financial interests and the need for commercial certainty to serve the broader goals of protecting Hong Kong's role as an international financial center.<sup>327</sup>

On the other hand, Australian courts have not shied away from imposing a more stringent set of obligations for the bank's exercise of due diligence and fair practice. It has been argued that Anglo-Australian law has been more perceptive in recognizing the principle of egalitarianism with a view to protecting socially and economically disadvantaged actors compared with English law. This is manifested by rigorous oversight of unconscionable conduct, unfair terms and unjust contracts using equity and statute law as part of its regulatory framework to guard against inequities and substantive unfairness.<sup>328</sup> Specifically, the Contracts Review Act 1980 of New South Wales has significantly broadened the grounds for setting aside an "unjust" guarantee contract.<sup>329</sup> In determining unjustness underlying the guarantee contract, the court is expressly required to take into account public interest as

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<sup>324</sup> John Mee, *Undue Influence, Misrepresentation and the Doctrine of Notice*, 54 CAMBRIDGE L.J. 536, 541 (1995).

<sup>325</sup> *Barclays Bank PLC v. O'Brien* [1994] 1 AC 80, [196] (HL). For discussion about the unconventional use of the doctrine of notice in *O'Brien*, see HONG KONG MONETARY AUTHORITY, *Survey of the Financing Situation of Small and Medium-Sized Enterprises*, (Aug. 2000); Christine N. Booth, *Undue Influence and Triangular Situations: The Husband, the Wife, and the Bank*, 26 H.K. L.J. 66 (1996). For the defense of the expended use of notice, see Lord Millet, *The Husband, the Wife and the Bank*, 4 PRIV. CLIENT BUS. 244, 244–45 (2001); *Etridge* [2001] UKHL at [38]–[43].

<sup>326</sup> English contract law's concern over economic certainty has a wider on equity in general, as is evident from the rejection of Lord Denning's proposal for a general doctrine of inequality of bargaining power, as well as the limited development of the doctrine of unconscionable bargain.

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<sup>328</sup> JEANNIE PATERSON, *CONTRACT: CASES AND MATERIALS* 936–39 (2009); Tyrone M. Carlin, *The Contracts Review Act 1980 (NSW) — 20 Years On*, 23 SYDNEY L. REV. 125, 125–26 (2001); John Goldring et al., *The Contracts Review Act (N.S.W.)*, 4 U. N.S.W. L.J., NO. 2, 1981, at 1–2, 14.

<sup>329</sup> Save for limited exceptions, the Act is applicable to all contracts rather than merely consumer contracts for the supply of goods and services. The vast majority of the cases decided under the Act were mortgage and guarantee cases. See Carlin, *supra note* 328, at 131.

well as the consequences of non-compliance with the contract.<sup>330</sup> The court also considers myriad other factors including, for example, material inequality in bargaining power between the contracting parties;<sup>331</sup> whether the terms are subject to negotiation;<sup>332</sup> educational and economic background of the parties;<sup>333</sup> whether the party has received independent legal advice;<sup>334</sup> the existence and use of undue influence, and unfair pressure or tactics.<sup>335</sup> The legislature supported the enactment of the Act despite the prospects for commercial uncertainty which the use of the doctrine of unconscionability would invariably carry.<sup>336</sup> It considered this a low price to pay in exchange for a fair market.<sup>337</sup>

### *B. Unconscionability the Better Approach?*

The Australian and UK approaches each have their own advantages and drawbacks in terms of protecting vulnerable sureties. On one hand, the Australian approach has the advantage of scrutinizing the bank's practice against the vulnerability of the surety on a case-by-case basis instead of focusing on a set of rigid pre-determined steps as a gauge for compliance with due diligence obligations. In *Garcia*, the majority of the High Court of Australia ruled:

As is implicit in what we have said, we prefer not to adopt the analysis made by Lord Browne-Wilkinson in *Barclays Bank Plc v O'Brien* which proceeded from identifying "the circumstances in which the creditor will be taken to have had notice of the wife's equity to set aside the transaction." ... Such an analysis may be required in ordering the priority of competing interests in property but in the present context it may well distract attention from the underlying principle: that the enforcement of the legal rights of the creditor would, in all the circumstances, be unconscionable.<sup>338</sup>

Similarly, Lord Millett speaking extra-judicially suggests that the English court ought to embrace the use of unconscionability in guarantee cases like its Australian counterpart, concerning itself with the fairness of the transaction.

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<sup>330</sup> *Contracts Review Act 1980* (NSW) s 9(1) (Austl.).

<sup>331</sup> *Id.* § 9(2)(a).

<sup>332</sup> *Id.* § 9(2)(b).

<sup>333</sup> *Id.* § 9(2)(f).

<sup>334</sup> *Id.* § 9(2)(h).

<sup>335</sup> *Contracts Review Act 1980* (NSW) § 9(2)(j) (Austl.).

<sup>336</sup> Carlin, *supra* note 328, at 136–41.

<sup>337</sup> Goldring, *supra* note 328, at 14.

<sup>338</sup> *Garcia v Nat'l Austl Bank Ltd.* [1998] HCA 48, ¶ 39 (Austl.).

[P]erhaps we need to consider a radically different approach. Perhaps we should consider expanding the claim to set aside harsh and unconscionable bargains, much as the High Court of Australia has done, and set the transaction aside if (i) the transaction is inexplicable except by the presence of undue influence (where, for example, there is no sexual or emotional relationship); or (ii) the bank is aware that the surety has not had the benefit of legal advice; or (iii) the bank is aware, and knows that the surety and the solicitor is unaware, of facts which make the transaction excessively improvident; or (iv) the security taken is disproportionately disadvantageous and more onerous than the situation justifies. In the last-mentioned case, the wife should be required to submit to an order cutting the security down to size rather than setting it aside completely.<sup>339</sup>

However, the Australian approach requires the bank to have *knowledge-based* notice of the surety's situational vulnerability arising out of the relationship between the donor and donee. While commercially viable, this fails to adequately protect vulnerable sureties, especially where those setting out to exploit their vulnerable donees take advantage of this cloud of opaqueness to ensure the loan comes through.<sup>340</sup> Dissenting in *Garcia*, Justice Kirby suggested that, in order to address the situational vulnerability of the surety, the re-formulated *O'Brien* principle should be adopted in addition to the existing unconscionability approach and in place of the special equity for wives.<sup>341</sup>

The fact that the *Amadio* principle is incapable of protecting volunteers who, because of the vulnerability of their personal relations with a borrower, and the lack of advice and information, bind themselves to a potentially prejudicial transaction, has been demonstrated several times. Suggestions, including some that I have made myself, that *Amadio* covered the field of available equitable relief must now be regarded as incorrect.

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I favor a re-formulation of the principle expressed by Lord Browne-Wilkinson in *O'Brien*. It is my view that the principle should be stated thus: Where a person has entered into an obligation to stand as surety for the debts of another and the credit provider knows, or ought to know, that there is a

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<sup>339</sup> Millett, *supra* note 140 (analyzing *Royal Bank of Scotland PLC v. Etridge* (No. 2) [1998] 4 All E.R. 705 (CA (Civ)) before its appeal to the House of Lords).

<sup>340</sup> *Garcia* [1998] HCA at ¶ 72 (Kirby, J., dissenting).

<sup>341</sup> *Id.* at ¶¶ 72–76 (Kirby, J., dissenting).

relationship involving emotional dependence on the part of the surety towards the debtor.

. . . .

In this way, equity is capable of affording a principle for relief in cases of this kind which (1) is expressed in non-discriminatory terms; (2) is addressed to the real causes of the vulnerability; and (3) recognizes the credit provider's superior powers to insist that volunteers in a vulnerable position are afforded access to relevant information and, where necessary, independent advice.<sup>342</sup>

The fact that two celebrated judges of both jurisdictions favor the approach of the other jurisdiction is evidence that neither the UK nor the Australian approach is a perfect safety net in and of itself. Although the two approaches overlap in certain situations,<sup>343</sup> by channeling the inquiry to different issues and contextual factors, they can only remedy either the relational vulnerability the surety has been subjected to and exploited under by the debtor or the primary wrongdoing, complicity or knowledge of wrongdoing by the bank, but not both. In order to do both however, the courts may need to amalgamate the duty of due diligence as suggested in *O'Brien* and the remedial measures proposed by the Australian court in *Amadio*.

Unfortunately, the requirements set by the House of Lords in *Etridge* — a proper explanation as to the nature and effect of the transaction — seem to be considered merely administrative formalities, which are to reduce, let alone eliminate, the risk of the surety entering into a transaction under undue influence. Compulsory independent legal advice should replace the perfunctory “explanation” to be offered to sureties in all non-commercial guarantees.<sup>344</sup>

As Lord Hobhouse has pointed, simply requiring the bank or its solicitor to proffer an explanation as to the nature and effect of the transaction to the surety without offering any valuable advice would be insufficient to protect the surety's interests, especially if she thinks she has no choice in the matter. Before he sat in the House of Lords in *Etridge*, in his dissenting judgment as Hobhouse LJ in *Banco Exterior*, his Lordship drew a sharp distinction between being “informed” and being “advised”:

An understanding of the document may be the first step in the exercise of a free choice whether or not to sign it, but it is not the point at which the law of undue influence is directed. A person may be fully informed as to the content of the document and its legal effect and yet be acting under the undue influence

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<sup>342</sup> *Id.* ¶¶ 72–74 (Kirby, J., dissenting).

<sup>343</sup> Bigwood, *supra* note 166, at 514; Mindy Chen-Wishart, *The O'Brien Principle and Substantive Fairness*, 56 CAMBRIDGE L.J. 60, 62 (1997).

<sup>344</sup> *Royal Bank of Scotland v. Etridge (No.2)* [2001] UKHL 44, [2002] 2 AC 773.

of another when she signs it. The two considerations are distinct. As Lord Browne-Wilkinson points out, it is the undue influence, not the lack of comprehension that gives the wife the defence.

It must be remembered that the starting point of this exercise is that the wife's will is being unduly and improperly influenced by the will of her husband. The steps taken have to be directed to freeing her of that influence or, at the least, providing some counterbalance.<sup>345</sup>

This sentiment resurfaces in his judgment in *Etridge*, although he ultimately entered judgment with the majority:

Similarly, the solicitor's instructions may simply be to explain to the signatories the character and legal effect of the documents. This is a low order of advice which can be given solely by reference to the formal documents to be signed.... Even when a solicitor is instructed to explain the character and legal effect of a document, he will not without more concern himself at all with the interests of the wife or whether she is accepting the obligations freely and with knowledge of the true facts. Under these circumstances it is scarcely surprising, as the facts of these cases and many others show, that wives are still signing documents as a result of undue influence. The involvement of a solicitor has too often been a formality or merely served to reinforce the husband's wishes and undermine any scope for the wife to exercise an independent judgment whether to comply. ... The law has, in order to accommodate the commercial lenders, adopted a fiction which nullifies the equitable principle and deprives vulnerable members of the public of the protection which equity gives them.<sup>346</sup>

Independent legal advice given specifically with the interests of the surety in mind would provide the much-needed counter-balance here. It might lead her to consider issues that she might not have thought about before, or to reconsider and maybe negotiate certain terms with the bank or to work out within the range of narrow options she has in light of cultural or other operative constraints, what are the minimal terms required for her agreement. This advisory element in the process has significant intrinsic value as it signals to the surety, contrary to perhaps her own beliefs, impression, knowledge and understanding, that she has a role to play in the contract negotiating process. In practice, for the most part, the surety has little direct interaction with the bank and virtually no negotiating power as to the terms of the guarantee. It is

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<sup>345</sup> *Id.* at 339–341.

<sup>346</sup> *Etridge* [2001] UKHL UKHL at [115] (Hobhouse L.).

only fair that, being one of the contracting parties to the transaction, the surety is included, informed and consulted during the contracting process rather than to simply feature towards the tail end as a vehicle of support for the debtor's loan application.

Although the restatement in *Etridge* requires the solicitor to make it clear, in a meaningful way, to the surety that she has a choice and she can renegotiate the terms if she wishes,<sup>347</sup> the practice of solicitors as described in case law suggests that the "choice" is more often than not presented as a "take it or leave it" deal without more. The process of the explanation is often intimidating and merely perfunctory:<sup>348</sup> the surety might feel intimidated with the heftiness of the legal documents which she has to parse through, in her view, on her own accord, or she may be hesitant to ask questions, worried that the length of time seeking legal advice might be read by the debtor husband as signaling her lack of trust or willingness to accede to the request. She might even fail to understand the underlying purpose of the process, which is to protect *her* interests alone.<sup>349</sup> Given that explanations proffered by solicitors have generally not lived up to the expectations outlined in *Etridge*, the court ought to reevaluate the extent to which banks should be permitted to rely on the competence of the solicitor in fulfilling his due diligence obligations on their behalf, without the imposition of positive duties.

Reliance on the competence of solicitors has long been treated as the "oils to the wheels" of commercial transactions,<sup>350</sup> and most of the time the banks are allowed to assume that competent advice has been given once it is confirmed that a consultation with the surety has taken place.<sup>351</sup> Any knowledge, action or omission (e.g. knowledge that the solicitor does not possess the necessary financial information) on the part of the lender that *undermines the intended purpose and effect of legal advice* and would still taint the transaction despite the presentation of a certificate that legal advice has been given.<sup>352</sup> To this end, the court must be more vigilant in scrutinizing what happens as a matter of fact during the meeting with the solicitor. Lord Millett has expressed strong opinions (extra-judicially) on the duty of the solicitor. He raises several questions that the court might need to ask:

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<sup>347</sup> *Id.* at [65].

<sup>348</sup> For the Hong Kong practice among legal professionals, see *Dah Sing Bank v. Sing Hai Handbags Mfg. Ltd.*, [2007] 3 H.K.C. 515; for the UK practice among legal professionals, see Millett, *supra* note 140, at 247–48; see also *Etridge* [2001] UKHL 44, [52], [68] (Nicholls, L.), [121] (Hobhouse, L.).

<sup>349</sup> Fehlberg, *supra* note 272, at 684, 688; Millett, *supra* note 140, at 246–47.

<sup>350</sup> *Bank of Baroda v. Rayarel* (1995) 27 H.L.R. 387, 393 (UK).

<sup>351</sup> See *Bank of Baroda v Rayarel* [1995] 2 FLR 376 (UK); *Banco Exterior International v. Mann, Mann and Harris* [1995] 1 FLR 602; *Massey v. Midland Bank plc.* [1994] 2 FLR 342; *Bank of Credit and Commerce International SA v. Hussain* [1999] 12 WLUK 461; see also Auchmuty, *supra* note 49, at 263–64.

<sup>352</sup> See *Dowdle v. Pay Now for Business Pty Ltd. & Anor* [2012] QSC 272 (Austl.); *Banco Exterior International v. Mann, Mann and Harris* [1995] 1 FLR 602 (dissenting judgment of Hobhouse LJ).

I must admit that I would have loved to cross-examine the solicitor in some of these cases. So “she appeared to understand the transaction”, did she? Did you tell her that it was a continuing security? Or an “all moneys” charge? (Do you even know what those expressions mean?) Did you tell her that it guaranteed the entire overdraft, not just the additional borrowing her husband told her about? (Did you take the trouble to find out what she actually believed? Or how much the overdraft actually was?) Did you tell her that it secured future borrowings, including increases in the overdraft? Or that the bank could increase the overdraft, and with it her liability, without reference to her? Did you tell her that she could stop this at any time simply by writing a letter to the bank? (Did you assume she knew that already? Did you even know it yourself?) You told her that her liability was “unlimited”, but did you tell her that this was not necessary, or even appropriate; that she could limit her liability to a stated sum if she wished, and that it would be wise for her to do so?

. . . .

He may have to advise her to decline to enter into the transaction at all. He does not discharge his duty unless he takes the trouble to discover the nature of the transaction, and this includes at least the amount of the overdraft and the reason why bank is demanding security when it was satisfied without it before. There is no difficulty about this. He can ask the husband, and seek his authority to obtain confirmation from the bank. The husband is in no position to refuse.

The solicitor must certainly advise the wife of any alternatives which are open to her. It is not enough for him to tell her that the charge is unlimited if he does not tell her that she could offer the bank a limited charge instead. He should if necessary offer to negotiate with the bank on her behalf. The solicitor should not assume that the bank's proposal is on a “take it or leave it” basis, or that it is in an impregnable negotiating position. In fact, its position *vis-à-vis* the wife is relatively weak, since she is not obliged to give security, any security is better than none, and the bank cannot afford to take security which it knows the wife's solicitor had advised her not to give.<sup>353</sup>

Such inquiry regarding the quality of the meeting must be made if the court is to treat the advice not as merely procedural formality but rather, as a substantive means to clear the conscience of the bank. Whether the advice is

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<sup>353</sup> Millett, *supra* note 140, at 247–48.

adequate should be fact-sensitive. It must be demonstrated that in a meeting without the presence of the debtor, the solicitor has explained in meaningful and accessible layman terms taking into account the affluence and language skills of the surety, and ensuring that the surety is able to appreciate the fact that the advice is not a mere formality but for her benefit, seeking all the relevant information from the bank and to bargain for more favorable terms if the surety wishes. The last two requirements mean that the banks should not be allowed to enforce a standard guarantee that is not tailored to the capacity of individual surety when the solicitor does not bother to ask for additional contextual information or negotiate the terms on behalf of the surety.

Lord Millet asks, “If the bank knows that no competent solicitor properly informed about the state of the account could possibly advise the wife to enter into the transaction, and that the solicitor advising the wife has not taken the trouble to make any inquiries of the bank, why should it be entitled to rely on his advice as dispelling any suggestion of impropriety?”<sup>354</sup>

Lord Hobhouse has further intimated an important signifier in terms of notice or knowledge on the part of the bank. He states,

A further point of relevance which has been commented on in the past and should be commented upon again has been the use by banks of forms under which the surety gives an unlimited guarantee or charge. This was what banks ordinarily asked for. Indeed, the guarantees obtained in the cases from which these appeals arise, are unlimited. Banks have acknowledged that such guarantees are likely to be unnecessary and unjustifiable where private sureties are sought. They should be subject to a stated monetary limit on the surety's liability and any legal adviser should so advise a private client. Where a bank has nevertheless obtained an unlimited guarantee from a wife, it should ask itself how that can be if the wife has in truth been independently advised. Would anyone who had a proper regard to the wife's interests ask her to sign an unlimited guarantee or charge.<sup>355</sup>

There will undoubtedly be cases where sureties refuse to act on the legal advice and signs of potential exploitation regardless, especially when sureties feel obliged to submit to and not to question the debtor's decision.<sup>356</sup> In *State Bank of New South Wales Ltd. v. Layoun*, the bank failed to ensure a Syrian couple, who reposed blind trust in their eldest son, who enjoys a special position in a Syrian family, had received proper advice. The bank sought to

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<sup>354</sup> *Id.* at 249.

<sup>355</sup> *Royal Bank of Scotland v. Etridge (No.2)* [2001] UKHL 44, [2002] 2 AC 773 (Hobhouse, L).

<sup>356</sup> For example, *Barclays Bank PLC v. Coleman* [2001] QB 20 (Eng.); *UCB Corp. Serv. Ltd. v. Kohli* [2004] EWHC (Ch) 1126; *Ellis J Enterprise, Alia Elkofairi, National Australia Bank v. Satchithanatham* [2009] NSWSC 21 and the Hong Kong cases discussed above.

argue that the cultural forces governing the relationship would render any such advice unwanted and ineffective in any case. The Supreme Court of New South Wales held:

Submissions of the Defendants: "To suggest that the trust and confidence reposed as part of Syrian culture (arguably rendering the 'truster' in as great a need of the equitable protection afforded by Garcia as any other party falling within its principles) is not subject to scrutiny and protection in equity because it is 'special' and 'Syrian' is an inappropriate and inexcusable exception to the equitable protection offered by the Courts of this country. To hold otherwise could render a creditor's ability to rely upon a security partly dependent upon the nationality and culture of its customers. That is not the law; to the contrary, in this regard, justice is impartial and 'culture-blind'".

The point for the defendants is well made.<sup>357</sup>

Since the provision of legal advice is intended to safeguard procedural fairness, empower decision makers, and encourage them to make informed decisions, as a first step, it should be irrelevant whether the advice will be acted upon or not, and is a matter out of the bank's control. If anything, this group of sureties characterizes vulnerabilities which should trigger additional protection from equity rather than being excluded from its purview on account of a claim that it would make no difference to their decision even if legal advice was properly given. The court should focus on the quality of advice given rather than the causative effect or impact of the advice or the receptivity of the surety to such. The bank's ability to enforce the guarantee should be tied to the actual advice given and its quality in each individual case. This can be achieved by prohibiting the bank from "outsourcing" its obligation and isolating itself from the potential consequences of subpar advice, and requiring it to employ a solicitor to advise the surety independently and to act as its agent so that knowledge gained in the process of the meeting may put the bank on notice or the giving of improper or poor-quality advice can be ascribed to the bank. This is the approach advocated by Lord Millett, speaking extra-judicially:

The other difficulty is that, under the law as it stands, the bank almost invariably gets a good security and the wife is left to sue the solicitor, when she has a difficult question of causation to overcome. What would have happened if the solicitor had given her proper advice? In many cases she would still have entered into the transaction. If so, there is no loss. Quite apart from the problem of causation, it is not really the right answer to evict the wife and family from their home and let them sue the solicitor for negligence. Surely it would be better justice to set

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<sup>357</sup> State Bank of New South Wales Ltd. v. Layoun [2001] NSWSC 198.

the charge aside and let the bank sue the solicitor? Its interest, after all, unlike that of the wife, is purely financial. It is difficult to see how this result can be achieved merely by arranging for the bank to pay the solicitor. It would be necessary to insist that the bank should instruct him to act for it as well as for the wife, thereby giving the bank imputed notice of the advice (or lack of it) actually given to the wife. The banks would, I think, recoil from this suggestion; but it is much closer to what Lord Browne-Wilkinson actually envisaged in *O'Brien*.<sup>358</sup>

Lord Brown Wilkinson in *O'Brien* has taken the view that the law should require standards of banking practices accorded to sureties to be enhanced.<sup>359</sup> The court in *Etridge*, however, not only shied away from taking up the opportunity to establish a fair practice standard but deferred to the common banking practice.<sup>360</sup> Requirements that are costly or might expose the banks to extra liability have been undone.<sup>361</sup> Moreover, in subsequent cases, lower courts have treated the minimal core obligations set out in *Etridge* as the 'best practice'.<sup>362</sup>

The courts should reinstate the original intent underlying the *O'Brien* decision and heighten the requirements pertaining to providing independent legal advice. Moreover, the UK and Hong Kong courts should veer closer to the Australian model by adopting the unconscionability approach and scrutinize unreasonable and unfair banking practices against sureties more vigilantly. An example would be the bank's indifference to the surety's ability to service the loan and lax attitude in giving out loans to businesses that are likely to fail. In the Hong Kong case of *DHB v Ho Yiu Yuk*<sup>363</sup>, a god child scammed her godmother out of her savings and properties. The bank was surprisingly honest and told the court that its officer was aware that the transaction was suspicious but he decided to proceed nonetheless because the transaction was very profitable to the bank.

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<sup>358</sup> See Millett, *supra* note 140, at 250.

<sup>359</sup> Barclays Bank PLC v. O'Brien [1993] 6 UKHL 198.

<sup>360</sup> *Etridge* [2001] UKHL at 95. (Per Lord Clyde: "But matters of banking practice are principally matters for the banks themselves in light of the rights and liabilities which the law may impose upon them. I would not wish to prescribe what those practices should be. One can only suggest some courses of action which should meet the requirements of the law.")

<sup>361</sup> Barclays Bank PLC v. O'Brien [1993] 6 UKHL 198. For example, Lord Browne-Wilkinson's proposed requirement of compulsory private meeting was removed. Recognizing this might expose the bank to liability such as misrepresentation, the court in *Etridge* accepted that it is sufficient for the bank to outsource this obligation to an 'independent' solicitor, who can act for the husband as well as the bank. *Etridge* [2001] UKHL at [55], [69]–[74], [96], [113], [115], [173]–[174].

<sup>362</sup> Banco Exterior Internacional v. Mann [1955] 27 HLR 336.

<sup>363</sup> *DHB v. Ho Yiu Yuk* [2002] HKEC 1330.

C. *Incentivizing Compliance with Principles of Substantive Fairness*

1. What Role for the Legislature?

Lord Scarman, in rejecting Lord Denning's proposal of a general doctrine of inequality of bargaining power, expressed the view that significant changes in law on grounds of policy ought to be secured through legislation rather than the courts.<sup>364</sup> Although the underlying intent is premised on the principle of separation of powers, it creates a dangerous paradox leaving consumer protection to be developed through the common law, with courts being mindful of the largely market-individualist paradigm which Hong Kong has benefited from and to keep that intact, while on the other hand, relegating interests of substantive fairness to be enacted by the legislature. The roles should, in fact, be reversed.<sup>365</sup>

Kirby J addressed a similar argument in *Garcia* when considering whether the special equity for wives should be abolished and replaced by a broader equitable doctrine for people vulnerable to abuse of trust and confidence. He said:

[E]quitable principles are themselves in a constant state of evolution in response to the developments of society. Borrowing against the family home to support a business venture is one such development which was not prevalent in earlier times. The changing nature of domestic relationships is another such development. Equitable doctrine is perfectly capable of adjustment to such changes...<sup>366</sup>

If it is true that some (but not all) wives continue to need the protection of a special rule of equity, the duty of a court such as this, absent applicable statutory provisions or judicial authority accepted as binding, is to "restate the law in a form which is principled, reflects the current requirements of society and provides as much certainty as possible."<sup>367</sup>

When there exists a legal vacuum for the effective protection of vulnerable individuals, the task of the court, and equity in particular, is to "evolve" and restate the legal principle to reflect the considerations of fairness, consumerism and altruism for a cosmopolitan age to ring in progress rather than to defer the matter to the legislature indefinitely.<sup>368</sup> The courts have a legitimate interest in and the authority to address the socio-legal implications of existing legal principles and whether they continue to be relevant in the

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<sup>364</sup> *National Westminster Bank PLC v. Morgan* [1985] 1 All ER 821.

<sup>365</sup> MCKENDRICK, *supra* note 37.

<sup>366</sup> *See Garcia v. Nat'l Austl Bank Ltd* [1998] HCA 48, ¶79 (Austl.) (Kirby J., dissenting).

<sup>367</sup> *See id.* ¶ 66.

<sup>368</sup> *See* MCKENDRICK, *supra* note 37, at 301–02.

economic environment and if not, to restate the principles in a manner that resonates with current practices and the cultural, business and societal environment more broadly.

## 2. Economic Stability and Market Dynamics

It is evident that the courts have given significant weight to values of economic stability and the social value of putting up the matrimonial home as suretyship for funding small family businesses.<sup>369</sup> This is clear from the jurisprudence multiple common law courts, including from *O'Brien* (UK), *Etridge* (UK), and *Garcia* (Australia).

Lord Brown-Wilkinson in *O'Brien* said:

...It is easy to allow sympathy for the wife who is threatened with the loss of her home at the suit of a rich bank to obscure an important public interest viz., the need to ensure that the wealth currently tied up in the matrimonial home does not become economically sterile. If the rights secured to wives by the law renders vulnerable loans granted on the security of matrimonial homes, institutions will be unwilling to accept such security, thereby reducing the flow of loan capital to business enterprises. It is therefore essential that a law designed to protect the vulnerable does not render the matrimonial home unacceptable as security to financial institutions.<sup>370</sup>

Lord Nicholls in *Etridge* similarly said:

More than two-thirds of householders in the United Kingdom now own their own homes. For most home-owning couples, their homes are their most valuable asset. They must surely be free, if they so wish, to use this asset as a means of raising money, whether for the purpose of the husband's business or for any other purpose. Their home is their property. The law should not restrict them in the use they may make of it. Bank finance is in fact by far the most important source of external capital for small businesses with fewer than ten employees. These businesses comprise about 95 percent of all businesses in the country, responsible for nearly one-third of all employment. Finance raised by second mortgages on the

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<sup>369</sup> Commentators have questioned whether this assumption made by the court is justified at all. Debra Morris, *Surety Wives in the House of Lords: Time for Solicitors to 'Get Real'? Royal Bank of Scotland Plc v. Etridge*, 11 FEMINIST LEGAL STUD. 57, 66 (2003); see Auchmuty, *supra* note 49, at 272–73.

<sup>370</sup> *Barclays Bank PLC v. O'Brien* [1993] 6 UKHL 188.

principal's home is a significant source of capital for the start-up of small businesses.

If the freedom of home-owners to make economic use of their homes is not to be frustrated, a bank must be able to have confidence that a wife's signature of the necessary guarantee and charge will be as binding upon her as is the signature of anyone else on documents which he or she may sign. Otherwise banks will not be willing to lend money on the security of a jointly owned house or flat.<sup>371</sup>

Likewise, in *Garica*, Kirby J addressed this very issue albeit from a slightly different perspective:

The desirability of protecting vulnerable persons from loss of their assets, particularly their homes, must therefore be balanced against the undesirability of economically sterilising those assets. Ironically, any judicial response which imposes upon lenders an unrealistic standard would also be tantamount to a judicial divestiture of a married woman's legal capacity to execute a guarantee. With capacity comes obligation.<sup>372</sup>

The argument of economic stability is two-fold. First of all, if the law concerning the enforceability of *in real* guarantee is uncertain, the bank might be discouraged from giving out loans due to the heightened risk of unsecured bad debts. As we have seen, the response of the UK courts to this concern is to envisage certain "reasonable steps" for the bank to follow in order to protect its interest. This brings us to the second point dealt with by Kirby J – that if the standard is unduly high, however, the lenders would again default to a conservative position and exercise caution against giving out loans. The joint and several effects of this is that the family wealth tied in with the property cannot be realized without the incursion of extra costs, disincentivizing bank-lending for particular communities. And accordingly, the flow of capital for small to medium sized enterprises and the broader economy would be affected.

Small to medium sized enterprises (SME) are a large part of the modern economy and make significant economic contributions in all three jurisdictions.<sup>373</sup> It is also the case that family wealth tied up in the matrimonial

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<sup>371</sup> *Royal Bank of Scotland v. Etridge (No.2)* [2001] UKHL 44, [2002] 2 AC 773 [34], [45].

<sup>372</sup> *See Garcia v Nat'l Austl Bank Ltd* [1998] HCA 48 ¶ 66.

<sup>373</sup> Australian Government Department of Innovation Industry, Science and Research, *Key Statistics: Australian Small Businesses* (2011); Department of Business Innovation Skills, *Business Population Estimates for the UK and Regions* (2013), <https://www.gov.uk/government/collections/business-population-estimates> [hereinafter *Austl. Small Bus.*]; Hong Kong Special Administrative Region Government Information Services

home is a significant source of funding for such business ventures, especially in Hong Kong, where property prices are extremely high and the family business model is prevalent.<sup>374</sup> However, due to a number of factors, a second mortgage of the property to the bank might not be a popular choice (or possible option) for funding as assumed here by the judges. Many of the SMEs are able to start up, operate, and grow without obtaining any bank loans at all.<sup>375</sup> However, for those who require the bank's support, their demands are generally not met.<sup>376</sup> In a sense, the availability of collateral as security might be an important factor in determining whether an SME can secure a bank loan,<sup>377</sup> but the greatest obstacle for SMEs to finance their businesses remains the general attitude of the bank. The bank's lending policy towards SMEs is conservative due to the higher risk and lower profit margins compared to lending to large enterprises. Regional/global economic downturns,<sup>378</sup> inability to meet lending standards (inadequate disclosure of financial information, poor accounting standards, low transparency of operations),<sup>379</sup> and high delinquency rates,<sup>380</sup> all undermine the chances of SMEs obtaining bank credit. However, the impact of the unavailability of matrimonial home for a mortgage might not be as direct and devastating to the SME or the market as the courts in *O'Brien* and *Etridge* have suggested.

The proposed requirements might increase the administrative and financial burdens for the bank, but it might not discourage the bank from lending as these costs can easily be transferred and diverted to the market. Moreover, the bank is well resourced and ultimately stands to benefit from these steps which will ensure the enforceability of the guarantee, its principal collateral. In the end, the value of providing fair protection to vulnerable sureties manifestly outweighs the financial costs of not doing so. In the words of Lord Millett:

The bank can reasonably be asked to pay, at least in the first instance, since it is really for the bank's benefit that the task is undertaken at all. But the bank will only add the solicitor's charges to the account. This is a development which I would

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Department, Hong Kong: The Facts: Trade and Industry (2014) [hereinafter Hong Kong Small Bus.].

<sup>374</sup> Booth, *supra* note 325 *The Bank*, 26 H.K. L.J. 70 (1996).

<sup>375</sup> Hong Kong Small Bus., *supra* note 373 (About half of the surveyed companies did not obtain any bank loan, but note the small sample size); Austl. Small Bus., *supra* note 375, at 34 (only 26% required additional funding to operate).

<sup>376</sup> Hong Kong Small Bus., *supra* note 373; Austl. Small Bus., *supra* note 373.

<sup>377</sup> Hong Kong Small Bus., *supra* note 373.

<sup>378</sup> *Id.*; Austl. Small Bus., *supra* note 373.

<sup>379</sup> Hong Kong Small Bus., *supra* note 373; Austl. Small Bus., *supra* note 373.

<sup>380</sup> Hong Kong Small Bus., *supra* note 373; Austl. Small Bus., *supra* note 373.

wish to encourage. Not only will a proper fee encourage the solicitor to do the job properly, but it will bring home to him that it is the bank's interest, as well as the wife's, that she really does understand the underlying transaction and is giving her free and informed consent to it. The downside is that this will add to the cost of an already expensive operation. The upside is that the extra cost is negligible compared, say, to the cost of having the house valued, and that it will save much litigation."<sup>381</sup>

The more substantive argument in *O'Brien* and *Etridge* is that uncertainty as to the enforceability of the guarantee would discourage the bank from lending. However, the doctrines of unconscionability or undue influence, and equitable doctrines more broadly for that matter, stand steadfast as legal principles ready to act on the conscience of parties to ensure fairness and justice. They are by design intended to operate flexibly and to offer maximum coverage to those who need to enter equity's fold to prevent the commercial world from shirking the normative mores that define the moral core of fairness. They ought to figure as part of the conversation on best practices in business even at the cost of losing some financial profits.<sup>382</sup> Dismissing the use of these doctrines to enhance market fairness on account of the desire for near-absolute market certainty and economic viability of the business environment violates these commitments. Although unconscionability is a fluid concept that has not been delineated by rigid rules, this does not preclude the practical uses to which it can be put in the context of contractual obligations. Common law and equity, which have developed incrementally over the centuries based on analogical reasoning and the application of the doctrine of binding precedent, are well-suited to address any uncertainties or to maintain them at an acceptable level relative to the costs of not embracing unconscionability in the cases being discussed.<sup>383</sup>

## VII. CONCLUSION

Undue influence is long overdue for a clean break and departure from the consent/wrongdoing paradigm. It warrants an urgent shift in its focus to fairness, protection and concern for the welfare of the claimant given their broader sociocultural and economic context and constraints. Courts need to take a nuanced approach and be sensitive to the complexity of the decision making processes in the domestic sphere, the different forms of vulnerabilities, the fact that 'modern' (read: educated, financially independent or working) wives do not always make independent financial decisions, and are not always cut off from traditional cultural or religious values; women who feel obliged

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<sup>381</sup> See Millett, *supra* note 140, at 249–50.

<sup>382</sup> Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73, 113.

<sup>383</sup> See MCKENDRICK, *supra* note 37, at 301–02. McKendrick's proposal (about unconscionable bargains).

and are subservient due to cultural values or hierarchical entrenchment of gender positioning are implicitly vulnerable and that should raise a red flag just as domestic violence or other conditions of oppression should; there is also the exacerbated vulnerability of newly arrived and isolated immigrants in such circumstances where they may be subjected to undue pressure.

Recent developments in public law concerning the exercise of discretion require that it should not be exercised arbitrarily, capriciously, perversely, unreasonably in *Wednesbury* sense,<sup>384</sup> or in a way that is oppressive or unfair to the subjects of the decision. The same applies in commercial settings.<sup>385</sup> The growing concerns being manifested over notions of fairness, reasonableness, and public interest in commercial practice should be extended to cover non-commercial guarantee cases. Indeed, one of the macro-level observations which emerged as a result of the UK and Australian cases was that the enforceability of the contract of guarantee is ultimately about the conscience of the bank. Providing suretyship, in a sense, is a risky economic activity (to the surety at least) but one which has significant social utility.<sup>386</sup> It is therefore, necessary to reconsider the balance between surety's status as victim and the larger social interest in the free market economy by requiring the bank to observe a higher standard of due diligence (avoid, address, and remedy the adverse impacts of the transaction on sureties).

Instead, it calls for the incorporation of a wider lens which recognizes and gives visibility to the mutually constitutive nature of relational and institutional structures. Moreover, it proposes that the permeability of categories often presented in binary form in most doctrines needs to be acknowledged and analytical frameworks need to be reoriented to recognize that ontological relationships between categories can coexist without dominating or obliterating dormant, less prominent or even latent identity categories. Understanding these dynamics is essential to more comprehensively theorize modern subjects of the law in light of their integrated identities<sup>387</sup> rather than risking their invisibility as a result of this systemic gap. This sets up the groundwork for the adoption of critical intersectional inquiry to inform a comprehensive doctrinal framework to help plug this gap. Such an approach would avoid the distortion these identities are routinely subjected to under the present theoretical and analytical frameworks adopted

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<sup>384</sup> *Braganza v. BP Shipping Limited* [2015] UKSC 17.

<sup>385</sup> *Assenagon Asset Management SA v. Irish Bank Resolution Corp. Ltd.* (formerly Anglo-Irish Bank Corp. Ltd.) [2012] EWHC 2090 (Ch).

<sup>386</sup> Anna Lawson, 'O'Brien and its Legacy: Principle, Equity and Certainty?', 54 *CAMBRIDGE L. J.* 280 (1995); see Auchmuty, *supra* note 49; Rick Bigwood, *supra* note 166.

<sup>387</sup> Integrated identities refer to multiple identity categories being represented in a single individual as opposed to using terms which are traditionally used to identify a particular trait such as gender, ethnicity, race, religion, sexuality or disability as though any one of these were somehow dominant. This discourse tends to essentialize identities and perpetuates the notion of identities being binary rather than an integrated whole where some features remain dominant but emerge relative to the context within which individuals find themselves.

in juridical and doctrinal settings. This framework carries the potential for grounding contractual construction in more substantively fair terms.

Through law's exclusion of the meaning of actions as understood from within a specific cultural context, it singles out particular groups for less than equal protection under the law or worse, risks marginalizing such groups further by entrenching them into their hierarchical social structures without relief. The detailed study of the ways in which the law accomplishes this using existing paradigms of inquiry to frame the needs and rights of those accessing systems of justice demonstrates the imperative of such work for a critical review across a range of fields in the law if our concern for justice is authentic. It is only through an intersectional approach towards examining the underlying contexts within which today's legal personalities are embedded, can the law's claim to legitimacy and accessibility to all without regard to color, race, religion or other status, be vindicated.