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ARTICLES

- Introducing a 'British Bill of Rights' 5
BEST ESSAY PRIZE WINNER: *Emma Sau Hong Lui*
- Critical Analysis of the Concept of a 'Reasonably Available Alternative Measure' in the Context of Article XX GATT, in the Light of the Panel and Appellate Body Rulings in Brazil-Tyres 31
Corinna Paeffgen
- Commutative Justice in Tort: Towards a 'Pure' Rights-Based Theory 53
Jonathan Michael Cockfield
- Can a Persuasive Case Be Made That the Monarch is an Efficient Part of the Constitution? 67
Dominic Bright
- Gill v RSPCA*: Law, Principle and Policy 91
Ranamit Banerjee
- Behind the Walls of the Forbidden Court: How US Courts Bar Access to Foreign Claimants 108
Jacopo Crivellaro
- Caribbean Court of Justice or the Judicial Committee of the Privy Council? A Discussion on the Final Appellate Court for the Commonwealth Caribbean 126
Matthew Gayle

BOOK REVIEW

- Tom Bingham's "*The Lives of the Law*" 155
Stefan Mandelbaum

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2011
VOLUME III, ISSUE I

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KING'S STUDENT LAW REVIEW

INTRODUCING A 'BRITISH BILL OF RIGHTS'

EMMA SAU HONG LUI

3rd Year LLB Student, University of Durham

ABSTRACT

Following the 2010 General Election, speculation reignited concerning the introduction of a British bill of rights (BOR). The Conservative Party had pledged in its election manifesto to repeal the Human Rights Act (HRA) 1998 and to replace it with a British BOR, although all three major political parties had previously expressed enthusiasm for such an instrument.

With the Conservatives in government (albeit in a coalition where the Liberal Democrats had envisioned a BOR as an additional rights protection layer alongside the HRA) this article will speculate on the BOR proposed to “restore our civil liberties”. It is imperative to explore the perceived shortcomings of the HRA, analysing them in light of whether any new BOR will, or could, effectively address these shortcomings. In addition, the superior legal status of a BOR may be incompatible (in so far as corresponding with the comparative jurisdiction discussion on Canada and South Africa) with the UK’s constitutional cornerstone of Parliamentary sovereignty.

Part 1 will argue that the successes of the HRA in achieving some of its originally intended purposes may not be retained by a BOR. Part 2 examines possible aims and content in relation to a British BOR and potential problems in terms of what rights it could contain. Comparative perspectives with the Canadian Charter of Rights and Freedoms and the South African Bill of Rights are contained in Part 3. Part 4 will finally examine the possible constitutional impact of a British BOR.

1. INTRODUCTION

From conception as a Labour sponsored Bill,¹ unfavourable media portrayal,² the subject of identity crisis discussions by commentators in recent years,³ the HRA's ill reputation has fuelled current discussions, focussing on devising a better perceived replacement for it. Internationally, Alston comments that within the last decade, "...bills of rights have assumed particular renewed importance", resulting from the assertions of self-determination and identity by post-colonial and Cold War era states.⁴ Coupled with this trend, it is unsurprising that criticisms of the HRA have become immersed with the proposals for a British BOR.

In discussing how a BOR could depart from the HRA, this will be explored in its possible aims and content, role models and legal mechanisms, and impact upon current constitutional arrangements. Although the Joint Committee on Human Rights (JCHR) rejected the term "British" with respect to the devolution settlements, this article employs "British" as including and referring to the United Kingdom's collective four component regions and three legal jurisdictions.

As the debate is ongoing, no developments after 1 March 2011 will be considered.

2. CONSTITUTIONAL BACKGROUND AND POLITICAL CONTEXT OF THE HUMAN RIGHTS ACT 1998

The then Lord Chancellor at the Clifford Chance Conference on the 28 November 1997, spoke of the Government's incorporation of three main aims for the Human Rights Bill: the constitutional balance between Parliament and the courts; protection of the citizen from State powers in a time of change; and provision for the incorporation of Convention thinking into English law.⁵

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1. Home Office, *Rights Brought Home: The Human Rights Bill* (Cm 3782, 1997).
 2. Particularly in anti-terrorism cases e.g. *A and Others v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68.
 3. F Klug, 'A Bill of Rights: do we need one or do we already have one?' [2007] PL 701.
 4. 'A Framework for the Comparative Analysis of Bills of Rights' in P Alston (ed), *Promoting Human Rights Through Bills of Rights* (Clarendon Press, New York 1999).
 5. Lord Irvine LC, 'Opening Address' in B Markesinis (ed), *The Impact of the Human Rights Bill on English Law* (The Clifford Chance Lectures: Volume Three, OUP, Oxford 1998).

2.1 PARLIAMENTARY SOVEREIGNTY

Parliamentary sovereignty, arguably the once absolute keystone of the British constitutional settlement⁶ was a delicate priority in composing an instrument to give further effect to the European Convention on Human Rights (ECHR).⁷ In the House of Lords debates, Lord Irvine stressed that "...we have built in as much parliamentary scrutiny as possible."⁸ Examples included Clause 4, (after Royal Assent, the s4 HRA declaration of incompatibility provision), and its ability to trigger a prompt parliamentary remedy in Clauses 10 to 12 (accommodated within s10 and Schedule 2 HRA). It remains at Parliament's discretion whether or not to rectify incompatibilities. Clause 19 imposed a requirement on government ministers when introducing new legislation to state whether or not the new Bill is compatible with the Convention. Nevertheless, a statute without a statement of compatibility remains valid, illustrated by s3(2) HRA and the Communications Act 2003.

However, Lord Irvine conveniently omitted the likely consequential appeal to the European Court of Human Rights (ECtHR) whose decision the government would be bound by treaty law (and Article 46 ECHR) to implement, demonstrated in the recent debates following the *Hirst v UK (No 2)*⁹ decision. The reported £160m compensation the UK will have to pay should it fail to reform prisoner voting rights is unlikely to endear the public to perceived aloof European legal meddling during much chronicled national economic restraint.¹⁰ Nevertheless even if the HRA did not exist, the same result would have been inevitable in legal outcome and public perceptions. Pre-HRA, bringing a case to Strasbourg under Article 34 ECHR was the only recourse for UK individuals for alleged infringements of ECHR rights (subject to Article 35's admissibility requirements). Direct application to the ECtHR would still be available under a BOR.

Lord Lester envisaged the judiciary vindicated in their rightful duty to interpret and apply common law and statute to ECHR obligations, alluding to the interpretative and public authority obligations under s3(1) and s6(3) (a) HRA.¹¹ Lord Bingham in his extra-judicial writings considered whether

6. *Jackson and Others v A-G* [2005] UKHL 56; 2006 1 AC 262 [104] (Lord Hope).

7. Human Rights Act 1998, Introductory Text.

8. HL Deb 3 November 1997, vol 582, col 1231.

9. (2005) 42 EHRR 41.

10. A Wagner, 'Prisoner voting and the £160m question' (*UK Human Rights Blog*, 20 January 2011) <<http://ukhumanrightsblog.com/2011/01/20/prisoner-voting-and-the-160m-question>> accessed 22 January 2011.

11. (n 8) col 1240.

the judiciary had exceeded “their brief” under the HRA. He argues that to say that the judiciary had seized the HRA as a pretext behind which to introduce their own utopia of human rights is negated by the duty to accord weight to relevant Strasbourg jurisprudence.¹²

In interpreting statutes as Convention-compliant, certain decisions have been fringed with policy implications. In *Ghaidan v Godin-Mendoza*¹³ the House of Lords (HL) approved the Court of Appeal’s interpretation of ‘spouse’ within paragraph 2(2) of Schedule 1 to the Rent Act 1977 to extend to cohabiting same sex couples: “as if they were his or her wife or husband”.¹⁴ Using s3 HRA to make the provision compatible with Articles 8 and 14 ECHR, the HL essentially empowered themselves to legislate in tandem with Parliament. When mindful of a previous HL decision on similar facts and the same statutory provision, *Fitzpatrick v Sterling House Association Ltd*,¹⁵ *Ghaidan* would initially indicate that the HL had legislated contrary to Parliament’s will. Although Parliament had not yet formally approved tenancy rights for same sex cohabiting couples, legislation was pending that would address this legal and societal anachronism. Due to the orthodox doctrine of express and implied repeal,¹⁶ Parliament cannot bind its successors. The decision was therefore in line with the contemporary Parliament, affording statutory protection the respondent would have received under new laws but not the old. The HL was merely bridging a legal lacuna. Nevertheless, the liberalising application of s3 HRA in *Ghaidan* is what makes the case so remarkable.

While the Diceyan conception of Parliamentary sovereignty has been remoulded by the HRA through the courts, the European Communities Act 1972 and other EU obligations have also challenged the orthodox view of sovereignty.¹⁷ Although the HRA itself is ultimately subject to Parliamentary sovereignty and can be repealed at Parliament’s will, the UK would remain bound by the ECHR at the international dimension.

12. ‘The Human Rights Act’ [2010] EHRLR 568.

13. [2004] UKHL 30; [2004] 2 AC 557.

14. [2002] EWCA Civ 1533; [2003] Ch 380 [35].

15. [1999] 1 AC 27 (HL).

16. *Ellen Street Estates v Minister of Health* [1934] 1 KB 590 (CA).

17. *Secretary of State for Transport ex parte Factortame (No 2)* [1991] AC 603 (HL).

2.2 PROTECTING THE INDIVIDUAL FROM THE STATE IN A TIME OF CHANGE

The civil liberties tradition in English law has long been regarded as one of the key important stalwart concepts,¹⁸ particularly when national security is at risk; the first casualty of government actions is the reduction of personal freedoms and civil liberties.¹⁹ It would be a sweeping statement to assert Lord Irvine's second aim has been solely relevant in anti-terrorism and detention cases, but it has been in this context that the HRA has exercised significant influence in the post 9/11 years. Unfortunately, this has been portrayed to its detriment, particularly by those inclined to the political right.²⁰

In *Secretary of State for the Home Department v JJ*,²¹ the HL majority dismissed the Home Office's appeal concerning non-derogating control orders available under the Prevention of Terrorism Act 2005. The majority found the six respondents to have been unlawfully deprived of their liberty guaranteed under Article 5 but there were difficulties in ascertaining a previous Convention case based on the meaning of the deprivation of liberty. As Lord Bingham later admitted: "The facts of *Guzzardi*,²² whose confinement on a Mediterranean island bore little resemblance to the situation of JJ, could not readily be transposed to JJ's case: the problem was to ascertain the true governing principle and apply it."²³

2.3 INCORPORATION OF CONVENTION THINKING INTO DOMESTIC LAW

The s2 HRA "duty to consider", as it has been termed, consists of the court's duty to only consider Strasbourg jurisprudence; they are not bound by it.

18. D Raab, *The Assault on Liberty: What went wrong with rights?* (Harper Collins, London 2009) Part I.

19. AC Grayling, *Liberty in the Age of Terror* (Bloomsbury Publishing, London 2009).

20. Daily Mail Editorial Comment, 'Another human rights victory for terrorism' (*The Daily Mail Online*, 2 November 2008) <<http://www.dailymail.co.uk/news/article-1082517/DAILY-MAIL-COMMENT-Another-human-rights-victory-terrorism.html>> accessed 28 December 2010.

21. [2007] UKHL 45; [2008] 1 AC 385.

22. (1980) 3 EHRR 333.

23. (n 12) 573.

In *Alconbury*,²⁴ Lord Slynn articulated this duty as following “clear and constant” Strasbourg jurisprudence in the absence of any special circumstances. Laws LJ’s interpretation of the s2 HRA duty in *Runa Begum*²⁵ advocates developing a municipal law of human rights inspired by the HRA, not limited by it. By fashioning an incremental development of domestic human rights via the common law, there is more potential for judicial discretion. As the common law does not unquestioningly defer to Strasbourg ideals, this method appears more flexible than Lord Slynn’s and can be easily tailored to develop a human rights tradition suited to British tastes. On legitimacy, Lord Slynn’s “clear and constant” Strasbourg jurisprudence would appear easier to ascertain for legal certainty whereas Laws LJ’s proposal may have less firm foundations. Overall, the current position on the degree of judicial discretion required by the HRA is inconclusive.²⁶

Viewing the ECHR as a platform for establishing a minimum standard of rights can be frustrating when applied alongside Lord Bingham’s “mirror” principle.²⁷ Does s2 HRA not merely perpetuate a circular and stagnant system whereby domestic courts take into account Strasbourg jurisprudence, and the ECtHR acknowledges domestic court developments and incorporates national legal norms into their own normative body? *A v United Kingdom*²⁸ and *Secretary of State for the Home Department v AF (No 3)*²⁹ illustrate this conundrum. In the former, the ECtHR rejected the British government’s argument that the s23 Anti-terrorism, Crime and Security Act 2001 detentions were justified within Article 5(1)(f) as the petitioners had been detained while their deportation preparations were ongoing. The ECtHR then upheld the Law Lords’ approach to the national emergency issue, a conclusion that Hickman emphasises as “without reasoning”.³⁰ However, the ECtHR’s deliberation on Articles 5(4) and 6 that “special advocates”, unable to take instructions on closed materials to challenge their appointed detainee’s detention, were insufficient to the provision of a fair hearing.³¹ This fairness principle fell to be applied by the HL in *AF (No 3)* concerning control orders under the Prevention of Terrorism Act 2005, two weeks after

24. [2001] UKHL 23; [2003] 2 AC 295 [26].

25. [2002] EWCA Civ 239; [2002] 1 WLR 2491 [17].

26. *Re G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 AC 173.

27. *R (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26; 2 AC 323 [20].

28. (2009) 49 EHRR 29.

29. [2009] UKHL 28; [2010] 2 AC 269.

30. T Hickman, *Public Law after the Human Rights Act* (Hart Publishing, Oxford 2010) 346.

31. (n 28) at [220].

A v UK. Hickman summarises the range of Judicial Committee responses to the task of balancing governmental interests and individual liberty in the contemporary domestic context as a narrow majority supporting the ECtHR's approach (albeit with variant reasoning) but with others applying *A v UK* "with barely disguised hostility", and Lord Rodger and Lord Walker applying the Strasbourg case without endorsement.³² Clarification is clearly needed, particularly as to the scope of the fairness principle post *A v UK* and *AF (No 3)*, and a BOR may be a way to do so. Equally, a BOR could allow a lower standard of human rights to be maintained.

2.4 THE HRA TODAY

While the often politically right-wing and negative public perceptions regarding the HRA are rooted in its image as a protector of illegal immigrants, criminals and terrorists, these perceptions are based on a misapprehension that rights afforded by the HRA are "European", and are not "British values".

While the UK remains party to the ECHR, it is difficult to see how a BOR could differ from the HRA in substantive civil and political rights. Given contemporary global and domestic perceptions on terrorism, a BOR borne of the current political era is likely to be more restrictive upon personal freedoms than the HRA. Parliamentary sovereignty and the degree of Strasbourg jurisprudence incorporation will be other concerns in differentiating a British BOR from the HRA, as the coalition government must decide whether they can compromise on the Conservatives' manifesto promise to "restore our civil liberties".

3. AIMS AND CONTENT

Another recent Lord Chancellor, Jack Straw, commented that "social and economic change has altered public attitudes. We have a less deferential, more consumerist public and, to an extent, rights have become commoditised."³³ The public now regard rights as something that must be endorsed by the community on individual merits, not unilaterally imposed on their behalf by politicians or European courts. So in addition to the HRA's original aims (assuming that the UK will remain party to the ECHR and thus must retain a working relationship with Strasbourg), there should be other considerations underlying a BOR to quell the public misunderstanding that

32. (n 30) 347.

33. Ministry of Justice, *Rights and Responsibilities: developing our constitutional framework* (Cm 7577, 2009).

has persistently dogged the HRA.

3.1 CLARITY AND ASPIRATION

Clarity should be incorporated into a BOR through its consultation process, implementation and enforcement of rights. Amos cited knowledge and respect as two of the eight problems with the HRA,³⁴ supported by reference to a research report concerning public awareness of human rights.³⁵ While the results revealed there was a generally high public awareness of the HRA, there was “a lack of clarity about what the Human Rights Act means in a UK context”. Furthermore, she attributes the “obvious lack of respect for the HRA” amongst political and public figures to a lack of knowledge. Misunderstanding arising from ignorance can be observed to have seeped into the poor public perceptions and ill media depictions of the HRA. In 2006 Jack Straw recognised the detrimental consequences of these attitudes and reports, stating that “such stories have undoubtedly had an accumulative and corrosive effect upon public confidence both in the Human Rights Act and in the European Convention on Human Rights itself.”³⁶

Clarity as to whom a BOR applies to, what rights are contained and the process for redress through the courts should be emphasised from the outset. As already alluded to, there is no widespread sense of public ownership of the HRA. Involving the public throughout and beyond the consultation process could help ensure that a British BOR would be perceived as something by the people, for the people. Asmal states the significance of such societal involvement as “the process by which a bill of rights is drawn up is as important as the end product.”³⁷ Alice Donald views clarity as necessary through the entire process: from clearly stated and justified public consultation results (whose methods must also be open to scrutiny), to the clearly reasoned final outcome that explains why specific provisions are included relative to community preferences, experiences and international standards.³⁸

34. M Amos, 'Problems with the Human Rights Act 1998 and How to Remedy Them: Is a Bill of Rights the Answer?' (2009) 72 MLR 883.

35. Ipsos MORI, *A quantitative survey of public awareness and attitudes towards human rights, the HRA and its underlying principles* (Institute for Public Policy Research, London 2005).

36. Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (DCA 38/06, 2006) <http://www.justice.gov.uk/guidance/docs/full_review.pdf> accessed 5 February 2011.

37. K Asmal, 'Designing a Bill of Rights for a Diverse Society' (2007) 6 EHRLR 607.

38. A Donald, 'A Bill of Rights for the UK? Why the process matters' (2010) 5 EHRLR 459, 463.

However the JCHR conceded “that there is not greater clarity in the Government’s reasons for embarking on this potentially ambitious course of drawing up a Bill of Rights”, and expresses anxiety that reasons appeared to be “concerned with correcting public misperceptions about the current regime of human rights protection, under the HRA.”³⁹ The prominent public law barrister Tom Hickman shared this view during his evidence to the JCHR.⁴⁰ Although ensuring public support of the BOR is important in overcoming HRA criticisms, there must be substance on which the public can rely to protect their rights. Otherwise, we would have just thrown out the baby with the bathwater.

A second suggested additional aim in underpinning a British BOR relates to its aspirational character. While this has been mentioned by various commentators, and the JCHR recommends a BOR of both aspirational and declaratory qualities,⁴¹ this aspirational quality should not be undervalued. The HRA was ushered through Parliament with no public fanfare and did not command a symbolic role of legal superiority. It was known as a domestic instrument giving effect to the ECHR, and perceived to have imposed “a pan-European jurisprudence of human rights.”⁴² In addition, the ECHR was drafted in the post-WWII era of a liberal Western European perception of rights. While this may have fit the UK’s political and geographical mould in the 1950s, (as the UK was a key state in drafting the ECHR, and the first to ratify it), the 21st century UK is all too aware of the wider spectrum of rights values to be country or nationality specific. Although the ECHR enshrined rights that are still relevant to the protection of domestic civil liberties, there is a real need to update the ECHR into this century. A British BOR may be the most pragmatic solution to modernise the ECHR into domestic law and enable clarity as to a British interpretation of rights.

3.2 RANGE OF RIGHTS

The JCHR emphasised that “any UK Bill of Rights has to be ‘ECHR plus’. It cannot detract in any way from the rights guaranteed by the ECHR.”⁴³ Moreover, the notion of a “British” BOR denotes an instrument containing values that people in the UK consider fundamental to the domestic human

39. Joint Committee on Human Rights, *A Bill of Rights for the UK?* (2007-08, HL 165-I, HC 150-I) para 33.

40. (n 39) para 36.

41. (n 39) para 69.

42. L Hoffman, ‘Human Rights and the House of Lords’ (1999) 62 MLR 159, 165.

43. (n 39) para 50.

rights tradition. Examples from the JCHR inquiry include the rule of law, liberty, democracy, fairness and civic duty. But what other rights should be clearly drafted within a BOR?

Prior to the 2010 General Election, David Cameron, rather ironically in light of his vision of achieving greater legal clarity through a BOR, briefly spoke of enshrining fundamental liberties such as jury trial, equality under the law and civil rights.⁴⁴ He was equally vague as to how a BOR should protect ECHR fundamental rights “in clearer and more precise terms.” Dominic Grieve, the current Attorney General for England and Wales stated during his time as Shadow Justice Secretary that in addition to protecting the historic British liberty of right to trial by jury, he felt that a British BOR could “do much more than the ECHR in terms of freedom of expression” and brought a cursory possibility of incorporating privacy law.⁴⁵ In a public lecture in 2009, he did not elaborate on the “... sound arguments for including the obligations of individuals to the wider community” and instead, summarily asserted that “there is no reason under the ECHR, why the failure to act in a neighbourly and acceptable way should not be taken into account if an individual seeks to invoke rights.”⁴⁶ Although the Conservatives are now in government, a more definitive list of “British” rights and values has not yet surfaced. Aside from examples examined by the JCHR, the lion’s share of the range of rights in a BOR discussion has been focused on commentator proposals.

3.3 SOCIO-ECONOMIC RIGHTS

Incorporation of socio-economic rights (ESR) was not rejected by the Labour government in the JCHR’s report, although they were favoured in a declaratory rather than a justiciable form.⁴⁷ While the inclusion of ESR will be discussed in Part III in a potential comparative perspective on the South

44. David Cameron, ‘Balancing freedom and security – a modern British Bill of Rights’ (Centre for Policy Studies, London, 26 June 2006) <http://www.conservatives.com/News/Speeches/2006/06/Cameron_Balancing_freedom_and_security__A_modern_British_Bill_of_Rights.aspx> accessed 15 February 2011.

45. C Baksi (2009) ‘Interview: Dominic Grieve, shadow justice secretary’ (Law Society Gazette, 26 March 2009) <<http://www.lawgazette.co.uk/features/clear-blue-water>> accessed 20 December 2010.

46. Dominic Grieve QC, ‘Multiculturalism – A Conservative vision of a free society’ (Annual Lord Smith of Clifton Lecture, Queen Mary, University of London, 4 March 2009) <http://www.conservatives.com/News/Speeches/2009/03/Dominic_Grieve_Multiculturalism_-_A_Conservative_vision_of_a_free_society.aspx> accessed 15 February 2011.

47. (n 39) para 162.

African Bill of Rights experience, it is worth noting that the British BOR as a whole was not recommended to include directly enforceable duties.

Fredman argues that the traditional division of civil and political rights (CPR) and ESR, often perpetuated by states, is ill reasoned.⁴⁸ Many adverse perceptions on the enforceability of ESR revolve around false distinctions: that CPR are “cost-free” due to the State’s negative duties, whereas ESR by their very character are resource intensive and compel positive duties. She draws examples from domestic and Strasbourg decisions to illustrate how the ECHR, perceived as a CPR instrument, has been successfully interpreted to have impacted upon the scope of ESR. The HL held in *Limbuela*⁴⁹ that the retraction of basic social security for destitute asylum seekers who had not correctly applied for asylum upon their arrival in the UK was a breach of the Article 3 ECHR right not to be subjected to inhuman and degrading treatment. In *Moldovan*⁵⁰ which concerned the Romanian state’s failure to provide housing for a Roma community in the aftermath of a pogrom, the ECtHR held that this failure similarly constituted a breach of Article 3.

Fredman also argues that in a British BOR discussion where the ESR debate has moved on to the role of the courts and state accountability for fulfilling such rights, there is “recognition that socio-economic rights, like civil and political rights, are already part of the British political constitution.”⁵¹ However given the UK’s ongoing austerity measures, it is highly unlikely that the inclusion and enforcement of ESR will go beyond an arguably weak duty of “progressive realisation”. This progressive realisation state duty is enumerated in Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966 to which the UK is party, and is the approach suggested by the JCHR, albeit “with a closely circumscribed judicial role.”⁵² The role of potential ESR rights and their precise justiciability mechanisms within “full use of maximum available resources”⁵³ satisfying the “minimum core obligation”⁵⁴ in the British legal system is clearly an aspect of the BOR debate that will benefit from some much needed clarity. Furthermore, in the Northern Ireland bill of rights (NIBOR) discussion,

48. S Fredman, ‘New Horizons: incorporating socio-economic rights in a British Bill of Rights’ [2010] PL 297.

49. [2005] UKHL 66; [2006] 1 AC 396.

50. (2007) 44 EHRR 16.

51. (n 48) 303.

52. (n 39) para 192.

53. UN Committee on Economic, Social and Cultural Rights, ‘General Comment No 3, The Nature of States Parties Obligations’ (1990) UN Doc E/1991/23 para 9.

54. (n 53) para 10.

the Northern Ireland Office (NIO) rejected the Northern Ireland Human Rights Commission's (NIHRC) advice on incorporating ESR⁵⁵- a move heavily criticised by the Commission in their response paper, as was the lack of explanation as to why these rights were effectively excluded.⁵⁶

There is growing internal awareness of domestic poverty issues, especially through campaigns such as Barnados and End Child Poverty. Clearly linked to the ESR inclusion debate, it is submitted that poverty issues are also influential on the emphasis of aspiration. A BOR should be inspiring, and following on from Dominic Grieve's ideas of encouraging neighbourly relations and community citizenship within a BOR,⁵⁷ surely then a BOR should be seen to specifically protect and care for the most vulnerable in society? The aspiration argument has some clear roots in Prime Minister David Cameron's "Big Society" project,⁵⁸ particularly on social action and community empowerment. By fostering responsibilities and duties to encourage a shared vision of a desirable future society and citizenship- isn't this the grand aim of a British BOR that the HRA notably lacks?

3.4 EUROPEAN CAVEATS

The recent ECJ decision on gender discrimination of car insurance payments⁵⁹ and the Supreme Court ruling that the sex offenders register is incompatible with the ECHR⁶⁰ have only further inflamed opinions on supranational European legal bodies. In the latter, although the Prime Minister has promised to do only the minimum necessary for compliance, the fact remains that the UK is bound by a superior level of treaty law. Even if a British BOR successfully incorporating clarity and aspiration is introduced, its provisions must not infringe EU laws and the ECHR as long as the UK remains party to those treaties. Furthermore, the judiciary must

55. Northern Ireland Human Rights Commission, *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland* (NIHRC, 10 December 2008).

56. Northern Ireland Human Rights Commission, *A Bill of Rights for Northern Ireland: Next Steps – Response to the Northern Ireland Office* (NIHRC, February 2010).

57. (n 46).

58. David Cameron, 'Our Big Society Agenda' (Liverpool, 19 July 2010) <http://www.conservatives.com/News/Speeches/2010/07/David_Cameron_Our_Big_Society_Agenda.aspx> accessed 5 February 2011.

59. Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL v Conseil des ministres* (ECJ Grand Chamber, 1 March 2011).

60. *R (on the application of F and Thompson) v Secretary of State for the Home Department* [2010] UKSC 17.

retain a working relationship with the ECJ and ECtHr, and forge its own interpretative identity to balance these two European caveats with a British BOR.

4. EXPLORING TWO COMPARATIVE MODELS AND MECHANISMS

The Canadian and South African models have been selected due to their legal systems comprising of both statute and common law, similar to the UK. Due to historical ties from both countries having been British dominions, English legal offshoots have found continued growth in these modern states and jurisdictions. The Canadian Charter of Rights and Freedoms (CCRF) will be discussed in respect of its role for the judiciary, and the South African Bill of Rights (SABOR) in the incorporation and judicial enforcement of socio-economic rights (ESR). Both countries have also grappled with the problem of integrating traditional legislative supremacy into their BORs, with different results.

4.1 THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

The Canada Act 1982 passed by the British Parliament and granted Royal Assent on 29 March 1982, enabled Canada's complete autonomy over its legal and legislative matters. CCRF is contained within Part I of the Constitution Act 1982, passed by the Canadian Parliament and granted Royal Assent on 17 April 1982. It was drafted with criticisms of the Canadian Bill of Rights 1960 in mind: particularly that it was an ordinary Act of Parliament and not constitutionally entrenched, it was restricted to federal laws and did not apply to the ten provincial legislatures, and failed to confer any judicial strike down powers.

As the Supreme Court of Canada acknowledged, CCRF:

“...is designed and adopted to guide and serve the Canadian community for a long time. Narrow and technical interpretation, if not modulated by a sense of the unknowns of the future, can stunt the growth of the law and hence the community it serves.”⁶¹

CCRF embodies six broad divisions of rights: fundamental freedoms, democratic, mobility, legal, equality and language rights.⁶² In elaborating

61. *Law Society of Upper Canada v Skapinker* [1984] 1 SCR 357.

62. Respectively s2, ss3-5, s6, ss7-14, s15 and ss16-23.

them, the Canadian judiciary have adopted a two-stage purposive method of interpretation and justification. This involves interpreting “the meaning of the right...at issue to determine whether the matter complained of constitutes an infringement”,⁶³ then turning to CCRF s1 which allows subjecting Charter freedoms to “reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

In the constitutionally significant *R v Oakes*,⁶⁴ the Supreme Court articulated a strict justification standard in applying CCRF s1. Proportionality and a rational connection as to the purpose of the law limiting the Charter right are required, with the minimum impairment possible to the right. *Oakes* also established the Court’s view of rights as having presumptive importance, with limitations as only acceptable exceptions if governments satisfy this demanding justification test. Thus the Court favours a rights-based approach to constitutional development, although this has placed additional burdens upon legislative drafters.

4.1.1 LAWYERS AND LAWMAKERS UNDER S33

CCRF s33’s “notwithstanding clause” enables the Canadian Parliament to declare that legislative provisions remain legally valid notwithstanding a violation of s2 (fundamental freedoms) or ss7-15 (legal rights and equality).⁶⁵ A declaration ceases to have effect after 5 years⁶⁶ but can be re-enacted by the legislator, subject to another 5 year limitation.⁶⁷ As Barbara Billingsley notes, s33 “represents a compromise forged between advocates of individual rights and proponents of Parliamentary supremacy”.⁶⁸ Although this purported legislative override appears limited as other rights are exempt, she argues that the relative ease with which the legislature can employ s33 indicates that legislative supremacy is favoured over judicial. The declaration must be express in its intention to operate notwithstanding a Charter provision and can be invoked by legislators on a simple majority as well as pre-emptively. Therefore “by permitting legislators to invoke the notwithstanding clause in the absence of a court ruling, section 33 tips the balance of power toward

63. R Sharpe, ‘The Impact of a Bill of Rights on the Role of the Judiciary: A Canadian Perspective’ in Alston, *Promoting Human Rights* (n 3).

64. [1986] 1 SCR 950.

65. s33(1).

66. s33(3).

67. s33(4); s33(5).

68. Symposium: 20 Years Under The Charter ‘Section 33: The Charter’s Sleeping Giant’ (2002) 21 Windsor YB Access Justice 331.

the legislative sovereignty position.”⁶⁹ As s33’s legal limits (the express declaration requisite and the 5 year “sunset clause”) are of style rather than substance, the “giant status” of the clause has hardly been diminished.⁷⁰

4.1.2 CONSTITUTIONALISM IN THE CANADIAN CHARTER

Political constitutionalism supports accountability by holding those who hold political power to constitutional account through political means and institutions. In contrast, legal constitutionalism regards the court as the primary guardian of societal rights.

In issuing s33 declarations, the legislator encounters political risk in informing the courts and public of the proposed law that deliberately infringes listed Charter provisions. This political safeguard, “intentionally built...to counter-balance the weighty legal power section 33 provides to governments by allowing them to circumvent particular Charter provisions”⁷¹ arguably goes further than the s4 HRA declaration of incompatibility. With the HRA, the very legislation enumerating national protection of rights does not command the same support from the population it was designed to protect. The CCRF was forged in a “democratic crucible” amidst lengthy national participation.⁷² By this endorsement, Penner argues that the “symbiotic relationship between the judiciary and its contemporary society” transformed the judiciary into taking rights “seriously and creatively.”⁷³ Although the Supreme Court in *Ford v Quebec*⁷⁴ set a highly deferential approach by refusing to impose substantive review on Quebec’s National Assembly’s use of the override provision, this effectively roused the judiciary to creatively seek alternative and stronger legal constraints to s33.

4.1.3 A MODEL JUDICIAL ROLE?

Judicial activism has emerged decidedly in statutory interpretation of Charter rights and judicial review. In *Andrews v Law Society of British Columbia*,⁷⁵ the British Columbia Barristers and Solicitors Act 1979 s42

69. (n 68) 335.

70. In the CCRF’s first twenty years, s33 was invoked seventeen times.

71. (n 68) 336-337.

72. ‘The Canadian experience with the Charter of Rights: are there lessons for the United Kingdom?’ [1996] PL 104.

73. (n 72) 125.

74. [1988] SCR 712.

75. [1989] 1 SCR 143.

requiring Canadian citizenship for admission to the British Columbian bar was held to infringe CCRF s15 equality rights. This sparked a legacy of stringent equality review.⁷⁶ Furthermore the Canadian judiciary were initially unsympathetic to giving effect to economic rights, exemplified by the “Labour Trilogy” which rejected the view that rights to strike were protected by freedom of association under CCRF s2(d).⁷⁷ The Supreme Court expressly overruled this two decades later in *Health Services and Support-Facilities Subsector Bargaining Association v British Columbia*.⁷⁸ Fudge justifies this constitutional jurisprudence shift as mirroring international efforts to conceptualise labour rights as a form of fundamental human right.⁷⁹ By relating CCRF to contemporary domestic and international expectations of rights alongside a careful legislative rapport, the Court has fashioned a delicate role in shaping Canadian society.

Political forces will not always serve as a restraint. Despite its rare use so far, s33’s influence over the legislature and the judiciary as to who truly wields the whip of supremacy has been understated but powerful. As yet, the “giant” is not dead but remains merely sleeping, its true potential uncertain for both the legislature and the courts.⁸⁰

4.2 THE SOUTH AFRICAN BILL OF RIGHTS

SABOR is enshrined in Chapter 2 of the Constitution of the Republic of South Africa, enacted in 1996. The extensive levels of public participation and political negotiations around formulating the Constitution and SABOR have been described as monumental in helping shape a single national South African identity and values.⁸¹ The post-Apartheid society’s hopes to redress injustices suffered under racial inequality were evident throughout the discussions. SABOR was envisioned as an inspiring symbol of social transformation, in reconciling the oppression of the past with aspirations for the future. State duties to respect, protect, promote and fulfil SABOR

76. *Egan v Canada* [1995] 2 SCR 49; *Law v Canada* [1999] 1 SCR 497; *Corbiere v Canada* [2004] 2 SCR 203.

77. *Reference re Public service Employee Relations Act* [1987] 1 SCR 313 (*Alberta Reference*); *Public Service Alliance of Canada v Canada* [1987] 1 SCR 424; *RWDSU v Saskatchewan* [1987] 1 SCR 313.

78. [2007] SCC 27.

79. ‘The Supreme Court of Canada and the right to bargain collectively: the implications of the Health Services and Support case in Canada and beyond’ [2008] ILJ 25.

80. (n 68) 339.

81. (n 37).

rights are found in s7. Both CPR and ESR are included, justiciable under s8 and s38. However, rights can be legally qualified by s36 (general limitation clause) and the specific rights provision itself.

4.2.1 INCORPORATING SOCIO-ECONOMIC RIGHTS

Although SABOR contains a range of ESR, it has predominantly been housing⁸² and healthcare⁸³ rights that the Constitutional Court of South Africa has faced enforcing.

Jurisprudence in early cases was criticised for being overly deferential to the state. In *Soobramoney v the Minister of Health (KwaZulu-Natal)*,⁸⁴ the appellant was denied access to lifesaving dialysis treatment due to his other irreversible medical conditions. Appeals on s11 (right to life) and s27(3) (non-refusal of emergency medical care) were rejected. Although s11 was absolute, it entailed a state duty of non-interference (to respect the right) and not a duty to provide sustenance of life. In addressing s27(3), Chaskalson P refused to extend the meaning of “emergency medical treatment” to include ongoing chronic illness treatments to prolong life.⁸⁵ Instead, the Court went on to consider the s27(1) general access to healthcare as internally qualified by s27(2): the state’s “available resources” to progressively realise the right. As Moellendorf comments, the narrow interpretation of available state resources failed to distinguish between rights and policy goals, as well as the purpose for including constitutional ESR.⁸⁶

A “reasonableness” standard was established in *Government of the Republic of South Africa v Grootboom and others*,⁸⁷ which concerned s26(1)’s right of access to adequate housing by homeless respondents. Yacoob J stated contemplating the inherent dignity of human beings was required in evaluating reasonableness of state action.⁸⁸ The Court then considered the respondents whose immediate needs were of society’s most vulnerable and financially desperate. As the state failed to take the reasonable steps necessary within its available resources to realise the right, i.e. to provide emergency accommodation after the respondents’ eviction from an illegal

82. s26(1).

83. s27(1)

84. 1998 (1) SA 765 (CC).

85. (n 84) para 13.

86. ‘Reasoning about resources: *Soobramoney* and the future of socio-economic rights’ (1998) 14 SAJHR 327.

87. 2001 (1) SA 46 (CC).

88. (n 87) para 83.

squatter camp, s26(1) was unreasonably interfered with. Thus, s26(2) textually mandated a positive and negative obligation.

However the Court issued a declaratory order containing no time frames, rather than a mandatory one. Two years later, the government still had not implemented it. The failure to retain a supervisory judicial role demonstrates how ESR can amount to little more than constitutional lip-service when not strictly enforced.⁸⁹ In a sobering postscript, when Irene Grootboom passed away in 2008, she was still homeless.⁹⁰

*Minister of Health v Treatment Action Campaign (No 2)*⁹¹ was praised in extending provision of a drug preventing mother-to-child HIV transmission during birth, beyond a limited number of research and training sites. Government policy confining Nevirapine's availability was held unreasonable, in violation of SABOR. However, the mandatory order's true enforcement was not through legal compulsion but Treatment Action Campaign's continued and renewed political pressures to ensure the order's implementation.⁹² Considered alongside the *Grootboom* postscript, the South African "conservative nature of legal culture" has restrained the real potential of ESR judicial enforcement.⁹³ Recently *Mazibuko and others v City of Johannesburg*⁹⁴ on the right to water only reaffirmed the Court's deferential approach, representing "a lost opportunity to deepen democracy in South Africa."⁹⁵

4.2.2 DIGNITY AND THE "MINIMUM CORE"

S39 SABOR contains the judiciary's interpretive obligations. These include express duties to consider international law, and promote the BOR's "spirit and purpose" through statutory interpretation and the common law.

89. D Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 SAJHR 1.

90. J Pearlie, 'Grootboom dies homeless and penniless' (*The Mail & Guardian Online*, 8 Aug 2008)
<<http://mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless>> accessed 3 January 2011.

91. 2002 (5) SA 721 (CC).

92. M Heywood, 'South Africa's Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health' (2009) 1 J Human Rights Practice 14.

93. D Davis, 'Socioeconomic rights: do they deliver the goods?' (2008) 6 IJCL 687.

94. 2010 (4) SA 1 (CC).

95. S Liebenberg, 'Constitution compels state to act- The right not to languish in poverty' *Cape Times* (Cape Town, 11 September 2010) 11.

Dignity as an interpretative value stems from the Universal Declaration of Human Rights (UDHR) preamble. Although the UDHR is not legally binding, it has been influential on political, legal and public opinions on promoting social progress. However, dignity has been disparaged as too indeterminate in normative value. If dignity is truly universal, then surely dignity should be equally afforded? Fredman argues that in reality, it has become an exclusionary concept to substantive equality and avoids demanding proper democratic accountability.⁹⁶ The South African fusion of reasonableness and dignity is a double-edged sword; it limits capricious decisions but hinders judicial development in compelling the state to address societal needs beyond the vulnerable.⁹⁷

The judiciary is bound by the immediate “minimum core” obligation in international law under s39(1)(b). Yet this has been used as a shield by the Court to justify apparent deference to the state.⁹⁸ The *TAC*⁹⁹ judgement failed to develop the initial approach to the “minimum core” obligation in *Grootboom* but instead confirmed the approach adopted therein.¹⁰⁰ In focussing on state duties to respect and long-term progressive realisation, the Court has appeared to neglect the immediate fulfilment necessary for ultimate realisation.

4.3 LESSONS FOR THE UK?

The JCHR praised South Africa’s approach for steering a middle path between fully justiciable and legally enforceable ESR, and weak directive state policy principles. The judiciary’s “limited role” in adjudicating ESR “without becoming the primary decision makers” was commended.¹⁰¹ Nevertheless when a state must ration the protection of rights; it is a tragedy for justice.¹⁰²

The Canadian s33 power of legislative override was also admired. Although the HRA does not contain an express equivalent, its processes accommodating Parliamentary sovereignty enable the same override effect. However, the JCHR remained receptive to including express legislative

96. ‘Providing Equality: Substantive Equality and the Positive Duty to Provide’ (2005) 21 SAJHR 163.

97. (n 93).

98. (n 89).

99. (n 91).

100. (n 93).

101. (n 39) para 181.

102. (n 86).

override powers in a British BOR.¹⁰³ Ultimately such a clause's exact application will not be textually confined if the British politicians and judiciary follow the Canadian examples of judicial restraint and legislative deference.

4.3.1 WHAT ALTERNATIVES COULD A BRITISH BILL OF RIGHTS CONTAIN?

How can a BOR's internal mechanisms realistically differ than those under the HRA? Sections 2, 3 and 4 will be briefly considered.

The s2 duty to consider relevant Strasbourg jurisprudence could include additional international legal developments, by an express provision similar to s39 SABOR. Alternatively drafting a nuanced framework to enable judicial application of international norms could mirror the Canadian Supreme Court's activism. While Lord Bingham's "no less" standard is understandable, why should the judiciary do "no more"?¹⁰⁴ Other interpretive values could be considered, allowing British courts develop a British tradition of rights, drawing from relevant jurisdictions and contribute to international customary law. However, such judicial flexibility could enhance or reduce rights protection standards. This would depend on the extent to which courts modify their approach to more wide-ranging evaluation processes.¹⁰⁵

The s3 duty to interpret statutes compliantly could be extended. Other international covenants could be incorporated, as well as an appreciation of UN treaty monitoring bodies' general comments. However, this may be difficult to realise pragmatically, especially with ESR. The UK has not yet ratified the recent Optional Protocol to ICESCR, which seeks to provide an individual complaints mechanism to enforce ICESCR rights against states. During national austerity, potentially enabling judicial foray into sensitive budgetary concerns is unlikely to appeal to the government.

A s4 declaration depends upon government whim whether to rectify incompatibilities and to what extent. In supporting the HRA as a de facto BOR, Wintemute suggested inserting a new HRA section to better accommodate Parliamentary sovereignty, enabling legislative override of s4

103. (n 39) para 223.

104. *Ullah* (n 37).

105. 'Incorporating socio-economic rights in a British bill of rights, pragmatic progression or a step too far?' (2007) 4 *Justice Journal* 88.

declarations.¹⁰⁶ This would be similar to CCRF s33. A similar BOR clause could potentially strengthen legislative sovereignty, but may only be in form. If judges follow the Canadian example of activism, then the judiciary's relationship with Parliament could be distorted to favour the former. Although the JCHR supports a BOR equivalent of s19 HRA (requirement of compatibility statements for bills),¹⁰⁷ a requirement compelling the state to account for its actions in court, in enacting incompatible legislation is also favoured.¹⁰⁸

4.3.2 CLARIFYING THE PUBLIC/PRIVATE DIVIDE?

The HRA was not intended to be directly horizontally effective. However, s6(3)(b) has clouded this position, particularly through varying judicial application of the "functions of a public nature" test with regard to hybrid public authorities.¹⁰⁹ Nevertheless, the JCHR shunned the idea of an express BOR provision giving full horizontal effect, preferring indirect horizontal effect in light of South African and HRA experiences.¹¹⁰ A provision promoting the BOR's purpose, akin to s39 SABOR, could apply to both common law and statute. An additional provision placing active promotion and fulfilment duties on public authorities, under the meaning of s6(3)(a) HRA was recommended.¹¹¹ If these recommendations modelled on s6 HRA are followed, it seems unlikely that the public/private divide in rights enforcement will be clarified.

However, judicial enforcement of BOR rights against private bodies may be strengthened via the common law. While a clear clause to preserve existing common law rights was recommended,¹¹² the relationship between a BOR and the common law could shift by including clauses modelled on s6 HRA and s39 SABOR. Textual uncertainties could be curbed, like the public/private divide. However, a provision enabling this substantial but subtle theoretical transfer of power to the courts, could be ultimately curbed by a future Parliament as a British BOR is unlikely to be entrenched.¹¹³ As Lord Bingham exhorts, "the prime characteristic of any common

106. 'The Human Rights Act's First Five Years: Too Strong, Too Weak, Or Just Right?' (2006) 17 King's College Law Journal 209.

107. (n 39) para 225.

108. (n 39) para 229.

109. *YL v Birmingham City Council* [2007] UHKL 27; [2008] 1 AC 95.

110. (n 39) paras 292-293.

111. (n 39) para 295.

112. (n 39) 132.

113. (n 39) para 235.

law rule is that it yields to a contrary provision of statute".¹¹⁴

5. CURRENT CONSTITUTIONAL ARRANGEMENTS: HOW MIGHT THE BALANCE BE AFFECTED?

5.1 SEPARATION OF POWERS

Paine lamented during the 18th century, that in mixed governments "the parts cover each other till responsibility is lost."¹¹⁵ In the present day, Gordon contends that there remains no real separation of powers in the UK, with the result that "...an overly strong executive dominating parliament weakens the pluralism that is intrinsic in representative democracy."¹¹⁶ This is "the vice of executive sovereignty masquerading as parliamentary sovereignty" when governments can force through their legislative agenda without effective opposition or internal dissidence.¹¹⁷ However Masterman refutes Gordon's view, arguing that in light of the HRA and Constitutional Reform Act 2005, contemporary separation of powers is multidimensional and dynamic.¹¹⁸ As discussed, through sections 2, 3, 4 and 6 HRA, legislative sovereignty remains intact in form.

By its character, a BOR is expected to affect the separation of powers by transferring significant political powers to the judiciary, e.g. legislative strike-down or amendment.¹¹⁹ Both sides in the debate on ESR inclusion illustrate possible ramifications for the doctrine. Raab agrees that priorities of economic and social policy should be debated and determined by ministers and democratic law-makers, not by lawyers in court.¹²⁰ Judges lack the competency to create or influence policy goals. Who knows the maximum resources available better than state organs themselves? However, participation could range from conventional judicial method, to an elevated supervisory role in evaluating budgetary concerns from an ESR and Article

114. T Bingham, *The Rule of Law* (Allen Lane, London 2010) 167.

115. *Rights of Man* (New edn Penguin Classics, New York 1984) Part I 141.

116. *Repairing British Politics: a blueprint for constitutional change* (Hart Publishing, Oxford 2010) 25.

117. *ibid.*

118. *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (CUP, Cambridge 2010).

119. (n 118) 39.

120. (n 18) 221.

2(1) ICESCR perspective.¹²¹ The latter, it is suggested, would not authorise judges to act beyond their competencies but rather enhances the existing judicial role. A BOR enabling greater institutional dialogue would propel the HRA's current separation of power dynamisms, contributing to a judiciary which better understands the communities it serves.

5.2 DEMOCRATIC DIALOGUE

Hickman identifies two polarised schools of thought as the 'incorporationists' or 'true blue human rights lawyers', and the 'constitutional dialogue' concept.¹²² The former, Hickman remarks, deny the HRA has any dialogic character and are concerned with legal aesthetics. The latter establishes a meaningful dialogue between the courts, Parliament and the executive; a fair and free exchange of institutional views. As discussed, the HRA enables a degree of institutional exchange between the legislature, executive and the courts. However, Parliament can ultimately legislate on whatever matters it chooses to. Restrictions are political, not legal, with no additional theoretical transfer of powers to the courts. Is this truly an institutional dialogue, or a mere monologue?

By their profession, judges are mandated to engage with legislative questions, whereas Parliament can choose to ignore or insufficiently address judicial responses. Furthermore, the institutional position of the court under the HRA imposes restrictions on what courts can actually express.¹²³ Both Houses of Parliament are expressly exempt from such restriction.¹²⁴ In terms of black letter law, the HRA is deceptive in its portrayal as a dialogic actor.

Michael Zander suggested establishing formal Parliamentary machinery to scrutinise whether legislation complied with a BOR, such as a Standing Committee.¹²⁵ This would enable dialogue beyond the executive, legislature and courts to include nonpartisan interest groups, surpassing sections 4 and 19 HRA. Dialogue between national, international and supranational courts could also be furthered through a similar s39 SABOR provision. Judges themselves appear receptive to this transnationalization of

121. A Nolan and M Dutschke, 'Article 2(1) ICESCR and states parties' obligations: whither the budget?' [2010] EHRLR 280.

122. (n 30) ch 3.

123. Human Rights Act 1998, s2 and s6(3)(a).

124. Human Rights Act 1998, s6(3)(b).

125. *A Bill of Rights?* (2nd edn Sweet & Maxwell, London 1997) 155-156.

constitutional rights discourse.¹²⁶

5.3 DEVOLUTION

Devolution problems concern whether disparate rights protection may arise between a national and a regional BOR.

The NIBOR experiences illustrate this. As mentioned in Part II, recommendations for ESR inclusion were rejected by the NIO. Despite references to international human rights instruments, the NIHRC noted that the NIO "...barely refers to the protections set down in these instruments".¹²⁷ Due to Northern Ireland's troubled political and social history, with dissident paramilitaries remaining a real concern, its resulting "special needs"¹²⁸ of rights have not been fully considered.

Almost a decade of NIBOR work has been undermined and put on hold while the central government turns to comparatively earlier stages of national BOR discussions. Colin Harvey, an NIHRC Commissioner, expresses frustration at this turn of events, remarking that the British BOR debate "...is increasingly expected to do the work of a broader constitutional conversation about the UK and its future."¹²⁹

As devolution promotes regional individuality, how can a BOR truly express a unified national identity? A BOR may be viewed as "a form of creeping centralisation", undoing Labour's devolution settlement.¹³⁰ Furthermore, a consultation process that does not involve the devolved administrations would cripple any semblance of legitimacy. It will be interesting to see how, or if, Sinn Fein and the Scottish National Party contribute to a British BOR.

6. CONCLUSION

A BOR is a statement of national identity, values and aspirations, with wide-ranging impacts. It could potentially state what the HRA does not.

Stylistically: the HRA has been portrayed as an imposed European instrument that fails to protect the domestic law-abiding citizen. Through

126. B Flanagan and S Ahern, 'Judicial decision-making and transnational law: a survey of common law Supreme Court judges' (2011) 60 ICLQ 1.

127. (n 56) 14.

128. (n 55) 7.

129. 'Taking the next step? Achieving another Bill of Rights' [2011] EHRLR 24.

130. V Bogdanor, *The New British Constitution* (Hart Publishing, Oxford 2009).

an inclusive public consultation process, a sense of public ownership could be realistically achieved and maintained.

Substantially: a BOR could include a wider range of rights, such as ESR. However, effective enforcement would depend on how willing British judges are to assess the state's allocation of resources. Apparent reliance on political accountability through s33's weak judicial façade has spurred the Canadian judiciary to challenge legislative actions in protecting CCRF rights. In contrast, SABOR provided a legislative springboard for the courts to assert guardianship of rights, which has not been fully realised.

Constitutionally: drafted mechanisms could enable democratic dialogue and outwardly strengthen Parliamentary sovereignty, with potentially adverse ramifications for devolution. However, a British BOR would still be subject to the two European courts' clear considerable superior influence over domestic law.

So to what extent can a BOR depart from the HRA? A BOR buoyed by contemporary transnational trends is a live possibility, yet depends on political will. Nevertheless the real measure of a BOR's departure lies in its judicial application. The stylistic gloss may be thick, but the sheen will wear fast if a BOR does not enable more substance and constitutional impact than the HRA already does.



KING'S STUDENT LAW REVIEW

CRITICAL ANALYSIS OF THE
CONCEPT OF A 'REASONABLY
AVAILABLE ALTERNATIVE MEASURE'
IN THE CONTEXT OF ARTICLE XX
GATT, IN THE LIGHT OF THE PANEL
AND APPELLATE BODY RULINGS
IN *BRAZIL-TYRES*

CORINNA PAEFFGEN
LLM Student, King's College London

ABSTRACT

In Brazil – Measures affecting Imports on Retreaded Tyres (Brazil – Tyres) the European Communities (EC) challenged Brazil's ban on imports of retreaded tyres and various related measures as a violation of World Trade Organization (WTO) rules. Brazil defended its measures as necessary to protect human, animal and plant life and health. The Appellate Body (AB) found Brazil's import ban in principle justified pursuant to Art. XX (b) GATT 1994 but not covered by the chapeau.

The concept of a 'reasonably available alternative measure' is part of the necessity test that examines whether a measure is necessary pursuant to Art. XX (b), (d) or (g). Necessity tests appear in slightly different forms in various WTO agreements. They reflect the balance between the goal of preserving the freedom of Members to set and achieve their own regulatory objectives through their chosen measures, and the goal of discouraging Members from adopting illegitimate protectionist measures. The decisions in Brazil-Tyres touched upon a number of issues relevant to the application of the necessity test.

In this paper, I will explore the main issues arising out the dispute. The main issues concern the concept of complementary measures, the characterization of a member's regulatory goal and finally the issue what kind of test was applied by the panel: whether it was a "weighing and balancing" test or rather a proportionality test or suitability test. I will discuss the nature of a complementary measure and how it could be defined since the panel and the AB did not elaborate upon that question. In particular, I will argue, that the categorization of alternative and complementary measures may be an instrument of preserving the lawfulness of the measure at issue. In addition, the characterization of Brazil's objective and its impact on the availability of possible alternatives will be examined. Member states are free to set their goals and level of protection. The EC argued on appeal that the panel applied an incorrect concept of alternative measures and criticized the discrepancy in the description of Brazil's regulatory goal. The third set of issues relates to the "weighing and balancing" process. In this context I will show that the application of the balancing test in Brazil – Tyres is debatable and seems to be a veiled proportionality test.

1. INTRODUCTION

Balancing the desire of an operating open multilateral trading system with the pursuit of Member's domestic regulatory policies is a significant and ongoing challenge faced by the World Trade Organization. The linkage between free trade, public health and environment as an important challenge is highlighted by the decisions of the panel and AB in *Brazil – Measures Affecting Imports of Retreaded Tyres*.¹ States can take trade and environmental measures and each type of measures may have externalities relevant for the other.² The task of the WTO panels and the Appellate Body is to examine whether such measures are consistent with WTO provisions.³ If a measure is WTO-inconsistent they have to examine whether one of the exception clauses such as Article XX of the GATT 1994 can justify this inconsistency.

In applying Article XX, the panels and the AB evaluate whether a measure taken by a Member is designed to achieve a certain non-trade goal that entails unavoidable restrictions on international trade or a disguised attempt to boost or protect national economy.⁴ An important tool to distinguish between legitimate exceptions and illegitimate protectionist measures is the necessity test that appears in slightly different forms throughout the various agreements.⁵ The concept of a 'reasonably available alternative measure' is part of the examination whether a measure is necessary pursuant to Article XX(b), (d) or (g) of the GATT 1994.

The decisions in *Brazil-Tyres* touched upon a number of issues relevant to the application of the necessity test. In this paper, I will explore the main issues arising out the dispute that concern the characterisation of a Member's regulatory goal, the concept of cumulative or complementary measures and the question what kind of test was applied by the panel.

1. Appellate Body Report, *Brazil – Measures affecting Imports on Retreaded Tyres (Brazil-Tyres)*, WT/DS332/AB/R, adopted 03 December 2007.

2. See for example, Charnovitz, S., 'The WTO's environmental progress', *JIEL* 10 (2007) 685.

3. See Understanding on Rules and Procedures Governing the Settlement of Disputes or "DSU".

4. Kapterian, G., 'A Critique of the WTO Jurisprudence on „Necessity', *ICLQ* 59 (2010) 89, 106.

5. General Agreement on Tariffs and Trade (GATT 1947), in WTO, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2007) 423-493; Arts. XX and XXI; Agreement on the Application of Sanitary and Phytosanitary Measures (15 April 1994); Marrakesh Agreement Establishing the WTO, Annex 1A, Legal Texts, 59-73, Arts. 2.2. and 5.6.; Agreement on Technical Barriers to Trade (15 April 1994), Annex 1A, Legal Texts, Arts. 2.2. and 2.5.; General Agreement on Trade in Services WTO Agreement, Annex 1B, Legal Texts, 284-320, Arts. XIV and IV:4.

2. BACKGROUND OF JUDGMENT

In *Brazil-Tyres*, the EC challenged the imposition of a prohibition on the importation of retreaded tyres, adopted by virtue of Article 40 of Portaria No. 14 of the Secretariat of Foreign Trade of the Brazilian Ministry of Development, Industry, and Foreign Trade (“SECEX”) and various related measures as a violation of Art. XI:1, respectively Art. III:4 of the GATT.⁶ The measure at issue imposed (i) an import ban on retreaded tyres, (ii) an import ban on used tyres and (iii) an exemption from the import ban of imports of certain retreaded tyres from other countries of the Southern Common Market (“MERCOSUR”). The latter was identified by the panel as a distinct measure and claimed separately as inconsistent with Art. I:1⁷ and Art. XIII:1⁸ of the GATT.⁹ Further, a number of related measures were challenged by the EC which will not be discussed in this paper.

Brazil contended that the import ban, the associated sanctions and the exemption for tyres from countries of the MERCOSUR were inconsistent with Art. XI:1, Art. III:4 and Art. XIII:1 but justified under Art. XX(b).¹⁰ Though the import ban was identified as ‘necessary to protect human, animal or plant life or health’ under Art. XX(b), the panel and the AB found ‘that the importation of used tyres under court injunctions resulted in the import prohibition on retreaded tyres being applied by Brazil in a manner that constituted both “a means of unjustifiable discrimination [between countries] where the same conditions prevail” and “a disguised restriction on international trade”, within the meaning of the chapeau of Article XX.’¹¹ Regarding the panel’s necessity analysis, the EC raised various legal issues: the assessment and weighing of the contribution of the import ban to the realisation of the ends pursued by it, the definition of alternatives to the import ban¹² and finally the failure of a proper weighing and balancing of the relevant factors.¹³

6. Dated 17 November 2004. Appellate Body Report, *Brazil-Tyres*, paras. 2, 122.

7. Most-Favoured-Nation-Treatment.

8. Non-discriminatory Administration of Quantitative Restrictions.

9. AB Report, *Brazil-Tyres*, para. 123.

10. *Ibid.*, para. 2.

11. *Ibid.*, para. 4, 232-233; Panel Report, *Brazil Tyres*, paras. 7.310, 7.349.

12. Panel Report, *Brazil-Tyres*, para. 209.

13. AB Report, *Brazil-Tyres*, para. 133; Panel Report, *Brazil-Tyres*, para. 285.

2. THE NECESSITY TEST UNDER THE GATT AND THE CONCEPT OF REASONABLY AVAILABLE ALTERNATIVE MEASURE

Various actions taken by Members to pursue national policy objectives may be justified by one of the specific policy exceptions listed in the subparagraph (a) to (j) of Article XX.¹⁴

The adoption or enforcement of measures pursuing the listed policies is limited by the chapeau of Article XX which prohibits measures constituting an arbitrary or unjustifiable discrimination, or a disguised restriction on international trade. The objective of the introductory clause of Article XX is generally the prevention of abuse of the exceptions of Article XX¹⁵. The contested measure needs to fall within one of the listed exceptions but must also satisfy the chapeau, thus, the analysis requires a two-tier test¹⁶.

The WTO jurisprudence, regarding the application of the necessity test has been inconsistent and criticised as being incoherent by many commentators.¹⁷ The GATT and WTO adjudicating bodies have developed two versions of the necessity-test, the traditional GATT test and the balancing test.¹⁸ According to the traditional GATT test or “least-trade-restrictive”-test in US-Section 33719, applied similarly in *Thai-Cigarettes*²⁰ and *US-Gasoline*, a domestic measure cannot be deemed necessary when another measure exists that would achieve the same regulatory goal benefits while being less trade restrictive. This test was modified with the AB’s decision in *Korea-Beef*²¹, recognised as marking the beginning of a new interpretation of the term ‘necessary’, where a new factor for determining whether a measure is “necessary” was introduced.

14. Lester, S.; Mercurio, B. and others, *World Trade Law – Text, Materials and Commentary* (Hart Publishing, Oxford, 2008) 381.

15. Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline (US-Gasoline)*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I 3, 22.

16. AB Report, *US-Gasoline*, at 22.

17. Bown, C.; Trachtman, J., ‘Brazil – Measures Affecting Imports of Retreaded Tyres: a balancing act’, *World TR* 8 (2009) 85, 86

18. *Ibid.*, 119-120.

19. GATT Panel Report, *United States Section 337 on the Tariff Act of 1930 (US-Section)*, L/6439, adopted 7 November 1989, BISD 36S/345.

20. Panel Report, *Thailand – Restrictions on Importation of Internal Taxes on Cigarettes (Thai-Cigarettes)*, DS10/R - 37S/200, adopted 07 November 1990.

21. Appellate Body Report, *Korea – Measures Affecting Imports Of Fresh, Chilled and Frozen Beef (Korea-Beef)*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 11 December 2000.

The meaning of necessary could range from “indispensable” to “making a contribution to” and the determination:

involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interest or values protected by that law or regulation, and the accompanying impact of the law or regulation in imports or exports.²²

This new test, also called “weighing and balancing” test, was refined and reinforced in *EC-Asbestos*²³ and *US-Gambling*²⁴; and recently applied in *Brazil-Tyres*. In *Korea-Beef*, reaffirmed in *EC-Asbestos*, the AB stated: ‘the more vital or important the common interests or values are considered the easier it would be to accept as necessary measures designed to achieve those ends.’²⁵ The introduction of the degree of the alternative measure’s contribution to the end remarked a departure from the understanding of ‘reasonably available’ which only considered the costs of the alternative measure.²⁶ It is generally believed that the AB established a cost-benefit balancing test: balancing the benefits from the measure in the achievement of the pursued goal against the costs of the measure in reduced trade.²⁷

3. THE IMPACT OF A NATIONAL REGULATORY GOAL ON THE AVAILABILITY OF ALTERNATIVE MEASURES

A fundamental principle is the right that WTO Members are free to determine the level of protection with respect to the objective within the meaning of Article XX(b).²⁸ It appears less likely to find reasonable alternatives to the impugned measure when a regulatory goal is characterised

22. AB Report, *Korea-Beef*, para. 164.

23. Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (EC-Asbestos)*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243.

24. Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Service (US-Gambling)*, WT/DS285/AB/R, adopted 20 April 2005.

25. *Ibid.*, para. 162; AB Report, *EC-Asbestos*, para. 172.

26. Bown/Trachtman (note 19) 120.

27. Regan, D., ‘The meaning of “necessary” in GATT Article XX and GATS Article XIV: the myth of cost-benefit balancing’, *World TR 6* (2007) 347.

28. AB Report, *Brazil-Tyres*, para. 210; AB Report, *US-Gambling*, para. 308.

in a qualitative manner and interpreted narrowly.

4. BRAZIL'S REGULATORY GOAL AND CHOSEN LEVEL OF PROTECTION

On appeal, the EC argued that the panel applied an incorrect concept of alternative measures²⁹ and criticised the discrepancy in the description of Brazil's regulatory goal.³⁰

Brazil relied upon Article XX(b) and claimed that the import ban was a measure necessary to protect human life and health and the environment. The objective of the import ban was the reduction of waste tyres volumes and by doing so, the reduction of the incidence of cancer, dengue, reproductive problem and other risks.³¹ Brazil argued that it prohibits the import of retreaded tyres because they have a shorter lifespan than new tyres, and thus would become waste sooner. This increases the accumulation of waste tyres to a greater degree than new tyres.³² In particular, Brazil claimed that disease carrying mosquitoes would use waste tyres as breeding grounds and the accumulation of waste tyres would create a risk of mosquito-borne diseases such as dengue, yellow fever and malaria. Additionally, it was claimed that these diseases would also be spread through interstate transportation of waste tyres. Furthermore, it was submitted that the accumulation of waste tyres would also create a risk of tyre fire and leaching of toxic substances.³³

The panel found, and the AB affirmed, that there existed a risk to human health and concluded that Brazil's policy fell within the range of policies covered by Article XX(b).³⁴ The objective of protecting of human life and health against diseases arising from the accumulation of waste tyres is 'both vital and important to the highest degree'.³⁵ With regard to the extent to which the goal is pursued, the panel noted that Brazil's chosen level of protection is the 'reduction of risks of waste tyre accumulation to the maximum extent possible'.³⁶ In its analysis of possible alternative measures

29. AB Report, *Brazil-Tyres*, para. 133.

30. Van Damme, I., 'Appellate Body Report: Brazil-measures affecting imports of retreaded tyres', ICLQ 57 (2008) 710, 716.

31. Panel Report, *Brazil-Tyres*, para. 4.11.

32. Panel Report, *Brazil-Tyres*, paras. 4.20-4.21.

33. *Ibid.*, para. 4.53.

34. *Ibid.*, para. 7.102; AB Report, *Brazil-Tyres*, para. 179.

35. Panel Report, *Brazil-Tyres*, para. 7.210; AB Report, *Brazil-Tyres*, para. 179.

36. Panel Report, *Brazil-Tyres*, para. 7.108.

the panel then identified the regulatory goal as 'preventing or reducing tyre waste to the maximum extent possible'³⁷ and shortly after, it stated that the chosen level of protection would involve the 'non-generation' of waste tyres.³⁸ It is unclear how the level of protection, 'non-generation of waste tyres', indicates to what extent the regulatory goal of 'preventing or reducing tyre waste to the maximum extent' was pursued.³⁹ Interestingly, the phrase of 'non-generation of unnecessary tyre waste' is only used in the panel's analysis of possible alternative measures, it is not used before in the section where the regulatory goal was examined in order to determine whether the measure fell within Article XX(b).

In analysing whether the measure at issue would contribute to the realisation of the regulatory goal, the panel examined (i) whether the import ban would reduce the accumulation of waste tyres⁴⁰ and (ii) whether the reduction of accumulation of waste tyres can reduce risks to human life and health⁴¹. With regard to the determination of reasonably alternative measures Bown and Trachtmann criticised that a reduced number of waste tyres would not constitute a degree to which health would be fulfilled. Furthermore, reduction of waste tyres may reduce the adverse effects on health; however, less trade restrictive alternatives could achieve the same effects on health without reducing the quantity of waste tyres.⁴² Thus, a level of protection within the meaning of Article XX(b) could not be characterised as 'reducing tyre waste to maximum extent possible' or 'reducing the number of waste tyres', this could only be a means of protection. Indeed, if a means of protection constitutes a standard itself to which all other means to be held it would be no necessity test.⁴³

5. NARROW INTERPRETATION OF ALTERNATIVE MEASURES

On appeal, the EC contends that the panel applied a narrow definition of alternative. The EC alleged, according to the narrow interpretation could a measure only be considered as an alternative when the measure could avoid

37. Panel Report, *Brazil-Tyres*, paras. 7.166, 7.177.

38. *Ibid.*, para. 7.177.

39. McGrady, B., 'Necessity exceptions in WTO law: retreaded tyres, regulatory purpose and cumulative regulatory measures', *JIEL* 12 (2009) 153, 158.

40. Panel Report, *Brazil-Tyres*, paras. 4.53-4.121.

41. *Ibid.*, paras. 4.122-4.162.

42. Bown/Trachtman (note 19) 128.

43. *Ibid.*, 125.

the waste tyres arising from imported, retreaded tyres or when the measure is "equal to a waste non-generation measure".⁴⁴

The EC proposed a series of possible alternatives which can be distinguished in two types of alternative measures: (i) measures to reduce the accumulation of waste tyres and (ii) measures to improve the management of waste tyres.⁴⁵

With regard to the proposed alternative measures aiming to improve the management of waste tyres, the EC put forward two collection and disposal schemes and a number of disposal methods.⁴⁶ One alternative measure could be seen in a collecting and disposal scheme adopted by the Brazilian legislation itself, CONAMA Resolution 258/1999, which created a collection and disposal scheme that 'makes it mandatory for domestic producers of new tyres and tyre importers to provide for the safe disposal of waste tyres in specified proportions'.⁴⁷ Another alternative measure could exist in a scheme called Paraná Rodando Limpo, which was a voluntary programme to collect 'all existing unusable tyres currently discarded throughout the territory of Paraná'.⁴⁸ The panel stated that, though recognising that the Resolution would constitute a less restrictive alternative measure, the collection and disposal schemes had already been implemented and would not be able to achieve the same desired level of protection. By referring to the findings of the AB in *EC-Asbestos* considering that 'France could not reasonably expected to employ any alternative measure if that measure would involve a continuation of the very risk that the measure seeks to halt'⁴⁹, the panel held the view that such disposal schemes would not address the risks associated with the disposal of waste tyres.⁵⁰

The EC proposed a series of disposal methods which focused rather on the management of waste tyres than on the reduction of waste, such as, (i) landfilling, (ii) stockpiling, (iii) incineration of waste tyres in cement kilns and similar facilities; and (iv) material recycling.⁵¹ Concerning the disposal methods landfilling, stockpiling and incineration, the panel found that all these

44. AB Report, *Brazil-Tyres*, para. 173; European Communities' appellant's submission, para. 227.

45. AB Report, *Brazil-Tyres*, para. 157.

46. Panel Report, *Brazil-Tyres*, para. 7.160.

47. *Ibid.*, para. 7.174.

48. AB Report, *Brazil-Tyres*, para. 131.

49. Panel Report, *Brazil-Tyres*, para. 7.177.

50. *Ibid.*, para. 7.178.

51. *Ibid.*, para. 7.179; European Communities' second written submission, paras. 106, 107, 113 and 133.

measures or practises would, 'even if they were performed under controlled conditions, pose risks to human health and cannot constitute an alternative to the import ban'⁵². With respect to Brazil's policy objective and chosen level of protection, in the panel's view non-generation measures would be more apt to achieve the objective 'because they prevent the accumulation of waste tyres, while waste management measures dispose of waste tyres only once they have accumulated'⁵³. According to the AB, with reference to its findings in *EC-Asbestos*, the panel did not commit an error of law by considering risks attached to the proposed measures.⁵⁴

With regard to material recycling applications the panel examined, *inter alia*, the use of rubber asphalt, rubber asphalt granulates and the method of devulcanization. It concluded that the use of rubber asphalt would result in higher costs and consequently 'the demand for this technology is limited and its waste disposal capacity is reduced.'⁵⁵ The use of rubber asphalt granulates may only dispose a limited amount of waste tyres.⁵⁶ The panel observed regarding tyre rubber devulcanization that 'under current market conditions, the economic viability of these options has yet to be demonstrated.'⁵⁷ Based on these considerations, the panel found 'that it is not clear that material recycling applications are entirely safe'. However, even if these methods were harmless, 'they would not be able to dispose of a quantity of waste tyres sufficient to achieve Brazil's desired level of protection due to their prohibitive costs and thus cannot constitute a reasonably available alternative to the import ban'.⁵⁸

6. IMPORTANCE OF THE CHARACTERISATION OF A REGULATORY GOAL WITH RESPECT TO THE AVAILABILITY OF ALTERNATIVES

In characterising Brazil's regulatory goal in broader terms such as 'to protect health by reducing the harmful impact of waste tyres', measures including the described collection and disposal schemes could be considered

52. Panel Report, *Brazil-Tyres*, para. 7.195.

53. AB Report, *Brazil-Tyres*, para. 174.

54. *Ibid.*, para. 174; AB Report, *EC-Asbestos*, para. 174.

55. Panel Report, *Brazil-Tyres*, para. 7.205.

56. *Ibid.*, para. 7.206.

57. *Ibid.*, para. 7.207.

58. *Ibid.*, para. 7.208.

as reasonably available alternatives.⁵⁹ However, based on the interpretation of the regulatory goal 'the reduction of risks of waste tyre accumulation to the maximum extent possible'⁶⁰ with the level of protection of 'non-generation of unnecessary tyre waste', the panel limited the possible alternatives to those that would 'prevent or reduce tyre waste to the maximum extent possible'.⁶¹ This is a very narrow interpretation of the level of protection focussing on the number of tyres and not on health. By using this narrow understanding of alternative, the panel forecloses measures focussing on the management of waste.⁶² It appears, the correct reference to 'reduction' is not the 'reduction of risks of waste tyre accumulation to the extent possible' when interpreting the level of protection, rather the reduction of risks as much as provided by the measure at issue. A less restrictive alternative measure has not to be more effective than the measure adopted by Brazil but to be as effective as the existing measure. Thus, an alternative measure is only required to reduce the risks of waste tyre accumulation as much as the existing measure and not to reduce the risks to the extent possible.⁶³

7. FREEDOM OF SETTING GOALS?

One notable feature is that both the panel and the AB took Brazil's goal at face value and stated that the goal 'as declared by the Member taking the measure, falls within the policies to protect human, animal or plant life or health'.⁶⁴

In contrast to *Brazil-Tyres*, the WTO jurisprudence suggests a different approach to the characterisation of a regulatory goal and level of protection, whereas the adjudicating bodies seemed to engage in judging the value of the policy goal.⁶⁵ For example, in the *Korea-Beef* dispute, Korea argued that its dual retail system for beef, segregating imported and domestic beef, was aimed at the total elimination of fraud concerning the origin of beef. However, the AB rejected Korea's chosen level of protection assuming that Korea's true intention was to reduce considerably the number of cases of fraud

59. McGrady (note 43) 158.

60. Panel Report, *Brazil-Tyres*, para. 7.108.

61. *Ibid.*, paras. 7.166, 7.177.

62. Bown/Trachtman (note 19) 129.

63. *Ibid.*

64. Panel Report, *Brazil-Tyres*, para. 7.101.

65. Weiler, J., 'Brazil-Measures Affecting Imports on Retreaded Tyres: prepared for the ALI project on the case law of the WTO', World TR 8 (2009) 137, 140.

occurring with respect to the origin of beef sold by retailers.⁶⁶ Interestingly, the AB called Korea's autonomy over its chosen level of protection on the ground that the 'total elimination of fraud would probably require a total ban of imports.'⁶⁷ In *US-Gambling*, the US, as a defence, invoked Article XIV(a) and (c) arguing that the restrictions on the cross-border supply of gambling and betting services were justified as necessary to protect public morals and to maintain public order.⁶⁸ When examining whether the measure at issue was designed to protect morals the AB acknowledged that Members have the right to choose the level of protection they considered appropriate for that value.⁶⁹ Though stating that 'Members should be given some scope to define and apply for themselves the concepts of "public morals" and "public order" in their respective territories, according to their own systems and scales of values',⁷⁰ the panel refrained from completely deferring the content of public morals to Members.⁷¹

It is important to note that the AB held in *US-Gambling* that a Member's characterisation of a regulatory goal underlies an objective standard and when determining whether a measure is 'necessary' it will be relevant how a measure's objectives and the effectiveness of its regulatory approach are characterised 'as evidenced by texts of statutes, legislative history, and pronouncements of government agencies or officials'.⁷² However, this comment was rebutted by stating that these characterisations were not binding for the panel but rather a guideline. Though a panel should objectively assess the necessity of a measure on basis of the evidence given on the records, there was no elaboration on how the assessment by the panel is to be applied or to what extent the Member's characterisation would be relevant to this assessment.⁷³

In *Korea-Beef* and *US-Gambling*, it appears that the panel departed from past practice in *Brazil-Tyres*.⁷⁴ If the logic of the AB in *Korea-Beef* is applied to the scenario in *Brazil-Tyres* the AB could reject Brazil's level of protection, also on the basis that Brazil made an exception to the import ban such as the MERCOSUR exception, reasoning that Brazil did not seek

66. AB Report, *Korea-Beef*, para. 178.

67. *Ibid.*, para. 178.

68. Panel Report, *US-Gambling*, para. 6.3.

69. *Ibid.*, para. 6.461.

70. Panel Report, *US-Gambling*, para. 6.461.

71. Kapterian (note 5) 111.

72. AB Report, *US-Gambling*, para. 304.

73. Kapterian (note 5) 112; AB Report, *US-Gambling*, para. 304.

74. McGrady (note 43) 156.

to the 'reduction of risks of waste tyre accumulation to the maximum extent possible' or 'non-generation of waste tyres' but had instead sought only to reduce the number of waste tyres considerably.

The different and incoherent approaches to the characterisation of a Member's regulatory goal highlight the impact and importance of a regulatory goal upon the necessity analysis but also the extent of the adjudicating body's discretion in the process of determination whether a reasonably available alternative measure exist. The characterisation of a regulatory goal may determine the lawfulness of a measure, depending on whether it is described narrowly or broadly, or either in qualitative or quantitative terms. However, due to the lack of any methodology underlying the analysis of the relative value of a regulatory goal, that may create uncertainty, and the lack of a legitimate mandate of the panel or AB, assessing the importance of a regulatory goal by panels or AB appears inappropriate. In addition, different WTO Members have various regulatory issues and the need to share common goals is far removed from the text of Article XX, and is rather a matter of political negotiation.⁷⁵

8. CONCEPT OF CUMULATIVE MEASURES

8.1 MEASURES PRESENTED AS POSSIBLE ALTERNATIVES

With regards to possible alternatives to reduce waste tyres accumulation the EC proposed, (i) measures to encourage domestic retreading or to improve the retreadability of domestic used tyres, (ii) measures to enforce the import ban without exception and finally (iii) measures to avoid the generation of waste tyres.⁷⁶ The panel found that these measures had already been implemented or were in the process of being implemented and held that under these circumstances that the impact of these measures 'could be cumulative rather than substitutable'.⁷⁷

Without offering explanation, the AB recognised the distinction between cumulative and alternative measures and that 'these measures already figure as elements of a comprehensive strategy designed by Brazil to deal with waste tyres. Substituting one element of this comprehensive policy

75. McGrady (note 43) 163; Van Calster, G., 'Faites vos jeux – regulatory autonomy and the World Trade Organization after Brazil Tyres', *J Env L* 20 (2008) 121, 134.

76. *Ibid.*, paras. 158-159.

77. *Ibid.*, para. 158, Panel Report, *Brazil-Tyres*, para. 7.169.

for another would weaken the policy by reducing the synergies between its components, as well as its total effect.⁷⁸ However, both adjudicating bodies failed to provide any definition of cumulative measures and neither the panel nor the AB offered a means to distinguish between both types of measures.

8.2 HOW TO DEFINE CUMULATIVE MEASURES

Bown and Trachtman suggest that an alternative measure can only be a measure that has not yet been implemented. Thus, the distinction between a cumulative measure and alternative is simply between what has already been done and what has not been done yet.⁷⁹ In contrast, McGrady argues that the mere fact that a purported alternative has already been implemented should not be definitive for the evaluation of whether a measure can be considered as an alternative measure. Rather, it should be concluded that a Member has the intention to use a range of measures when other measures are already in place and a further measure is implemented. Whereas the lack of other measures in force indicates that a Member has no such intention. In the latter scenario, a possible alternative measure could be foreclosed from consideration as an alternative simply by being categorized as a complementary measure. Thus, the concept of complementary measures may serve as an instrument of protectionism of the measures in force.⁸⁰ It must also be taken into account that states impose and maintain measures not only for reasons of necessity.⁸¹ Similarly, the requirement articulated by the AB to consider a measure in a broader context of a comprehensive strategy is not indicative to the question whether a measure is complementary. The main issue here, among others, is to determinate when measures are to be considered in a broader context and how, in the absence of specific rules, this should be conducted. A panel would be endowed with an undesirable, wide discretion.⁸²

In attempting to define the concept of cumulative measures, the fact that a measure has been implemented or is in the process of implementing should not be the decisive factor to determine a measure as complementary. Two more factors should be significant for such evaluation: (i) two measures must have a different effect upon the regulatory goal and (ii) both measure must serve the same regulatory goal, thus, one measure must complement

78. AB Report, *Brazil-Tyres*, para. 172.

79. Bown/Trachtman (note 19) 127.

80. McGrady (note 43) 166.

81. Regan (note 30) 367.

82. McGrady (note 43) 166.

the other measure. In order to evaluate the different effects of measures a panel is required to characterise a regulatory domestic goal. Therefore, under this approach, the categorical identification of particular measures as complementary measures is avoided.⁸³

For example, if Brazil's goal was to reduce waste tyres/generation of waste tyres by a particular quantity (however, this is an indirect objective,⁸⁴ a direct goal would be avoidance of X number of malaria or dengue fever cases)⁸⁵ each measure would have this effect. However, where the goal is the reduction of the risk of waste tyre accumulation to the extent possible, each measure would make a different contribution to the goal. Thus, the characterisation of a regulatory goal determines the lawfulness of a measure. A more sophisticated definition of cumulative measures, as developed above, may encourage panels to consider a Member's regulatory goal in a more careful analysis and to consider the necessity of a measure in its broader context.⁸⁶

8.2.1 MEASURES TO ENCOURAGE DOMESTIC RETREADING

One proposed alternative to the import ban in Brazil-Tyres was to encourage domestic retreading or to improve the retreadability of domestic used tyres. This could be attained through a subsidy, which Bown and Trachtmann consider in an economic analysis of Brazil's policy choices as the economically most attractive alternative with a very less restrictive impact on trade than the import ban.⁸⁷ The EC proposed a series of examples of measures to promote the retreading of domestic passenger cars including measures.⁸⁸ The panel stated that encouraging domestic retreading or improving the retreadability of domestic used tyres would be less trade restrictive and 'could contribute to the reduction in the number of waste tyres generated by domestic and used tyres in Brazil by maximising their overall lifespan.'⁸⁹ However, it would not lead to the reduction in the number of waste tyres

83. Ibid.

84. Van Damme (note 33) 716.

85. Schloemann, H., 'Brazil-Tyres: Policy Space Confirmed under GATT Article XX', *Bridges Monthly Trade Review*, 12(1) (2008) <<http://ictsd.org/i/news/bridges/3141/>> accessed 31 August 2010.

86. McGrady (note 43) 168.

87. Bown/Trachtman (note 19) 128.

88. Panel Report, *Brazil-Tyres*, paras. 4.179-4.189.

89. Ibid., para. 7.167.

additionally generated by imported short lifespan retreaded tyres.⁹⁰ Further, the panel held that this type of measure had already been implemented by Brazil and could therefore not be considered as an alternative.⁹¹ However, neither the panel nor the AB considered whether additional incentives beyond these measures to encourage domestic retreading could establish a less trade restrictive alternative to the import ban.⁹²

8.2.2 ENFORCEMENT OF IMPORT BAN OF USED TYRES

The EC proposed further the prevention of imports of used tyres through court injunctions. The EC contended that, though an import ban on used tyres was already in force, Brazilian retreaders continued importing used tyres through injunctions from Brazilian courts for purposes of retreading them in Brazil.⁹³ The panel noted that the importation of used tyres was already prohibited by Article 40 of Portaria SECEX 14/2004. Though it recognises the contribution of the import ban on used tyres to the objective,⁹⁴ the panel stated that the Brazil already prohibits the import of used tyres and thus, if the EC propose the prohibition of used tyres as an alternative measure, it could be said that the proposed measure has already been implemented.⁹⁵

Two issues arise in this context. First, for purposes of international law national measures are all measures that emanate from the internal domestic process with no regard to the actual state actor and secondly, the panel failed to consider the import ban on used tyres as an alternative when evaluating the necessity of the import ban of retreaded tyres.⁹⁶ With regards to whether Brazil as a state is responsible for all national measures taken by legislative, administrative and judicative powers, it becomes apparent that the import ban of used tyres has not been enforced completely. Hence, in contrast to the findings of the panel and the AB,⁹⁷ the enforcement of the import ban of used tyres could be considered as an alternative measure that would achieve the same objective, as already recognised by the panel,⁹⁸ and could be less

90. Ibid., para. 7.168.

91. Ibid., para. 7.169.

92. Bown/Trachtman (note 19) 109.

93. Panel Report, *Brazil-Tyres*, para. 4.187.

94. Ibid., para. 4.139.

95. Ibid., para. 7.171.

96. Bown/Trachtman (note 19) 130.

97. AB Report, *Brazil-Tyres*, para. 159, Panel Report, *Brazil-Tyres*, para. 7.171.

98. Panel Report, *Brazil-Tyres*, para. 4.139.

trade restrictive.⁹⁹

8.3 PURPOSE OF CONCEPT OF CUMULATIVE MEASURE

Based on the previously developed definition of the term ‘cumulative’, a complementary measure can only be identified as such when a particular goal cannot be achieved by one measure solely, but rather two or more measures are necessary to achieve the pursued goal. Thus, a complementary measure is not an alternative and cannot undermine the necessity of another measure which is considered necessary. It appears that with defining measures as cumulative certain measures, such as the proposed measures to avoid the generation of waste tyres, can be removed from consideration as alternatives. From this point of view, recognising a measure as cumulative may serve as an instrument to preserve the lawfulness of a measure deemed to be necessary because alternative measures would not be reasonably available.¹⁰⁰

9. THE TEST OF “WEIGHING AND BALANCING” IN BRAZIL-TYRES

The question of whether alternative measures are reasonably available is also important for the third stage of the necessity analysis, the weighing and balancing of the relevant factors. On appeal, the EC claimed that the panel conducted only a ‘superficial analysis’ and had failed to balance ‘its arguments about the measure and the alternatives with the absolute trade-restrictiveness of the import ban and with a real evaluation of the contribution of the import ban to the objective pursued.’¹⁰¹ According to the respond of the AB the process of necessity requires the assessment of ‘the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure’s objective, and its trade restrictiveness.’¹⁰² Is the measure at issue considered to be necessary, this conclusion must be confirmed by ‘comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective’ in the ‘light of the importance of interests or values at stake.’¹⁰³ The AB rejected the EC’s claim finding that the panel weighed and balanced

99. Bown/Trachtman (note 19) 127.

100. McGrady (note 43) 166.

101. AB Report, *Brazil-Tyres*, para. 178.

102. *Ibid.*, para. 178.

103. *Ibid.*

all relevant factors. For the first time, the process of weighing and balancing was described as a 'holistic operation that involves putting all the variables of the quotation together and evaluate them in relation to each other after having examined them individually, in order to reach an overall judgment'.¹⁰⁴ In this context the question arises whether the panel did only consider all relevant factors, evaluate them and how the factors were compared in detail.

The EC contended the panel's decision to analyse the contribution in a 'qualitative' manner instead of a 'quantitative' manner. Further, the EC argued that the relationship between the importation of retreaded tyres and the health risks is a 'very indirect' one that required a more diligent examination.¹⁰⁵ However, the AB upheld the panel's choice to conduct a qualitative analysis of the contribution of the import ban to the achievement of its objective. The risk to human life or health may be evaluated in either quantitative or qualitative terms.¹⁰⁶

Further, the AB affirmed the conclusion of the panel that 'in the light of the importance of the interests protected by the objective of the import ban, the contribution of the import ban to the achievement of its objective outweighs its trade restrictiveness'.¹⁰⁷ In examining the alternatives to the import ban, the EC claimed that the panel failed to make a proper collective assessment of all the proposed alternatives. The AB accepted the panel's view that none of the proposed alternatives would be a real substitute since they were either already implemented, not reasonably available, or would carry their own risks. None of the proposed alternatives would be an alternative that would eliminate safely the risks arising from waste tyres as intended by the import ban.¹⁰⁸ In this context, the question arises how the panel assessed the different measures without evaluating the different risks of the measures.

The import ban was considered to contribute to the objective of protecting human life and health against diseases arising from the accumulation of waste tyres by reducing the number of waste tyres. However, this was rather a theoretical approach. Other measures could also reduce the number of waste tyres or reduce the adverse effects of waste tyres. However, it is difficult to assess the risks of each measure and to compare them without knowing the magnitude of each effect. Even where possible alternatives would have collateral deleterious effects on health, they could

104. AB Report, *Brazil-Tyres*, para. 182.

105. *Ibid.*, para. 137.

106. *Ibid.*, para. 146.

107. *Ibid.*, para. 179.

108. *Ibid.*, para. 181.

still protect health better than the import ban could protect, presuming that the overall contribution to the objective would exceed the contribution to health provided by the import ban.¹⁰⁹

The determination of an equivalent contribution to the pursued objective when examining the availability of possible alternatives is faced with the same problem. The AB seems to be satisfied with a simple means and ends relationship, that is, the national measure is only required to be reasonably designed to achieve the legitimate goal. Thus, the necessity test conducted in *Brazil Tyres* could be interpreted not as a balancing test but rather as a mere suitability test.¹¹⁰

Another issue of evaluation arise in the context of the assessment of the importance of regulatory goals since the AB stated in *Brazil-Tyres* that the weighing and balancing process is carried out 'in the light of the importance of the interests or values at stake'.¹¹¹ This view is not new;¹¹² however, in *Brazil-Tyres* the AB stated that the panel 'must consider all the relevant factors',¹¹³ which suggests an obligation of the panel to consider importance in the context of Article XX(b). The panel concluded that the objective of protecting human health and life is both vital and important to the highest degree,¹¹⁴ and it also considered the importance of the objective of protecting animal and plant life. On the basis of the *US-Shrimp*¹¹⁵ ruling and the reference to the importance of environmental protection of the preamble to the WTO Agreement, the panel found that 'the objective of animal and plant life and health should also be considered important'.¹¹⁶ It can be concluded that panel demonstrated the requirement of value-judging of a Member's regulatory goal.¹¹⁷ It is uncertain how a panel may evaluate the importance of regulatory objective since there is no methodology underlying this analysis. Furthermore, there is no existing comprehensive value system and both the panel and the AB have no legitimate role in evaluating the importance of

109. Bown/Trachtman (note 19) 128.

110. Bown/Trachtman (note 19) 90, 126.

111. AB Report, *Brazil-Tyres*, para. 178.

112. AB Report, *US-Gambling*, para. 307.

113. AB Report, *Brazil-Tyres*, para. 178.

114. Panel Report, *Brazil-Tyres*, para. 7.210; AB Report, *Brazil-Tyres*, para. 179.

115. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US-Shrimp)*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755.

116. Panel Report, *Brazil-Tyres*, para. 7.112.

117. McGrady (note 43) 162.

domestic policy goals.¹¹⁸

The lack of a standardised necessity test¹¹⁹ makes it difficult to classify the test applied in *Brazil-Tyres* that could also be characterised as a suitability test or a proportionality test. Suitability tests require that the adopted measure is appropriate or reasonably designed to achieve the purported objective. Thus, suitability requires 'a causal relationship between the measure and its object.'¹²⁰ In contrast to a suitability test, a balancing test further requires to examine and balance a series of factors.¹²¹ This may involve the consideration of similar factors as considered in a cost-benefit analysis, however conducted more imprecisely and less formally: balancing regulatory benefits from the measure against the costs of implementing the measure, and costs of the measure in reduced trade.¹²² Balancing within the WTO legal system requires an evaluation of specific rights and interests at issue, though, there is no overall balancing of competing values and the objective pursued by the Member is not put into question.¹²³

A proportionality test¹²⁴ comprises three different elements: suitability, necessity and proportionality in the narrow sense (proportionality *strictu sensu*).¹²⁵ The first step of assessment is suitability in the meaning of a suitability test set out above. At the second step it is assessed whether the objective cannot be achieved by an alternative that is less restrictive but equally. If a number of appropriate measures are available, the least restrictive alternative needs to be selected.¹²⁶ Finally, the third step is reached when a measure has been found suitable and necessary. At this stage a weighing and balancing of competing values is required to analyse whether the effects of a measure are disproportionate or excessive in relation to the interests affected.¹²⁷

It is suggested above that the test applied by the panel was a mere suitability test. However, I suggest that the test applied could also be characterised as a poorly conducted proportionality test. At the first stage,

118. Ibid.

119. Andenas, M., Zlepting, S., 'Proportionality: WTO Law: in Comparative Perspective', *Tex Int'l LJ* 42 (2006/2007) 371.

120. Jans, J., 'Proportionality Revisited', *LIEL* 239 (2000) 240.

121. Bown/Trachtman (note 19) 86-87.

122. Ibid.

123. Andenas/Zlepting (note 127) 411, 425.

124. Desmedt, A., 'Proportionality in WTO Law', *JIEL* 4 (2001) 441, 443.

125. Jans (note 128) 240.

126. Andenas/Zlepting (note 127) 389.

127. Ibid., 390.

the import ban was considered suitable to achieve Brazil's objective and the level of protection. At this stage it is debatable whether the measure is appropriate. With the decision to apply a 'qualitative' analysis the panel failed to conduct a detailed examination of the contribution of the import ban to the objective. As a second step, it was examined whether the measure was necessary. At this stage, the evaluation of possible alternatives is debatable. It appears that all proposed measures were removed from consideration either through the introduction of the new concept of cumulative measures or through defining the objective and level of protection too narrowly. Though there was no 'classical' third step of a proportionality test, it could be argued that the balancing of effects in relation to the objective pursued was embedded in the necessity test. The panel considered the protection of health to be important to the 'highest degree' and the protection of animal and plant life also 'to be considered important'. By assessing the importance of both, the panel judged Brazil's regulatory goal with respect to its value. The value of the objective was particularly significant to the question whether an alternative measure would be reasonably available. This was reflected, for example, by the narrow interpretation of the regulatory goal and by rejecting several disposal methods presented as possible alternatives. The adoption of the highest restriction on international trade, a total import ban, was justified with the importance of the objective pursued (vital and important to the highest degree). Thus, the test applied in *Brazil-Tyres* could be characterised as a balancing test guided by the principle of proportionality.

10. CONCLUDING REMARKS

The rulings of the panel and AB in *Brazil-Tyres*, praised as a potential milestone in WTO jurisprudence on trade and environment,¹²⁸ were significant in many respects, highlighting the tension between free trade and non-trade values such as public health and environmental protection. The unilateral adoption of import bans imposed to protect health and the environment was affirmed to be WTO-consistent.¹²⁹

In particular, the decisions touched upon a number of issues regarding the necessity test under Article XX and the concept of a 'reasonably available alternative measure'. The dispute is significant because the panel report

128. Qin, J., 'WTO Panel decision in Brazil-Tyres supports safeguarding environmental values', *American Society of International Law, Insights* 11 (23) (2007), available at <<http://www.asil.org/insights070905.cfm>> accessed 29 August 2010.

129. Qin, J., 'Update: The Mercosur Exemption Reversed – Conflict between WTO and Mercosur Rulings and its Implications for Environmental Values', *American Society of International Law Insights American, Insights* (2009), available at <http://www.asil.org/insights070905_update.cfm> accessed 29 August 2010.

demonstrates that both the characterisation of a regulatory goal and the new concept of cumulative measures are essential for the determination of whether a measure is considered necessary. With respect to the characterisation of Brazil's regulatory goal, the failure of both the panel and AB in dealing effectively with the issues of defining the measure, the level of protection, and examining how the measure at issue would contribute to protecting health was illustrated. It appears that the panel also failed to provide a usable assessment of the measures proposed as alternatives.¹³⁰ The combination of these issues may leave policy makers 'unsure as to what types may withstand scrutiny'¹³¹ and stands in stark contrast with the function of the AB 'providing security and predictability to the multilateral trading system.'¹³² With respect to the highly criticised¹³³ application of the weighing and balancing process, I suggested¹³⁴ that the test applied in *Brazil-Tyres* could rather be characterised as a veiled proportionality test. A prospective application of the *Brazil-Tyres* necessity may incentivise states to engage in domestic protectionism, adopting protectionist measures disguised under the necessity provisions. On the other hand, the reasoning of the AB is vague and imprecise, which may lead to the conclusion that this decision is probably not the final interpretation of the term 'necessary' in Article XX.

130. Bown/Trachtman (note 19) 130.

131. *Ibid.*, 89-90.

132. See Article III:2 DSU (General Provisions).

133. Bown/Trachtman (note 19) 130; Van Damme (note 33) 717; Weiler (note 59) 142-144.

134. See previous page.



KING'S STUDENT LAW REVIEW

COMMUTATIVE JUSTICE IN TORT: TOWARDS A 'PURE' RIGHTS-BASED THEORY

JONATHAN MICHAEL COCKFIELD

2nd Year B.A in Jurisprudence Student, University of Oxford

ABSTRACT

The aim of this paper is to propose a new framework for the consideration of obligations from a rights-based view of tort law. It does this with particular focus on the decisions of the courts in 'wrongful conception' cases. Conventional rights-based explanations of these decisions shall be seen to rely excessively upon the presence of losses in a manner which is at odds with the rights-based viewpoint and ultimately self-defeating. The alternative suggested is a distinction between those wrongs that are 'actionable per se' and those wrongs that exist because of the losses inflicted upon the claimant. This distinction will be shown to be founded upon the difference between commutative and corrective justice. While the majority of torts may be explained in terms of corrective justice, others constitute violations of rights in their 'purest' form, without loss in the sense that it is usually understood. It is hoped that this distinction will provide a new framework for a rights-based view of tort law which is not overly reliant on the presence of loss to justify its decisions as well as providing a more intuitively satisfying explanation of the law regarding 'wrongful conceptions'.

1. INTRODUCTION

There exist two competing analytical explanations of the law of torts. The first has been described as the 'loss-based model',¹ where the loss suffered by the claimant, in the absence of justification, provides the reason for the action against the responsible party. Baroness Hale characterised this approach accurately in stating that 'damage is the gist'² of liability in negligence. In opposition to this view sits the 'rights-based model',³ in which the availability of an action in tort flows from the infringement of a right. This approach views a tort as a type of wrong.³ In summarising this side of the debate, I can improve little upon Robert Stevens' explanation that 'The law of torts is concerned with the secondary obligations generated by the infringement of primary rights.'⁴ The constant goal of the advocates of both sides of the debate is to apply their model to case law in the most convincing way possible. This paper shamelessly marches under the banner of the rights-based model and aims to revise and strengthen that viewpoint. I shall attempt to follow the rights-based model to its logical conclusion and propose a framework for the consideration of negligence in particular and the law of tort in general from a 'pure' rights-based perspective. The aim of such a framework will be to categorise torts based on their affect upon individuals' rights, without other irrelevant (from a rights-based perspective) considerations. Such considerations shall be shown to include the type of harm caused or the manner in which a right was violated. The proposed framework will focus on which rights are violated and the subsequent justification for the law's intervention.

Our enquiry will begin with an analysis of the decision of the House of Lords in *McFarlane v Tayside Area Health Board*⁵ and *Rees v Darlington Memorial NHS Trust*.⁶ The role played by the concepts of loss and justice in these decisions will be examined, with particular focus on the relationship between corrective and distributive justice. It shall be submitted that a rights-based approach precludes distributive justice from playing a role in tort law, being relevant only in determining primary duties, the breach of which gives rise to secondary obligations in tort. From this conclusion, the

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1. R Stevens, *Torts and Rights*, (OUP 2007) 2
 2. *Greg v Scott* [2005] UKHL 2, [2005] 2 AC 176, [99]
 3. P Birks, 'The Concept of a Civil Wrong' in D Owen (ed) *Philosophical Foundations of the Common Law* (1995) 29
 4. R Stevens, *Torts and Rights*, (OUP Oxford 2007) 2
 5. *McFarlane v Tayside Area Health Board* [2000] 2 AC 59, [1999] 3 WLR 1301
 6. *Rees v Darlington Memorial NHS Trust* [2003] UKHL 52, [2004] 1 AC 309

appropriateness of losses as a determinant of liability will be examined. It shall be submitted that a rights-based approach to the law of tort necessitates a two-stage structure based upon rights alone and not on the presence of losses. To find a principled basis for this new framework, an examination of the Thomist conception of commutative justice will be undertaken and the idea contrasted with both corrective and distributive justice. This theoretical base will lead to the drawing of a distinction between those torts that are actionable per se and those which are actionable because of their losses. The goal of this new framework will be to describe the law of torts by reference to the rights that have been breached and the resulting obligations and not by using a categorisation that focuses on the nature of the loss or the fault that has occurred.

2. THE ROLE OF LOSS IN 'WRONGFUL CONCEPTION' CASES

McFarlane and *Rees* are both cases concerning so called 'wrongful conceptions', where vasectomies have been carried out negligently, resulting in unwanted pregnancies. The action in negligence in these cases is based either upon the doctor's failure to correctly perform the sterilisation or to appropriately warn the patient of the remaining risk of conception. Lord Millett's judgment in *McFarlane* took a structured view of the law of negligence which relied upon a distinction between legal wrongs and loss. This approach has been praised for its conceptual clarity.⁷ His Lordship held that 'In the present case the injuria occurred when (and if) the defenders failed to take reasonable care to ensure that the information they gave was correct. The damnum occurred when Mrs. McFarlane conceived. This was an invasion of her bodily integrity and threatened further damage both physical and financial.'⁸ The two propositions in this passage are clear; firstly, that the doctor's failure to take reasonable care in their treatment of the claimant constituted a legal wrong. Secondly, it can be seen that a loss was required in order for the action in negligence to be made out. In this case it took the form of the conception of a child. Whether or not these propositions hold up to careful analysis is what must now be determined.

The identification of the presence of a legal wrong in these cases is clearly correct. In *Parkinson v St James and Seacroft University Hospital NHS Trust*, Hale LJ (as she was then) recognised that a negligently caused unwanted pregnancy violates a woman's right to bodily integrity.⁹ In *Rees*,

7. A Beever, *Rediscovering the Law of Negligence* (Hart, Oxford, 2009), 389

8. *McFarlane v Tayside Area Health Board* [2000] 2 AC 59, [1999] 3 WLR 1301

9. [2001] EWCA Civ 530, [2002] QB 266 at [63]-[68]

Lord Millett recognised that such an occurrence violated the individuals 'right to limit the size of their family'.¹⁰ This is also a wrong that has been recognised in other jurisdictions, notably, by McHugh and Gummow JJ in *Cattanach v Melchior* where the parents in a 'wrongful conception' case were recognised as having an interest in their 'reproductive future'.¹¹ From a rights-based view of tort law this is an entirely acceptable state of affairs; tort law, including the law of negligence, is concerned with addressing legal wrongs and the vindication of rights. While the identification of a legal wrong is not controversial, it is the role played by 'loss' in these cases that causes the most difficulty, both in general and for the rights-based position in particular.

In the preceding extract it was noted that the presence of a loss is viewed as an integral part of the courts' determinations as to whether or not an action in negligence for a wrongful conception should be successful. This is however inconsistent with Lord Millett's conclusion regarding the worth of an unwanted child in the eyes of the law:

...society itself must regard the balance as beneficial. It would be repugnant to its own sense of values to do otherwise. It is morally offensive to regard a normal, healthy baby as more trouble and expense than it is worth.¹²

If a child must always be regarded as a benefit, then it is difficult to see how its conception can be viewed as a loss. Similarly, Lord Slynn refused to treat the situation as representing a personal injury.¹³ Furthermore, Witting has also argued that pregnancy cannot represent harm in the conventional sense because pregnancy is a condition natural to the human female body that it is designed to accommodate.¹⁴ It is submitted that this line of judicial and academic authority reflects a recognition of the inherent value and potential of a human life that is intuitively satisfying and should be preserved.

Alan Beever has provided a sophisticated critique of this interpretation in which he seeks to distinguish between the value of the human life concerned and the effect it has upon the claimant.¹⁵ In effect, he argues that a child may still be seen as valuable while inflicting loss upon the claimant. This argument seeks to reconcile Lord Millett's use of legal reasoning

10. *Rees v Darlington Memorial NHS Trust* [2003] UKHL 52, [2004] 1 AC 309 at [123]

11. *Cattanach v Melchior* [2003] HCA 38, (2003) 215 CLR 1 at [66]

12. *McFarlane v Tayside Area Health Board* [2000] 2 AC 59

13. *McFarlane v Tayside Area Health Board* [2000] 2 AC 59, 76

14. C Witting, 'Physical Damage in Negligence' [2002] CLJ 189, 192-193

15. A Beever, *Rediscovering the Law of Negligence* (Hart, 2009), 390

which relies upon the presence of a loss with his remarks concerning the value of a child. This is unsuccessful. Beever's argument is based upon a false distinction between the effects that a child has and the child itself and this is drawn from a misreading of Lord Millett's judgment. The House of Lords did not view the baby's existence in isolation in reaching its decision; it took into account the variety of interactions between baby and parents, observing: 'In truth it is a mixed blessing. It brings joy and sorrow, blessing and responsibility'.¹⁶ Ultimately the conclusion is one made on the balance of all the effects created by the existence of the child and therefore includes any losses caused to the parent. To argue that a child's conception (a necessary feature of its existence) constitutes loss, it must be accepted that the child itself is a loss. This position is unacceptable if one is to agree, in a Kantian sense, that humans have dignity rather than price¹⁷ and that they should be seen as ends in themselves and not as means to an end. By way of analogy, it 'costs' time and effort to go to a bank in order to cash a cheque but one would not say that the cashing of a cheque constitutes a loss. In the same way, the pain and discomfort caused by childbirth cannot be separated from the birth of a child and to do so would be, I suggest, artificial and flawed.

So how did the House of Lords deal with negligence claims in which a legal wrong had been committed against the claimant but no loss had been caused? In *Rees*, their lordships followed their previous decision in *McFarlane* in making a 'conventional award' and increased its size from the £5,000 in *McFarlane* to £15,000.¹⁸ Lord Bingham recognised that this award would 'afford some recognition of the wrong done' and seemingly abandoned Lord Millett's previous search for an identifiable loss.¹⁹ Lord Millett was also sitting in this case and did not depart from Lord Bingham's position. This clearly presents a problem — if losses were such a crucial aspect of the structure of the law of negligence and this was identified by the court as not being present, then how could the action succeed and justify such a large award? Nolan has recognised that this rights-vindication approach has the possibility of furthering the cause of rights-based tort lawyers, although he himself rejects that position.²⁰ The goal of this paper will therefore be to explain the jurisprudence in this area without, as Beever does, resorting to the fiction of classifying the birth of a child as a loss to its

16. *McFarlane v Tayside Area Health Board* [2000] 2 AC 59, [1999] 3 WLR 1301

17. I Kant, *Groundwork of the Metaphysics of Morals* in M Gregor (ed), *Practical Philosophy* (Cambridge University Press, Cambridge, 1996), 84, [4:434-435]

18. *Rees v Darlington Memorial NHS Trust* [2003] UKHL 52, [2004] 1 AC 309

19. *Rees v Darlington Memorial NHS Trust* [2003] UKHL 52, [2004] 1 AC 309 at [8]

20. D Nolan, 'New Forms of Damage in Negligence' (2007) 70(1) MLR 59, 79

parents or adopting a contradictory position, as the House of Lords has. It is hoped that this approach will lead to a clearer and more stable formulation of the rights-based model.

3. CORRECTIVE JUSTICE AND TORT LAW

We are then left in a position where no loss has been caused and yet the courts have still seemingly required both a legal wrong and loss to be caused in order to allow an action in negligence to succeed. To proceed, it will therefore be necessary to examine the role played by loss and how its relevance may be justified on a principled level. Beever has argued that 'Corrective justice provides the most abstract explanation of the law of negligence.'²¹ On this approach, when one individual causes another a loss and wrongly upsets the pre-existing distribution of resources in society, an action in tort may be seen as justified in order to restore that distribution. This pre-existing distribution can be seen as placing the affected parties on a footing of notional equality and it is the validity of this prior state which justifies the corrective effect of tort law.²² It is from this theoretical basis that so called 'mid-level principles' are derived which make up the law of negligence.²³ Following our earlier discussion of *McFarlane* and *Rees*, this approach is now confronted by a principled inconsistency. Corrective justice properly so called focuses on the rectification of inequalities that arise as a result of interactions between individuals. Corrective justice is therefore based upon a pre-determination of what groups or individuals are entitled to following distributive considerations.²⁴ The conventional award made in *Rees* was made in the absence of loss being inflicted on the claimants. If the distribution of goods has not been altered by dealings between individuals, then no principled justification for the award of damages can be drawn from corrective justice. An alternative will be required to justify the 'wrongful conception' case law.

If the award of a conventional sum of £15,000 cannot be justified by reference to corrective justice, then how can it be accounted for? The rights-based model of tort law views the claimants in such cases as possessing a right to the money, flowing from the breach of a primary obligation owed to them. The determination of the existence of rights and the corresponding

21. A Beever, *Rediscovering the Law of Negligence* (Hart, 2009), 47

22. E J Weinrib, 'Corrective Justice in a Nutshell' (2002) 52 *University of Toronto Law Journal* 349

23. A Beever, *Rediscovering the Law of Negligence* (Hart 2009), 47

24. J Finnis, *Natural Law and Natural Rights* (Clarendon 1986), 178-179

obligations represents the allocation of something advantageous or disadvantageous and as such falls within the province of considerations of distributive justice.²⁵ Furthermore, corrective justice is not a suitable alternative as a basis for these rights because it is dependent on a logically prior distribution in a manner which a primary right cannot be.²⁶ The question that remains is where does this secondary right come from? If this cannot be adequately explained then the rights-based approach will fail to explain the law in this area. Although corrective justice does not provide a solution, the possibility still to be considered is whether or not distributive justice can also be deployed to provide a principled basis for the secondary rights which flow from the infringement of primary rights. In his judgment in *McFarlane*, Lord Steyn claimed that 'The truth is that tort law is a mosaic in which the principles of corrective justice and distributive justice are interwoven'²⁷ and this followed Lord Hoffmann's use of considerations of distributive justice in previous decisions.²⁸ If a primary right is determined by what is distributively just and secondary obligations flow from a breach of this distribution, then these rights seem to be founded just as equally on distributive justice.²⁹ This approach has been rightly dismissed as ignoring the distinction between societal and interpersonal morality which divides the concepts of distributive and corrective justice.³⁰ While distributive justice can explain why a right to plan one's family life exists, it cannot offer guidance as to how individuals are to behave towards each other, it is this which limits the usefulness of distributive justice. Distributive justice and corrective justice may be inextricably linked but they are not interwoven and should be kept conceptually separate, even if only for analytical convenience.³¹

4. JUSTICE AND THE RIGHTS-BASED VIEW OF TORT

The more important reason for refusing to exclude corrective justice in favour of distributive justice is because such an account is incompatible with a rights-based view of tort law. A right exists because of the distribution

25. J Rawls, *A Theory of Justice* (Belknap Harvard 6th Ed 2003), 7

26. P Cane, 'Distributive Justice and Tort Law' (2001) NZLR 401

27. *McFarlane v Tayside Area Health Board* [2000] 2 AC 59, [1999] 3 WLR 1301

28. *White v Chief Constable of South Yorkshire* [1999] 2 AC 455, 503-504

29. P Cane, 'Distributive Justice and Tort Law' (2001) NZLR 401, 413

30. A Beever, *Rediscovering the Law of Negligence* (Hart 2009), 68

31. J Finnis, *Natural Law and Natural Rights* (Clarendon 1986), 179

of rights within a society, determined in accordance with precepts of distributive justice. The protection and vindication of that right follows logically from the determination of its existence. Using distributive justice to justify these secondary obligations gets things back to front and ultimately results in the adoption of a loss-based approach. Such an approach would begin with a loss and then determine how to distribute it. In contrast, the rights-based viewpoint begins its inquiry with the existence of a right and then determines whether or not it has been breached. A position which claims that both primary and secondary obligations may be explained by distributive justice collapses the two-stage structure of the rights-based analysis and results in a loss-based, entirely distributive analysis of tort law. This is an unacceptable outcome for a paper which is seeking to strengthen the rights-based approach.

The necessity of separating the concepts of distributive and corrective justice within the rights-based approach can be seen from an analysis of the content of rights that are created by considerations of interpersonal morality (this includes both corrective and commutative justice). Interpersonal morality must be kept conceptually separate from distributive justice because although it is primarily dependent on distributive justice for its content, it still retains a minimal content based on the recognition of the individual's personality which is presupposed in the field of interpersonal morality.³² Distributive justice in contrast, is essentially devoid of substantive content.³³ Therefore, corrective justice contains considerations which are not a necessary feature of distributive justice (even though the majority of formulations include it) and as such, it is logically necessary that the two concepts are kept separate. This conclusion highlights how the justification of secondary obligations with reference to distributive justice is incompatible with the rights-based approach to the law of torts. Rights may not be justified by reference to utilitarian or consequentialist goals; they are inherently valuable and a failure to recognise this would represent a wholesale rejection of the concept of a framework of rights.³⁴ It is accepted that rights may conflict with each other and that one may override another.³⁵ The justification for this is not however a single objective test but the individual importance of the rights themselves. Once it is accepted that a violation of a primary right has occurred, it would therefore be inappropriate

32. P Benson, 'The Basis of Corrective Justice and its Relation to Distributive Justice', (1991) 77 *Iowa Law Review* 515, 607

33. J Gardner, 'The Virtue of Justice and the Character of Law', *Current Legal Problems* 53 (2000), 19

34. R Stevens, *Torts and Rights* (OUP 2007), 333

35. J Waldron, 'Rights in Conflict' *Ethics* 99 (1989), 503

to reassess the reasons for the existence of that right. Such an investigation would only confirm the existence of the primary right and would offer no guidance as to the content of the obligation entailed by the primary breach. This demonstrates how the award of damages in no-loss cases cannot be explained solely by way of distributive justice and how such an approach is incompatible with the rights-based model.

5. COMMUTATIVE JUSTICE

So where does this conclusion leave us? So far we have seen that in cases of a wrongful conception where an individual's right to plan their life is violated, a £15, 000 award may still be made. This award is made in the absence of any recognisable loss; if anything, the benefit of a new child has been gained by the claimant. This has exposed a limitation in a rights-based account of negligence which justifies the existence of secondary obligations on the basis of corrective justice because a proper account of wrongful conception case law demonstrates that no loss has been caused to correct. The use of distributive justice to explain such an obligation has also been seen to be fatal to the rights-based position. From these conclusions, the problem that we are confronted with is how to construct a principled justification for a rights-based view of tort law that takes into account cases where damages have been awarded in the absence of loss.

On a principled level, our solution requires a justification for secondary obligations which does not rely on loss like a corrective explanation and does not damage the rights-based view like a distributive explanation. Furthermore, this justification must be grounded in an interpersonal morality because of the necessarily interpersonal nature of the breach of a primary right. The solution may be found in a re-examination of the concept of corrective justice. Aristotle's original separation of distributive justice (*dianemetikon dikaion*) and corrective justice (*diorthotikon dikaion*) views corrective justice narrowly, in so far as it is limited to the remedying of disruptions to the distribution of the common stock of society's resources.³⁶ It is this narrowness that led Aquinas to reinterpret corrective justice as commutative justice in order to include dealings between individuals which did not necessarily involve distributions of the common stock of resources.³⁷ Commutative justice is therefore focussed on the individual's well-being

36. J Finnis, *Natural Law and Natural Rights* (Clarendon 1986), 178

37. *Ibid*, 179

and how this is affected by interactions with others.³⁸ From this account, it seems that while all considerations of corrective justice are concerns of commutative justice, only those commutative considerations which concern the distribution of common stock are properly called considerations of corrective justice.

The Thomist conception of commutative justice relies upon an overly narrow idea of what constitutes the common stock which is capable of distribution. The precepts of distributive justice and commutative justice are both required by practical reasonableness.³⁹ Distributive justice is therefore capable of determining how common stock must be distributed as well as determining how individuals should behave towards one another in the absence of concerns regarding the common stock of resources. The Thomist approach seeks to confine distributive justice to determining issues of common stock while overlooking the fact that distributive justice also determines the existence of the rights and obligations that people owe commutatively, such as basic human rights.⁴⁰ In order to resolve this classificatory instability, it must be accepted that distributive justice determines primary obligations which concern both the distribution of common stock and the distribution of purely commutative obligations between individuals. The distinction to be drawn is therefore between secondary obligations which concern the distribution of common stock (justified by corrective justice) and those obligations which only concern the violation of rights, without a disruption to the distribution of resources (justified by commutative justice).⁴¹

6. A NEW FRAMEWORK FOR THE RIGHTS-BASED APPROACH

This principled distinction between correctively just and commutatively just secondary obligations may now be applied to the law in practice. There can be said to be a principled justification for secondary obligations where the primary right has been violated despite no loss actually being inflicted on the claimant. There is a distinction between torts

38. Ibid, 166

39. Ibid, 161

40. J Finnis, *Aquinas* (OUP 1998), 215

41. It should be noted that here I use commutative justice to refer only to those considerations which cannot also be said to concern corrective justice. It is 'commutative justice in its 'purest' sense.

which are actionable 'per se' and those which are actionable as a result of the loss they cause.⁴² This distinction is not a new one, although when it has been made previously, it has been dismissed because the line that it drew ran through the middle of negligence and disrupted attempts to categorise torts by the nature of the 'loss' inflicted and not the nature of the right that has been breached.⁴³ This analysis is however beneficial for the rights-based approach because it focuses our attention on the principled justification for the existence of the secondary obligation which flows from the breach of a primary right. Those torts that are 'actionable per se' exist because of the violation of a primary right which gives rise to a secondary obligation of commutative justice which allows for the vindication of a right in the absence of loss. In contrast, those torts which are 'actionable on their loss' exist because the primary right that was breached concerned the distribution of the common stock of society's resources and the secondary obligation is therefore one of corrective justice. This corrective explanation justifies why damages for damage to property may vary while a fixed sum of £15,000 in a 'wrongful conception' case is appropriate. Those torts that are 'actionable per se' bear their harm on their face while those 'actionable on their loss' may vary in their harmfulness because they are dependent on the degree to which the distribution of the common stock of resources has been disrupted.

Both types of tort are based upon a primary right whose existence is determined by what is distributively just. The proposed analysis seeks to describe the content of secondary obligations based upon the substantive content of the obligations and the principled reasons for why these obligations arise. This framework provides a clearer understanding of secondary obligations. This approach enables a rights-based reappraisal of the approach taken by Lord Millett when he required that both a wrong (*damnum*) and a loss (*injuria*) be present for an action to be made out. While this would be necessary for a tort actionable on its loss, it is not for a tort actionable per se, which only requires the infringement of a right in its 'pure' sense; only the legal wrong is required for such an action to be made out. The category that a tort falls into is determined by the substantive content of the primary right, formulated from principles of distributive justice. It is submitted that this framework enables decisions such as those made in *McFarlane* and *Rees* to be understood without resorting to a fiction that loss has been caused (as Beever does) or making an internally inconsistent decision (as Lord Millett did). The advantage of this to the rights-based project is clear; it removes

42. D Nolan, 'New Forms of Damage in Negligence' (2007) 70(1) *Modern Law Review* 59-88, 79

43. D Nolan, 'New Forms of Damage in Negligence' (2007) 70(1) *Modern Law Review* 59-88, 79

the supposed reliance on the presence of loss unless the content of a primary right allows for a right to have a loss corrected. In cases where losses have been inflicted, the loss only serves to be the means by which the primary right is breached. The primary right is a right to a share of the common stock of resources and the loss represents the breach of this right. The loss in such cases is therefore inseparable from the legal wrong.

The title of this paper promises a 'pure' rights-based theory of tort law and that is what this new framework provides because considerations such as loss only become relevant in so far as a claimant has a right for them to be considered. The wrong/loss distinction is not a necessary analytical device; wrongs are either actionable in themselves and losses do not come into play or losses form the subject matter of a wrong and may be subsumed within the legal wrong identified. This framework is not designed to replace existing classifications of tort but instead is designed to complement them as a useful heuristic for understanding the rights-based view of tort law and appreciating the conceptual clarity that commutative justice can bring to both 'wrongful conception' cases and the law of torts in general. It should be noted that the new framework draws its dividing line down the middle of the law of negligence 'Wrongful conception' cases as well as 'negligent imprisonment' claims (where losses are not caused) would be taken out of the law of negligence and viewed in the 'actionable per se' category along with actions for trespass, where previously the fiction of loss being 'assumed' was utilised. The new framework is a 'pure' rights-based theory of tort law because liability is determined only by the rights possessed by the individuals involved in the claim; the type of loss and the manner in which it is inflicted are treated as less important than the rights that have been infringed.

6. CONCLUSION

This paper began its enquiry with the decisions of the House of Lords in *McFarlane* and *Rees* and from this has sought to outline a new framework for considering tort law from the rights-based viewpoint. My central thesis can now be summarised in the form of seven propositions:

- i) Damages for negligence can be awarded without loss being suffered.
- ii) This precludes corrective justice from underpinning the law of negligence in such cases.
- iii) Distributive justice is not an acceptable alternative

because it is incompatible with the rights-based view of the law.

iv) A modification of the Thomist conception of commutative justice can justify the infringement of rights in the absence of losses.

v) A distinction should be drawn between torts that are actionable per se and those which are actionable on their losses.

vi) This distinction is underpinned by the distinction between purely commutative justice and corrective justice that exists within the sphere of interpersonal morality that is identified by proposition (iv).

vii) The distinction made in the law of negligence between wrongs and losses is not a valid analytical tool when using the new framework created by proposition (v).

It is hoped that this framework will strengthen the rights-based approach to tort law by providing a principled basis, grounded on a consistent account of principles of justice, on which to view the secondary obligations that flow from the violation of primary obligations. This account does not look to the existence of losses to begin its enquiry but instead seeks to ascertain what rights and obligations come into play in any given situation. Loss only becomes relevant when a claimant has a right that it should be so.



KING'S STUDENT LAW REVIEW

CAN A PERSUASIVE CASE BE MADE THAT THE MONARCH IS AN EFFICIENT PART OF THE CONSTITUTION?¹

DOMINIC BRIGHT

3rd Year LLB Student, King's College London

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ABSTRACT

The last general election in May returned a balanced (hung) parliament. This begs the question: does the monarch retain, by virtue of Head of State, any significant executive power?

The thesis idea is motivated by Bagehot's 'The English Constitution', wherein a theoretical distinction was drawn, between the 'dignified' and 'efficient' parts of the Constitution. The direct legal prerogative to appoint a Prime Minister renders the monarch a potential working part of the Constitution. However, what Tomkins terms 'constitutionally significant spheres of influence' would necessarily qualify Elizabeth II as an efficient part of the Constitution notwithstanding any question of direct legal prerogative power. The importance of the thesis idea – never before enjoying academic support – is that the principle of rule by law may be violated by a future Head of State.

This paper concludes by identifying that there is a case, but not clamour, for reform.

1. THE THESIS IDEA AND ITS SCOPE

1.1 THE THESIS IDEA

In Bagehot's most celebrated work he theoretically divided the Constitution of the United Kingdom into two parts: 'first, those which excite and preserve the reverence of the population – the dignified parts [and] next, the efficient parts'.¹ This paper does not dispute that the monarch remains, what Bagehot termed, a 'dignified' part of the Constitution.² However a dignified part does not, perforce, affect the *working* of the Constitution. An efficient part does by very definition.³

The thesis maintained here has not previously enjoyed academic support but is propagated as a modest but also quietly fundamental idea: *the monarch remains an efficient part of the Constitution*. The thesis operates notwithstanding the argument that the Head of State retains a (much) greater dignified rather than efficient constitutional role. To test the thesis idea we will ascertain whether the monarch retains any significant personal and thus, political, discretion in practice.

1.2 THE CHARACTERISTICS PARTICULAR TO CONSTITUTIONAL MONARCHY AND ITS HISTORICAL EVOLUTION

The following provides the framework in which the monarch's prerogative power can be understood. What will here be termed *absolute* constitutional monarchy imposes a heavy obligation upon the monarch so that any direct executive action on the part of the monarch must be provided for by legislation. Or, which is to say the same, executive action of the monarch is subject to—and therefore within the scope of—the principle of rule by law. It follows that no form of personal prerogative powers whatsoever would be lawful in an absolute constitutional monarchy. However, the following section makes it clear that the historical evolution of the British Constitution has not (yet) progressed into an absolute constitutional monarchy. The British monarch retains prerogative power that is not provided for by legislation. Thus, the British Constitution will

1. Walter Bagehot, *The English Constitution*, (OUP: 2001), p.7

2. Vernon Bogdanor, *The New British Constitution*, (Hart Publishing: Oxford, 2009), p.20. see above

3. 'Efficient' derives from the Latin meaning 'accomplishing' 'making' or 'causing'.

here be termed a *progressive* constitutional monarchy. It is because the British Constitution is not an absolute constitutional monarchy that it is possible to construct the thesis idea.

Bogdanor has defined 'constitutional monarchy' as being a form of governance whereby 'a state ... is headed by a sovereign who reigns but does not rule'.⁴ This is an organising aspect that informs the thesis idea.

There are two potential sources for confusion that are contained within Bogdanor's definition and are in need of clarification. The first is semantic: it has been argued that there are two 'sovereign authorities' within the Constitution of the Britain. By this, it was meant that 'within their respective domains the Crown and Parliament possess ultimate power – that is, neither is legally dependent on any further source of authority – their power is immanentimminent, not derived.'⁵ It is not necessary to ascertain which is the more influential of the two. The salient point here, on which it is possible to construct the thesis idea, is that both Parliament and the reigning monarch are 'the only two powers the constitution has ever recognised as enjoying any degree of sovereign authority'.⁶ However, it is only a reigning monarch whom may be termed 'the sovereign'.

It follows that, by 'sovereign', Bogdanor was referring to the monarch and not what Tomkins has subsequently argued to be the other sovereign authority in the United Kingdom, namely Parliament.⁷ To avoid this potential source of confusion, 'monarch' is the exclusive term used here.

Secondly, Bogdanor made a sharp distinction between 'reigns' and 'rules'. What normative work does this distinction do to further identify characteristics particular to constitutional monarchy? 'Reigns' may be defined merely as the passive act of 'holding royal office' whereas 'rules' connotes 'control or domination over an area or people'.⁸ This distinction is an important one. While the monarch may *reign*, it does not follow that he or she possesses the personal discretion to exercise direct political control over his or her subjects and therefore *rule*. An immediate example may be found in Spain where the 1978 Spanish Constitution re-established constitutional monarchy and provided in Article 56: 'The King [only has authority to exercise] the functions expressly conferred on him by the Constitution

4. Vernon Bogdanor, *The Monarchy and the Constitution*, (OUP: 1995), p.1

5. Adam Tomkins, *Public Law*, (OUP: 2003), p.46 see above

6. Adam Tomkins, *Public Law*, (OUP: 2003), p.46

7. Contrast with Walter Bagehot, *The English Constitution*, (OUP: 2001), p.53: '[It is an error to regard the monarch as] a separate co-ordinate with the House of Lords and the House of Commons. This and much else the sovereign once was, but he is not longer.'

8. *Oxford English Dictionary*, (OUP: 2011)

and the laws.⁹ Article 56 imposes legal constraint upon the monarch, and thus, permits the monarch to reign, but *not* to exercise a direct personal and political discretion over the Spanish executive.

Therefore, a constitutional monarchy must have a monarch as head of state following Bogdanor's definition. However that monarch is, and must *necessarily* be, precluded from acting as the *de facto* head of government.¹⁰ This characteristic, which is particular to constitutional monarchy, may only be found in the historical evolution of the Constitution. This forms the platform on which the thesis idea is constructed.

It is possible to identify the advancement, from an antecedent and absolute, to a more progressive and constitutional monarchy. Moreover, it is possible to ascertain when the distinction between a monarch who ruled and one who merely reigned was imposed, and by what authority.¹¹ Bogdanor argues, 'the real beginning of the idea of constitutional monarchy dates from the Magna Carta in 1215.'¹² Notwithstanding this, Anson has gone even further and argued that Magna Carta was the 'first attempt to express in exact terms some of the leading ideas of constitutional government.'¹³ Two 'fundamental principles' for which Magna Carta is authority, by implication, are thus:

[T]he first principle required the sovereign to rule according to law and to make himself or herself accountable for the way in which he or she ruled[.] [T]he second fundamental principle was that the rights of individuals took precedence over the personal wishes of the sovereign.¹⁴

It follows that the Magna Carta was the first step in, what is identified here as, the *evolutionary attenuation of the prerogative of the monarch*.¹⁵ This feeds into the distinction identified above between a monarch who merely

9. Spanish Constitution, (1978), Article 46.

10. See Walter Bagehot, *The English Constitution*, (OUP: 2001), p.48: '[I]f a head of society were a natural idea, it certainly would not follow that the head of civil government should be that head'.

11. See Adam Tomkins, *Public Law*, (OUP: 2003), p.42: 'Power resides in the authority of the Crown, save for that which has been specifically forced from it by Parliament.' This has been true at least since 1689 and the Bill of Rights. See too Tom Bingham, *The Rule of Law*, (Penguin: London, 2010), p.10: '[There] was not at that stage a statute, since there was nothing recognisable as a parliament.'

12. Vernon Bogdanor, *The Monarchy and the Constitution*, (OUP: 1995), p.3.

13. William Anson, *The Law and Custom of the Constitution*, (OUP: 1935), p.23.

14. Vernon Bogdanor, *The Monarchy and the Constitution*, (OUP: 1995), p.3

15. This paper hereby coins this term.

reigns and one who actually rules.

The former Lord Chief Justice has recently argued that the Magna Carta 'was the rule of law in embryo'.¹⁶ This can reliably be taken to represent the prevailing view of the senior judiciary.¹⁷ It must be correct, too. 'In England power started with the Crown',¹⁸ then Magna Carta was given legal force having the effect of replacing absolute with a more progressive and constitutional monarchy. The monarch was beginning to be constrained by law as early as 1215. As Bingham correctly identified, the principle rule by law took hold.

It is because the monarch is *not* completely constrained by law that it is possible to identify the monarch as retaining – at least the potential – to constitute an efficient part of the constitution.

In 1689, Parliament presented the Bill of Rights before the Crown of England was offered to who would become William III of England. In the words of Tomkins, 'the "rights" of the Bill of Rights are those enjoyed by Parliament'¹⁹ and, thus, not rights enjoyed by the individual. The impact of the 1689 Act was that it 'severely limited the powers of the sovereign'²⁰ so that 'Parliament could lay down the terms and conditions on which England was to continue as a monarchy'.²¹ In short, it furthered the progression of constitutional monarchy. In the same way as identified above, the evolutionary attenuation of the prerogative of the monarch and the 'control and subjection of the Crown'²² was further increased with the passage of the 1701 Act of Settlement. The 1701 Act should be regarded as the most pertinent of all three constitutional statutes cited here. This is for the reason that the 'charm of royalty'²³ and 'defining feature' of monarchy – as distinct from all other forms of governance – is parasitic upon an hereditary bloodline. This was undermined with the passage of the 1701 Act because 'parliament [now had] the right both to determine the succession to the throne and also the conditions under which the Crown was to be held'.²⁴

Above, three authorities have been identified which support

16. Tom Bingham, *The Rule of Law*, (Penguin: London, 2010), p.12

17. Meeting in person with Tom Bingham (24/03/2010).

18. Adam Tomkins, *Public Law*, (OUP: 2003), p.39

19. Adam Tomkins, *Public Law*, (OUP: 2003), p.44

20. Vernon Bogdanor, *The Monarchy and the Constitution*, (OUP: 1995), p.6

21. Adam Tomkins, *Public Law*, (OUP: 2003), p.44

22. Adam Tomkins, *Public Law*, (OUP: 2003), p.40

23. Walter Bagehot, *The English Constitution*, (OUP: 2001), p.54

24. Vernon Bogdanor, *The Monarchy and the Constitution*, (OUP: 1995), p.8

Bogdanor's distinction that a constitutional monarchy is headed by a sovereign who reigns, but does not rule. Tomkins has concluded:

[The] combined effect of these constitutional statutes is that monarchs reign in England not because they have a divine right to do so, but because Parliament has permitted it. Power started with the Crown, but it continues to vest in the Crown only because, and for only as long as, Parliament continues to wish it.²⁵

'Constitutional monarchy' has been defined above. Two particular characteristics have then been identified and supported by tracing the constitutional evolution of 'the new settlement'. This process of constitutional evolution 'made the monarchy into a parliamentary, and therefore constitutional monarchy.'²⁶ Work has now been done to set the ground for consideration of the monarch's personal prerogatives. This forms the focus of Part Two and will ultimately sustain the thesis that the monarch is an efficient part of the constitution.

1.3 THREE DIRECT LEGAL PREROGATIVES

Blackburn identified 'three royal powers of state': '(1) prime ministerial appointment, (2) Royal Assent to legislation, and (3) dissolution of Parliament'. Blackburn argued that these 'royal powers of state' are 'best described as the monarch's "direct" legal prerogatives.'²⁷ 'Direct' is used to connote that this power is only exercisable by the monarch him or herself and *not* indirectly through Ministers of the Crown. 'Legal' does work to encapsulate the idea that, although not prescribed by statute, such power remains lawful. It follows that Blackburn's description is accurate and so will be the terminology employed subsequently.

In order to propagate the thesis idea, we must adduce persuasive authority bearing out that the monarch *de facto* affects the working of the constitution. To achieve this, we will ascertain whether any direct legal prerogative retains personal discretion in practice. If such personal discretion remains, the whim of the reigning monarch may still be imposed upon the constitution. Thus, the monarch would constitute a working part of the constitution – the thesis propagated here. However, do these direct legal

25. Adam Tomkins, *Public Law*, (OUP: 2003), p.44

26. Vernon Bogdanor, *The Monarchy and the Constitution*, (OUP: 1995), p.8

27. Robert Blackburn, *King and Country*, (Politico: London, 2006), p.8

prerogatives remain legal notwithstanding that they do not enjoy statutory provision?

According to Tomkins, 'the constitutional doctrine of the rule of law provides that the executive may do nothing without clear legal authority first permitting its actions.'²⁸ This has been the correct position since at least 1765 when the then Lord Chief Justice famously held, 'If it is law, it will be found in our books. If it is not to be found there it is not law.'²⁹ This definition is too crude, misleading and strictly incorrect. It is *only* inclusive of statutory authority. The then Lord Chief Justice failed to take account of common law authority to act – prerogative. This power will not be found in the law books. It remains law nonetheless. A more complete – and therefore convincing – account of executive power is thus:

There are *two* sources of law which may provide the executive with [the] authority [to act]. The first is statute and the second is the prerogative. Thus, even if the executive lacks the statutory power to act in a certain way, it will nonetheless be able lawfully so to act if its actions can be justified under the prerogative.³⁰

Statutory authority may take one of two forms: primary or secondary (delegated) legislation.³¹ The thesis maintained here cannot, however, be propagated by statutory authority because Acts of the Queen-in-Parliament do not prescribe the monarch executive authority, and therefore advance the thesis that the monarch is a working, efficient, part of the constitution. Now that we have identified that *common law prerogative* provides the monarch with executive authority, let us ascertain its definition.

Blackstone provided a definition of 'prerogative power' as early as 1765. He proposed a narrow definition:

[It is] in its nature singular and eccentrical [in] that it can only be applied to those rights and capacities which the king enjoys alone [and] not to those he enjoys in common with any of his subjects.³²

28. Adam Tomkins, *Public Law*, (OUP: 2003), p.81

29. Lord Camden CJ in *Entick v Carrington* 19 St. Tr. 1029.

30. Adam Tomkins, *Public Law*, (OUP: 2003), p.81

31. For a comprehensive explanation of legislation see A. Bradley & K. Ewing, *Constitutional and Administrative Law*, (Longman: London, 2007), pp.193-202.

32. William Blackstone, *Commentary on the Laws of England*, (Clarendon: Oxford, 1765) p.232

Blackstone only takes us as far as to identify that prerogative power is parasitic on a hierarchical distinction between the monarch and the individuals living under his or her jurisdiction. A more sophisticated and concise definition – taking stock of constitutional constraint operating upon the exercise of this power – was recently fixed by Tomkins: ‘Prerogative powers are legal, not conventional, although their exercise in practice may be regulated or limited by convention.’³³ Previously, Dicey offered a historically descriptive description superior to the definition offered by Tomkins insofar as it is also attendant to the fact that such power contains personal discretion: ‘prerogative appears to be both historically and as a matter of fact nothing else than the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown.’³⁴ If such power does not retain a ‘discretionary’ element, it follows that it should not qualify as ‘prerogative power’.

The salient point, and one that may be adduced *both* from a narrow and broad definition, is that ‘prerogative powers are unique to the Crown.’³⁵ This proposition, as a common denominator, does work towards settling on the first defining feature of prerogative power.

The second defining feature of prerogative power has been argued to be that it is ‘undetermined.’³⁶ Here, Bogdanor intended to convey that prerogative power is ‘undetermined by statute’ because its definition and scope are not easily ascertainable through Act of the Queen-in-Parliament.³⁷ This is a stumbling block facing Part Two and therefore the development of the thesis idea. This is because if a personal discretion remains, its identification would become easier if expressly codified in statute. Bagehot, too, attempted to capture the idea that statute is silent in regard to the direct legal prerogative by using the term ‘secret power.’³⁸ However, ‘undetermined’ and ‘secret power’ is liable to criticism that they are misleading – prerogative

33. Adam Tomkins, *Public Law*, (OUP: 2003), p.62

34. Albert Dicey, *Introduction to the Study of the Law of the Constitution*, (Macmillan: London, 1959), p.424

35. Adam Tomkins, *Public Law*, (OUP: 2003), p.81

36. Vernon Bogdanor, *The Monarchy and the Constitution*, (OUP: 1995), p.76

37. Meeting in person with Vernon Bogdanor (22/03/2010).

38. Walter Bagehot, *The English Constitution*, (OUP: 2001), p.54

power is determined somewhat through 'constitutional convention'.³⁹ Therefore, the label 'under-determined'⁴⁰ improves on 'undetermined'. 'Under-determined' enjoys the benefit of encapsulating Bogdanor and Bagehot's shared intention to convey a sense of vagueness but also maintains that prerogative power is somewhat determined.

Part Two considers whether direct legal prerogative power – 'a corner of the Constitution that is little understood and is routinely misinterpreted'⁴¹ – does work to further the thesis that the monarch is a working part of the Constitution. The 'prerogative powers of ministers'⁴² therefore falls outside the scope of this paper.

2. TESTING THE THESIS IDEA

2.1 ROYAL ASSENT AND DISSOLUTIONS

We have done work to identify that – notwithstanding the formal constraint that progressive constitutional monarchy has imposed – Elizabeth II has retained three directly exercisable prerogatives that continue to remain lawful. In the words of the Fabian Commission:

The current constitutional settlement in the UK leaves a number of residual powers with the scope for political discretion in the hands of the monarch. By convention, these discretionary powers are rarely or never exercised, but the powers remain and could be used in different circumstances in the future.⁴³

As has been argued above, these 'residual powers' are under-

39. See Ivor Jennings, *The Law and the Constitution*, (University of London Press: London, 1952), p.81: '[Constitutional conventions] provide the flesh which clothes the dry bones of the law; they make the legal constitution work; they keep it in touch with the growth of new ideas'. See also Vernon Bogdanor, *The New British Constitution*, (Hart Publishing: Oxford, 2009), p16: '[An] obvious example of a convention in Britain is that which provides that the Queen, on the advice of her ministers, assents to laws duly passed by Parliament.'

40. Vernon Bogdanor, *The Monarchy and the Constitution*, (OUP: 1995), p.66

41. Robert Blackburn, *King and Country*, (Politico: London, 2006), p 79

42. HC 442 (2003-4) para.1; for a comprehensive explanation of 'the prerogative powers of ministers' see A. Bradley & K. Ewing, *Constitutional and Administrative Law*, (Longman: London, 2007), pp.255-268.

43. *The Future of the Monarchy: The Report of the Fabian Commission*, (Fabian Society: London, 2003) p.135

determined. This apprehension has led Bogdanor to highlight the rub of, and thus requirement for, Part Two of this paper: 'Defining a convention and distinguishing it from a practice or mere usage, therefore, are no means simple, and some conventions are so very general that it is difficult to interpret their meaning with any real degree of precision.'⁴⁴ Does Elizabeth II retain a personal discretion in the execution of her direct legal prerogative to issue Royal Assent or dissolve Parliament?⁴⁵ If so, the exercise of these prerogatives will serve to bear out the thesis idea that the monarch is an efficient part of the Constitution. This follows because if the monarch did not retain a personal discretion, the monarch would not be able to exert her influence upon the workings of the Constitution. Thus, the Constitution would work irrespective of the monarch's personal preferences. Accordingly, this would present a serious hurdle to the thesis idea.

To identify whether the direct legal prerogative has retained any element of personal discretion, Hanson and Walles have used the threshold of 'some measure of real personal choice.'⁴⁶ However, 'some measure of real personal choice' can – rightly – be criticised and ousted because it is so vague that it cannot impart any meaningful description. To overcome this lack of clarity, 'significant' should be substituted for 'some measure'; 'In practice' should be substituted for 'real', therefore notions of 'pure theory' fall outside its scope. Instead of 'choice', a more precise term would have been 'discretion'. The threshold then is significant personal discretion in practice. If this threshold is cleared it is defensible to hold that direct legal prerogative power retains personal discretion. This is so, notwithstanding that the direct legal prerogative remains legal in principle. The direct legal prerogative of the monarch to grant Royal Assent to legislation is tested using this threshold below.

George V believed that the necessary circumstances before the Royal Assent could be refused were that there must be, 'convincing evidence that it would avert a national disaster, or at least have a tranquilizing effect on the distracting conditions of the time.'⁴⁷ These are exceedingly

44. Vernon Bogdanor, *The New British Constitution*, (Hart Publishing: Oxford, 2009), p.255: 'It may be objected that the same is often true of statutory rules. But these can be interpreted by the courts; there is no similar umpire for conventions.'

45. See also A. Hanson & M. Walles, *Governing Britain*, (Collins, Great Britain, 1970), p.13: 'Whether these powers have suffered total atrophy is a question that cannot be answered with complete confidence.'

46. A. Hanson & M. Walles, *Governing Britain*, (Collins, Great Britain, 1970), p 13

47. Letter by George V (31/07/1914) in A. Bradley & K. Ewing, *Constitutional and Administrative Law*, (Longman: London, 2007), p.241; Meeting in person with Vernon Bogdanor (22/03/2010): 'George V seriously considered not giving the Royal Assent to the 1914 Government of Ireland Act providing for Home Rule.'

vague concepts. They would be in urgent need of clarification if the Royal Assent were to be withheld *de facto*. What would be required to qualify as 'convincing evidence', 'a national disaster' or 'a tranquilizing effect' is by no means obvious. Therefore, it is of great value that Bradley and Ewing have particularised what *should* be required to qualify as 'a national disaster': 'it were clear that one party or its leader had seriously departed from the accepted rules.' Here Bradley and Ewing pick up the idea that this direct prerogative is circumscribed by constitutional constraint: 'the accepted rules'. What exactly these accepted rules comprise, however, remains controversial. Nevertheless, *both* George V and Bradley and Ewing agree that 'personal intervention by the monarch [refusing to grant Royal Assent] could be justified on constitutional grounds.'⁴⁸

In contrast to Bradley and Ewing's emphasis upon 'the accepted rules', Bogdanor has emphasised the political repercussions *subsequent to* breach of 'the accepted rules': 'were the Queen now to refuse to assent, there would be a constitutional crisis which might put in doubt the future of the monarchy.'⁴⁹ Here, Bogdanor is suggesting that the political repercussions would be so devastating for monarchy, as effectively to argue that a royal veto is defunct. In this way Bogdanor enjoys common ground with Bagehot, who, as far back as 1867, argued:

[T]he Queen has no such veto. She must sign her own death-warrant if the two Houses unanimously send it up to her. It is a fiction of the past to ascribe her legislative power. She has long ceased to have any.⁵⁰

Here Bagehot assertively argued that any significant personal discretion, retained by the monarch, was 'a fiction of the past'. Blackburn too, further secures the position previously adopted by both Bagehot and Bogdanor by having recourse to the 'reality' of the situation: 'As a matter of political reality, there has been no royal veto – as it was once called – for three centuries.'⁵¹ Blackburn's use of the word 'reality' may be replaced by 'in practice'. It is therefore clear that, in Blackburn's summation, the Queen does not retain significant personal discretion to withhold her Royal Assent *in practice*.

48. A. Bradley & K. Ewing, *Constitutional and Administrative Law*, (Longman: London, 2007), p.252

49. Vernon Bogdanor, *The New British Constitution*, (Hart Publishing: Oxford, 2009), p.16

50. Walter Bagehot, *The English Constitution*, (OUP: 2001), p.51

51. Robert Blackburn, *King and Country*, (Politico: London, 2006), p 90

On this point, Blackburn enjoys the support of the former Lord Chief Justice: ‘we know that the Queen has no choice but to assent to legislation duly laid before her.’⁵² Bingham’s use of the inclusive ‘we’ was intended to capture convergence of the senior judiciary.⁵³ Such judicial consensus undoubtedly carries significant constitutional weight. It also comprises yet another source arguing that this direct legal prerogative has ceased to entail any significant⁵⁴ personal discretion in practice. Put another way, as a ‘matter of political reality’, this direct legal prerogative has evolved to become ‘merely part of the formal apparatus of government.’⁵⁵

Another direct prerogative remaining lawful today, however, is the power to dissolve Parliament – and thus, determines the date of a general election. The most pragmatic and defensible standpoint today must surely be the one taken by Blackburn. The ‘true situation’ is that ‘the personal prerogative or discretionary power of the monarch to decide dissolution affairs and general election timing is an anachronism, and as political reality is defunct.’⁵⁶ Although academics have argued hypothetical cases wherein a request for dissolution may be constitutionally refused,⁵⁷ this does not ever appear to become ‘political reality’. This is the position this paper seeks to adopt. Blackburn must be correct that it is completely isolated from the ‘reality’ of a democratic society in the Twenty-First Century to maintain that a hereditary monarch retains power to dispense with an elected legislature and survive as Head of State. The life of a parliament is prescribed by statute⁵⁸ and, further, the circumstances surrounding dissolution are stringently constrained by constitutional convention.⁵⁹ Therefore the direct legal prerogative to dissolve Parliament, albeit existing *in principle*, cannot be maintained here exist *in practice*. It is *merely another part of the formal apparatus of government*.

52. Tom Bingham, *The Rule of Law*, (Penguin: London, 2010), p.12

53. Meeting in person with Tom Bingham (22/03/2010).

54. See Anthony Sampson, *The Essential Anatomy of Britain: Democracy in Crisis*, (Hodder & Stoughton: Great Britain, 1993), p.71: [The monarch] no longer appears as any serious counterweight to House of Commons or the government’.

55. A. Bradley & K. Ewing, *Constitutional and Administrative Law*, (Longman: London, 2007), p.251

56. Robert Blackburn, *King and Country*, (Politico: London, 2006), p 99

57. Meeting in person with Vernon Bogdanor (22/03/2010): ‘It is reasonable to suppose that the Queen can only refuse one when it is improperly sought, for example, after a Prime Minister has lost an election’.

58. Parliament Act, (1911), s.7: ‘Five years shall be substituted for seven years as the time fixed for the maximum duration of Parliament’

59. Vernon Bogdanor, *The New British Constitution*, (Hart Publishing: Oxford, 2009), p.16: ‘imposing non-legal rather than legal obligations’.

So far then, we have established that the direct legal prerogative to grant Royal Assent and, further, grant a dissolution of Parliament, do not retain any significant personal discretion *in practice*. This presents a serious hurdle for – but is not, however, fatal to – the thesis idea. The monarch's direct legal prerogative to appoint a Prime Minister has generated, 'reams of academic speculative theorizing and much exaggerated comment about "grey areas"'.⁶⁰ This direct legal prerogative may, then, help to propagate the thesis that the monarch is a working, or efficient, part of the Constitution.

2.2 PRIME MINISTERIAL APPOINTMENT

Queen Elizabeth II herself has previously described her constitutional duty to appoint a Prime Minister in terms of 'not doing, but being'.⁶¹ Her Majesty is correctly stating here that she retains personal discretion to choose a Prime Minister, however she does not exercise such power in practice.⁶² It is vital to the thesis idea that Her Majesty is *not* here stating that she no longer retains any significant personal discretion. This position is in conformity with the Cabinet Office Precedent Book: 'as the King should not exercise, or appear to exercise, any political bias, he would *normally choose* as Prime Minister the leader of the party having the largest number of seats in the House of Commons.'⁶³ The Queen and the Cabinet Office Precedent Book do *not*, therefore, support the proposition that personal discretion in the appointment of a Prime Minister is now defunct.

Going further, Blake does work to sustain support for the thesis idea insofar as he argues that 'Queen Victoria' not only retained, but also *de facto* exercised, significant personal discretion as late as 1923:

notably in the case of the appointment of Lord Rosebery in 1894, as did her grandson, George V, in 1923, when he appointed Baldwin rather than Curzon as successor to

60. Robert Blackburn, *King and Country*, (Politico: London, 2006), p.88

61. Antony Jay, *Elizabeth R: The Role of the Monarchy Today*, (BBC: London, 1952), p.236

62. The last general election in May is the most recent example of when personal discretion in respect of this prerogative power was not exercised.

63. Public Record Office, *Function of the Prime Minister and His Staff*, (1947-9), CAB 21, 21/1638.

Bonar Law.⁶⁴

The argument that the monarch has previously retained a personal discretion is not inconsistent with the position that Blackburn has taken. However, Blackburn asserts that ‘since the 1960s’ any significant personal discretion has become defunct ‘in practice’:

Certainly since the 1960s... talk of the “personal prerogatives” as signifying personal discretionary constitutional rights of the sovereign, or of the monarch’s freedom from ministerial responsibility in exercising the prerogative, has become redundant in practice and an arcane academic red herring.⁶⁵

The common denominator bringing Blake and Blackburn together, then, is that the monarch retained significant personal discretion in the appointment of a Prime Minister *before 1960*.

Blackburn bases his argument – that the monarch no longer retains any significant personal discretion in practice – on the ‘procedures’, which, he argues, were ‘followed’ in recent hung Parliament situations.⁶⁶ Blackburn’s argument may be taken further upon acknowledging that the ‘fundamental purpose’ of constitutional convention is ‘limiting the position of the sovereign to ensure that he or she acts within democratic norms.’⁶⁷ This follows because ‘acts within democratic norms’ would necessarily prohibit the monarch from the exercising any significant personal discretion to choose a Prime Minister. However, Blackburn’s argument that since the 1960s the monarch has ceased to retain any significant personal discretion is – it is argued here – primarily founded upon a future concern of ‘the worrying prospect of’:

royal activism, perpetuated by academic and establishment exponents of a monarch’s “personal prerogatives”, being combined with the reality of a future King Charles’ propensity for asserting strong personal views and involving himself in matters of government policy and public affairs.⁶⁸

64. Butler, Bogdanor & Summers, *The Law, Politics and the Constitution*, (OUP: 1999), p.21; meeting in person with Vernon Bogdanor (22/03/2010): ‘The sovereign had discretion on who to choose in 1915, 1916 and 1931. In these odd situations when coalition government may be needed, such as war or national emergency, constitutional convention may not be very helpful.’

65. Robert Blackburn, *King and Country*, (Politico: London, 2006), p.85

66. Robert Blackburn, *Monarchy and the Personal Prerogative*, (2004), P.L. 552

67. Vernon Bogdanor, *The Monarchy and the Constitution*, (OUP: 1995), p.65

68. Robert Blackburn, *King and Country*, (Politico: London, 2006), p.172

In Blackburn's view, 'royal activism' as envisaged above, 'may occur through academic theorists "talking up" the personal discretion and moderating role of the monarch.'⁶⁹ Nevertheless, Blackburn concedes that such 'real and serious dangers' will not be realized 'during the reign of the present monarch Elizabeth II'. Instead, Blackburn argues that, 'the repercussions might well be that a future Charles III, William V or Henry IX [will be] misguidedly persuaded to believe that it is he personally who is best placed to resolve a political crisis.'⁷⁰ It follows from the above that Blackburn is attempting – in his own words – to 'clarify [and] circumscribe [the] role and duties of a British monarch.'⁷¹ This is not a sound base upon which Blackburn's argument can be sustained.

When identifying constitutional convention, Bogdanor maintains that it is imperative to 'distinguish between the question "what is in fact the convention", and the question "what ought the convention to be".'⁷² It follows that Blackburn's argument is, most defensibly, the latter. Thus, Brazier should be credited for identifying how Blackburn's argument may have been 'a sort of wish-list.'⁷³ Put another way, because it would be 'to everyone's benefit' to 'take the role of the monarchy out of the political process altogether',⁷⁴ it does not, *per se*, render any significant personal discretion that has been retained defunct. What would clearly achieve this norm, in the words of Blackburn himself, would be, 'an agreed written statement to be issued from Buckingham Palace or a Conference on Royal Affairs initiated by the Palace.'⁷⁵

In want of either of these undertakings, we should be extremely careful to conclude that the monarch has ceased to retain any significant personal discretion to choose a Prime Minister in practice. By no means is it clear that such personal discretion is 'removed from political actuality, and indeed convention.'⁷⁶

What can be supported here, however, is Brazier's 'guiding light': 'the

69. Robert Blackburn, *King and Country*, (Politico: London, 2006), p.101

70. Robert Blackburn, *King and Country*, (Politico: London, 2006), p.102

71. Robert Blackburn, *King and Country*, (Politico: London, 2006), p.172

72. Vernon Bogdanor, *The New British Constitution*, (Hart Publishing: Oxford, 2009), p.18

73. Rodney Brazier, *Monarchy and the personal prerogatives: a personal response to Professor Blackburn*, (2005), P.L. 47

74. Robert Blackburn, *King and Country*, (Politico: London, 2006), p.177

75. Robert Blackburn, *King and Country*, (Politico: London, 2006), p.94

76. Robert Blackburn, *Monarchy and the Personal Prerogative*, (2004), P.L. 552

political crisis should if possible be resolved by politicians.⁷⁷ In this way, Brazier enjoys the support of Ganz insofar as she argues: ‘Ultimately the decision lies with the Queen and her advisers, though politicians will, if at all possible, settle the problem among themselves.’⁷⁸ This common ground is identified here to be the most defensible – and therefore the position this paper seeks to associate itself with. This is because the bulk of authority is in conformity – or at least not in conflict with – the said position. This is so notwithstanding that it would be to everyone’s benefit to take the role of the monarchy out of the political process altogether. This is the most sustainable position and one for which there must surely be unanimous agreement. Therefore: ‘encouraging royal intervention’ to ‘pre-empt’ a decision, ‘is literally the last thing that should happen in appointing a Prime Minister.’⁷⁹ However, discouraging the exercise of monarchical discretion is one thing. Denying its existence is *completely* another and, on current authority, must surely be the overly bold and less substantiated side of the academic debate.

Bogdanor argues that exercise of the direct legal prerogative to choose a Prime Minister, ‘has been greatly limited by the development of a two party system, which has meant that the Queen has not been called upon to use her discretion as to whom to appoint Prime Minister.’ Furthering the thesis idea, Bogdanor continues: ‘if the Commons came to be elected by proportional representation [such] a change could significantly alter the role of the Queen.’⁸⁰ Proportional representation would dispense with the ‘two party system’ and render a clear leader, once again, less clear. Would this enable the monarch to exercise the ‘undoubted legal power to choose a Prime Minister’?⁸¹ Or would Bogdanor’s suggestion that what ‘in the past was essentially political might now become a matter of constitutional law’⁸² be implemented through primary legislation? It is far from clear.

Following from the above, having distilled the commentary, we may

77. Rodney Brazier, *Constitutional practice*, (Clarendon: Oxford, 1988), p.43; Telephone conversation with Paul Craig (29/03/2010): Craig adopts a similar position.

78. Gabriele Ganz, *Understanding Public Law*, (Collins: Great Britain, 1970), p.9

79. Rodney Brazier, *Monarchy and the personal prerogatives: a personal response to Professor Blackburn*, (2005), P.L. 45

80. Vernon Bogdanor, *The New British Constitution*, (Hart Publishing: Oxford, 2009), p.225

81. Rodney Brazier, *Monarchy and the personal prerogatives: a personal response to Professor Blackburn*, (2005), P.L. 45; Telephone conversation with Jeffrey Jowell (29/03/2010): ‘we can rule this out as a ‘real possibility’; Telephone conversation with Paul Craig (29/03/2010): ‘the possibility of the monarch’s input is greater under a proportional representation system’.

82. Vernon Bogdanor, *The New British Constitution*, (Hart Publishing: Oxford, 2009), p.225

conclude that: 1) the monarch retains significant personal discretion to appoint a Prime Minister; 2) Elizabeth II has not *de facto* exercised such a personal discretion in practice; 3) it is undesirable that she use this personal discretion in practice; and 4) until an agreed written statement is issued from Buckingham Palace, or primary legislation is passed which formally removes such discretion, the monarch will continue to retain significant personal discretion in practice. The *personalities* of individual monarchs are therefore important. If the monarch plays 'an active role' in selecting a Prime Minister, 'there is no guarantee that one monarch will behave in the same way as another'.⁸³ When Her Majesty surrenders the throne the *working* of the constitution may change. A future Charles III who may become more of an efficient part of the constitution than Elizabeth II has been thus far – there is no guarantee.

2.3 GOING FURTHER THAN BAGEHOT — THE MONARCH REMAINS AN EFFICIENT PART OF THE CONSTITUTION

Along with Hennessy, then, I would identify the monarch as 'still a central player in the political life of her realm'.⁸⁴ However, it is regrettable that neither Leyland⁸⁵ nor Bogdanor identified the authority which lead them to the conclusion that Bagehot considered the monarch to have become a dignified – and no longer an efficient – part of the Constitution. This paper will therefore continue where Leyland and Bogdanor fell short. It is precisely because Bagehot also fails to identify the monarch as an efficient part of the Constitution that the thesis here takes shape. It is noteworthy therefore, that the only 'rights', which Bagehot attributed to the monarch in a 'constitutional monarchy such as ours', were 'the right to be consulted, the right to encourage [and] the right to warn'.⁸⁶ These 'rights' have recently been accurately described by Tomkins as 'constitutionally significant spheres of influence'.⁸⁷

More important, however, is Bagehot's failure to identify that the monarch retained three direct and legal prerogatives. This was a remarkable oversight and one of great consequence. It is argued here that so great was this

83. Robert Blackburn, *King and Country*, (Politico: London, 2006), p.102

84. Peter Hennessy, *The Prime Minister: The Office and its Holders since 1945*, (Penguin: London, 2000), p.22

85. Peter Leyland, *The Constitution of the United Kingdom: A Contextual Analysis*, (Hart: Great Britain, 2007), p.73: '[Bagehot believed that] the monarch had become a "dignified" rather than an "efficient" (i.e. working) element of the Constitution'.

86. Walter Bagehot, *The English Constitution*, (OUP: 2001), p.64

87. Adam Tomkins, *Public Law*, (OUP: 2003), p.62

oversight, that Bagehot's belief should properly be discarded as incomplete. Bagehot would have been accurate if he had argued that the monarch had evolved to become *more* of a dignified element of the constitution. This would still have been incomplete, however.⁸⁸

Bagehot could and, it is argued here, *should*, have gone further and argue that: *the monarch is a dignified and efficient part of the Constitution*. This is notwithstanding that she may have a greater dignified than efficient constitutional role. This is the rub of the thesis idea, which has never before enjoyed academic support.

Tomkins does work to motivate the thesis idea by maintaining an argument that the monarch has two mechanisms by which she which she may impact upon the working of the Constitution:

[F]irst there are the specific prerogative powers which continue to be exercisable only by the monarch herself and not by her Ministers; and, secondly, there are the constitutionally significant spheres of influence which remain open to the monarch. Of these, two are especially important: her unique relationship with the Prime Minister and her roles with regard to the Commonwealth.⁸⁹

Here, Tomkins has theoretically split, what he has termed, 'constitutionally significant spheres of influence' into two parts. Both 'her unique relationship with the Prime Minister', and 'her roles with regard to the Commonwealth' are quite rightly described as 'especially important'.⁹⁰ This is because, regardless of any remaining direct legal prerogative power, 'the Queen remains immensely powerful'.⁹¹ The monarch remains, thus, an efficient part of the Constitution.

Her Majesty's 'unique relationship with the Prime Minister' is maintained through 'weekly audiences... when they are both in London'.⁹² These weekly audiences must have been what Bagehot had in mind when he articulated his 'three rights'. Tomkins has subsequently interpreted Bagehot's 'three rights' in terms of 'the rights to encourage and to warn, and

88. See A. Hanson & M. Walles, *Governing Britain*, (Collins, Great Britain, 1970), p.13: 'Indeed, as the actual powers of the monarchy have decreased almost to the vanishing point, its symbolic significance has increased'.

89. Adam Tomkins, *Public Law*, (OUP: 2003), p.62

90. See Robert Blackburn, *King and Country*, (Politico: London, 2006), p.147: "[It is questionable whether the monarchy will survive in Australia...when Charles III becomes the King'.

91. Adam Tomkins, *Public Law*, (OUP: 2003), p.62

92. Adam Tomkins, *Public Law*, (OUP: 2003), p.71

to be consulted by, the Prime Minister of the day.⁹³ This begs the question, are these 'rights' mere formality? As a former Prime Minister, Thatcher has firmly rejected such a proposition: 'Anyone who imagines that they are a mere formality or confined to social niceties is quite wrong.'⁹⁴ Since no minutes are kept at these 'weekly audiences', Thatcher's words are immensely valuable. So much so, it must be correct that the Queen is an efficient part of the Constitution as a result of her relationship with the Prime Minister *per se*.

Tomkins asserts that in respect of 'her roles with regard to the Commonwealth': 'The *political* area in which the present Queen has perhaps most frequently acted independently of ministerial advice is in regard to the Commonwealth.'⁹⁵ This furthers the thesis idea because, not only does Tomkins argue that this 'constitutionally significant sphere of influence' is 'political'. He subsequently argues that: 'the most fundamental doctrine or convention [is that] the monarch is bound to accept and to act on the advice of her Ministers.'⁹⁶ Tomkins argues that this, 'most fundamental doctrine', is violated by the monarch. Here, Tomkins enjoys the support of Pimlott⁹⁷ insofar as they both argue that Her Majesty acts independently of ministerial advice with respect to the Commonwealth. Therefore the thesis that the monarch is an efficient part of the Constitution *must* be correct in light of her 'constitutionally significant spheres of influence' *per se*.

However – and crucially for the thesis idea – Tomkins goes further than Bagehot by identifying that the monarch has retained 'specific prerogative powers'. Blake, too, should be credited here for stating that Bagehot failed to identify that the monarch had retained what Tomkins has termed 'specific prerogative powers':

[Bagehot's] three "rights" were not the only ones that the Crown possessed... There were at least two others which he did not mention. One was the right to appoint the prime minister. A second was the right to refuse a request for the dissolution of parliament.

Unfortunately, Blake was not able to ascertain the reason for Bagehot's shortcoming. However a reasonable – but unsubstantiated – suggestion was

93. Adam Tomkins, *Public Law*, (OUP: 2003), p.71

94. Thatcher, *The Downing Street Years*, (HarperCollins: London, 1993), p.18; Telephone conversation with Paul Craig (29/03/2010): 'the influence of the monarch on the Prime Minister depends on the personalities of both'.

95. Adam Tomkins, *Public Law*, (OUP: 2003), p.72

96. Adam Tomkins, *Public Law*, (OUP: 2003), p.71

97. See Ben Pimlott, *The Queen: A Biography of Elizabeth II*, (Wiley: United Kingdom, 1998), pp.463-469

offered: ‘Perhaps Bagehot took these for granted, believed these did not need to be spelled out, and so omitted them.’⁹⁸ Whatever the *de facto* reason for Bagehot’s remarkable oversight, Bagehot’s failure to reference the retention of direct legal prerogative power suggests that Bagehot did *not* factor them into his calculations. This suggests that Bagehot’s belief that the monarch had become a dignified part of the Constitution should, as stated above, be discarded as incomplete or indeed misconceived.

Sofar, then, we have identified that the monarch retains ‘constitutionally significant spheres of influence’, which, as it is argued here, necessarily renders the monarch an efficient part of the Constitution. This finding attributes greater persuasiveness to the thesis idea. However, if the reader is still unconvinced that the monarch is an efficient part of the Constitution, the monarch satisfied Bagehot’s own criteria for *de facto* efficient institutions of state: ‘those by which [the Constitution] in fact works.’⁹⁹ Bogdanor has recently embraced the thesis that the monarch is an institution of state by which the Constitution in fact works.¹⁰⁰ In the words of Tomkins: ‘The monarch is no mere figurehead ... Elizabeth II has extraordinary power.’¹⁰¹

3. SIGNIFICANCE OF THE THESIS IDEA

3.1 THE PRINCIPLE OF RULE BY LAW

The thesis idea has been nurtured in Part One. Part Two has tested the thesis idea to identify whether support for the thesis idea can be adduced from the direct legal prerogatives. However, the monarch’s two ‘constitutionally significant spheres of influence’ leave no doubt that she *is* an efficient part of the Constitution. Part Three will develop a modern conception of the principle of – what will here be termed – ‘rule by law’.¹⁰² Then we will be in a position to go further than merely propagating the thesis idea. We will be able to ascertain its *significance* and real worth.

Loughlin has recently interpreted the ‘ancient idea of the rule of law’ as one that ‘promotes the idea of a State ruled by law’.¹⁰³ The principle bears

98. Butler, Bogdanor & Summers, *The Law, Politics and the Constitution*, (OUP: 1999), p.21

99. Walter Bagehot, *The English Constitution*, (OUP: 2001), p.7

100. Meeting in person with Vernon Bogdanor (22/03/2010)

101. Adam Tomkins, *Public Law*, (OUP: 2003), p.72

102. This paper hereby coins this term.

103. Martin Loughlin, *Sword and Scales*, (Hart: Oxford, 2000), p.13

its origins to the work of Aristotle: 'It is preferable that the law should rule rather than any single one of the citizens.'¹⁰⁴ The normative work Aristotle has done was again captured in the 18th Century. This time however, in just ten words: 'Be you ever so high, the Law is above you.'¹⁰⁵ Subsequently, Dicey encapsulated this constitutional norm in just five words: 'rule or supremacy of law.'¹⁰⁶ Thus we have the first aspect of the principle rule by law.

Plato sowed the seeds for what became the second aspect of the principle rule by law: 'law is the master of government and the government is its slave.'¹⁰⁷ Plato develops the principle further because he argues that, just as the citizen is subject to law, so is 'government'. The logic behind both aspects of the principle developed here is based upon 'the idea of the *rule of reason*.'¹⁰⁸ Thus far our enunciation of the principle appears not dissimilar to that of Bingham: 'all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.'¹⁰⁹ The only significant advancement Bingham makes upon our principle is that laws are 'generally' non-retrospective and 'publicly administered in the courts.'¹¹⁰

Therefore, we may conclude that the principle of rule by law demands that: 1) citizens are subject to law; 2) executive power is subject to law; 3) laws must generally not be applied retrospectively; and 4) the principle and the laws beneath it must be applied and enforced in the courts by the judiciary.

104. Aristotle, *The Politics*, (Penguin: London, 1962), p.143; Martin Loughlin, *Sword and Scales*, (Hart: Oxford, 2000), p.69: 'Aristotle here provides us with the first clear expression of the principle of the rule of law'; see also Thomas Paine, *Paine: Collected Writings*, (Library of America: New York, 1995), p.34: 'For as in absolute government the king is law, so in free countries the law ought to be King; and there ought to be no other'.

105. Thomas Fuller, *Gnomologia: Adagies and Proverbs*, (Kessinger: United Kingdom, 2003), p.23; Lord Denning MR in *Gouriet v Union of Post Office Workers* (CA) [1977]: 'To every subject in this land, no matter how powerful, I would repeat the words of Thomas Fuller'.

106. Albert Dicey, *Introduction to the Study of the Law of the Constitution*, (Macmillan: London, 1959), p.184; Jeffrey Jowell, *The rule of law's long arm: uncommunicated decisions*, (2004), P.L. 246: 'Dicey's conception of the rule of law's purpose and scope have been rightly contested'.

107. Plato, *The Laws*, (Penguin: London, 1970), p.715; see also Lord Steyn, *The Constitutionalisation of Public Law*, (The Constitution Unit: London, 1999), p.4: '[The rule of law also] conveys the idea of government not under men but under laws'.

108. Martin Loughlin, *Sword and Scales*, (Hart: Oxford, 2000), p.74

109. Tom Bingham, *The Rule of Law*, (Penguin: London, 2010), p.8

110. Tom Bingham presumably had the Nuremberg Trials (1945-46) in mind wherein the war crime 'genocide' was applied retrospectively.

**3.2 DOES THE THESIS IDEA OFFEND AGAINST THE PRINCIPLE OF
RULE BY LAW?**

The Fabian Commission concluded in 2003: ‘the monarch is regarded as the fount of law and therefore effectively above it’.¹¹¹ Thus, the monarch is ‘effectively’ outside the scope of the principle rule by law. This proposition rests upon two grounds. Firstly, the monarch is a citizen and therefore should be subject to the law (the first aspect of the principle rule by law). Secondly, the thesis maintained here is that the monarch is an efficient part of the Constitution wielding executive power – to choose a Prime Minister. That the monarch is ‘effectively’ outside the scope of the principle rule by law, it follows that the exercise of her direct legal prerogative to choose a Prime Minister is not within the scope of the principle rule by law. This, then, is the significance of the thesis idea for British public law.

In 1994, the House of Lords was of the opinion that the ‘legal metaphor of the Crown’¹¹² encompassed two distinct meanings – the ‘Crown-as-Monarch’ and the ‘Crown-as-executive’.¹¹³ This ‘highly artificial’¹¹⁴ distinction was drawn to ensure that ‘the servants and agents of the Crown no longer operate entirely beyond the rule of law’. However, the significance on the thesis idea is that ‘the same cannot be said for the monarch herself’.¹¹⁵ The monarch is thus outside the scope of the principle rule by law and, therefore, the exercise of her direct legal prerogative to choose a Prime Minister is not judicially reviewable. This is of fundamental significance to the thesis idea because we have previously identified that the Queen has retained significant personal discretion to choose a Prime Minister in practice. Jacob has stated the above succinctly: ‘At the heart of Britain, law does not rule. The Crown is at this centre [where] the rule of law does not operate’.¹¹⁶

The significance of our previous finding that the monarch retains significant personal discretion to choose a Prime Minister renders future

111. The Future of the Monarchy: The Report of the Fabian Commission, (Fabian Society: London, 2003) p.137

112. Adam Tomkins, *Public Law*, (OUP: 2003), p.61

113. *M v Home Office* (HL) [1994] 1 AC 377.

114. M. Sunkin & S. Payne, *The Nature of the Crown: A Legal and Political Analysis*, (OUP: 1999), p.26

115. Adam Tomkins, *Public Law*, (OUP: 2003), p.84; see also p.88: ‘the Crown can do no wrong’; Telephone conversation with Paul Craig (29/03/2010): ‘It does not necessarily mean that the Queen is immune from criminal proceedings because she is outside the scope of the rule of law’.

116. Joe Jacob, *The Republican Crown: Lawyers and the Making of the State in Twentieth Century Britain*, (Dartmoor: Aldershot, 1996), p.1

violation of rule by law *possible*, albeit possibly not probable, nor desirable. If the monarch were to exercise a personal discretion when appointing a Prime Minister in practice, she *would* necessarily offend against the principle rule by law.¹¹⁷ This potential violation, it must be conceded, can be dispelled as nothing more than 'pure theory'¹¹⁸ until the monarch exercised a *de facto* personal discretion and *chose* a Prime Minister. This is *fundamentally* different to claiming that this direct legal prerogative is defunct. This position admits that such a potential, albeit undesirable, in fact, remains.

4. CONCLUSIONS MOTIVATED BY THE THESIS IDEA

Our progressive constitutional monarchy has retained three, common law, under-determined, direct and legal prerogative powers. Of the three only the prerogative to appoint a Prime Minister maintains significant personal discretion in practice. This has the potential to render the monarch – once again – an efficient part of the Constitution.

However, the - very private - relationship enjoyed with the Prime Minister necessarily qualifies the monarch as a working part of the executive. The weekly meetings held are no mere formality. Her Majesty is also very politically active in her roles with regard to the Commonwealth. It follows that there can be no doubt Elizabeth II is what Bagehot termed an efficient part of the Constitution.

The significance of the thesis propagated here is that the potential for the monarch to violate the principle of rule by law, in fact, remains. This violation would become obvious if the monarch were to exercise a personal discretion and select a Prime Minister. Ordinarily the clamour for constitutional reform would not be contingent on the individual personality of public office-holders. However, because of its nature, direct legal prerogative is contingent on the reticence or willingness of the monarch to invoke its exercise. The blunt reality is that respect for the office of the monarch is contingent on the continuing reticence of the current monarch, Elizabeth II, and further, the incumbent office-holder showing the same reticence.

117. Robert Blackburn, *Monarchy and the Personal Prerogative*, (2004), P.L. 563: 'political neutrality must be the golden rule for the continuity of the monarchy'.

118. See A. Hanson & M. Walles, *Governing Britain*, (Collins, Great Britain, 1970), p.12: 'In a sense, the monarchy itself is an anachronism'



KING'S STUDENT LAW REVIEW

GILL v RSPCA:
LAW,
PRINCIPLE
AND POLICY

RANAMIT BANERJEE
3rd Year LLB Student, University of Warwick

1. INTRODUCTION

*"... could he have predicted that some... gentlemen would take on themselves to make a law altering the whole purport of his will, without in the least knowing at the moment of their making it, what it was that they were doing?"*¹

The highly publicised litigation between Dr.Gill and the RSPCA has finally come to an end with the Court of Appeal dismissing RSPCA's appeal against the High Court's judgment. The decision, which overturned the testatrix's will, examined the extent of the power of a disinherited relative to contest the terms of a will. Such cases are difficult to resolve, especially against the background of the strong emotional involvement, as it is difficult to prove with any degree of certainty the intention of the deceased.²

This essay will commence by outlining the material facts and legal contentions of the case. It will then critically analyse the reasoning adopted by the court and how it reflects the current legal position. Before concluding, it will examine the principle and policy considerations encompassed in the judgment, the practical implications this judgment has for charities, testators and lawyers and possible alternative solutions.

2. THE CASE

Dr.Gill³ was the only child of Mr. and Mrs. Gill,⁴ who died in 1999 and 2006 respectively. The testatrix's will, which mirrored her husband's, provided that her estate would be left to Mr.Gill, and, in the event of him predeceasing her, to RSPCA.⁵ The will contained a declaration stating that no provision had been made for the daughter because she had already been 'well provided for'.⁶

The testatrix suffered from agoraphobia and heavily depended on her

1. Anthony Trollope, *Barchester Towers* (Copyright Edition Leipzig Bernhard Tauchnitz, 1859) p.22

2. John Biggar, 'Charity Begins at Home? A Scottish view following lecturer's £2m will challenge win against RSPCA in England' *Legal Bulletin for Anderson Strathern Solicitors* <<http://www.andersonstrathern.co.uk/legal-updates/charity-begins-at-home/>> [accessed 17 February 2011].

3. Hereinafter The Claimant

4. Hereinafter The Testatrix

5. Hereinafter The Respondent

6. Paragraph 5 of the 1993 Will quoted in *Gill v RSPCA* [2009] EWHC 834 (Ch) [24]

husband. The claimant shared a good relationship with both of her parents. Furthermore, she had worked on the farm for many years and the testatrix had indicated that she would inherit the farm. In contrast, there was no apparent reason why the RSPCA was selected as a beneficiary.

The claimant had initially pursued an action under the Inheritance Act⁷ which, if successful, allows the will to be varied so as to provide for the person who has been excluded. She subsequently dropped that and challenged the validity of the will, on the grounds of lack of knowledge and approval of the will by the testatrix and undue influence being exerted by Mr.Gill. A successful claim on these grounds would result in the will being struck out and, in the absence of any earlier will, the estate would be intestate and assets would be distributed in accordance with the intestacy rules. A proprietary estoppel claim was added later which, if established, allows the court to grant an equitable relief.

At first instance, the judge rejected the argument that the will was invalid for lack of knowledge and approval, but found in favour of the claimant on both the undue influence and proprietary estoppel contentions. The respondent appealed on both grounds and the claimant cross-appealed. Lord Neuberger MR, giving the leading judgment in the Court of Appeal, focussed on the issue of lack of knowledge and approval, since the claimant's success on that issue rendered the other issues academic.

3. LEGAL CONTENTIONS

3.1 KNOWLEDGE AND APPROVAL

At first instance,⁸ the judge found that despite the unbalanced relationship between the claimant's parents, the wills had been approved by the testatrix. This decision was based on the presumed facts that the solicitor had read each clause out separately to Mrs.Gill and that she had attended an earlier meeting with the solicitor. The Court of Appeal decided⁹ that the facts did not support the presumptions. The court concluded that Mrs.Gill had not in fact read the will; and held that the respondent had not discharged the burden of proving that the testatrix knew and approved the will.

7. Inheritance (Provision for Family and Dependents) Act 1975 c. 63

8. *Gill v RSPCA* [2009] EWHC 834 (Ch)

9. *Gill v RSPCA* [2010] EWCA Civ 1430; [2010] N.P.C. 126

Lord Neuberger rejected the traditional two-stage approach¹⁰ - where the first stage is to ask whether there are circumstances which excite the suspicion of the court, and, if so, ask whether those suspicions are dispelled - as applied by the High Court in determining lack of knowledge and approval claims. Instead, he stated the preferable test as 'whether or not those propounding the will have discharged the burden of establishing that the testatrix knew and approved the contents'.¹¹

Whilst the judgment is set to be one of the leading cases on lack of knowledge and approval,¹² it is not clear whether the Court of Appeal overruled the traditional two stage approach or merely preferred the one-stage test under specific circumstances.¹³ The scope of the test is blurred further as Lord Neuberger comments that irrespective of the approach adopted 'the answer should be the same'.¹⁴

The fact that a will had been properly executed, after being prepared by a solicitor and read over to the testatrix, raises a *prima facie* presumption that the testatrix knew¹⁵ and approved¹⁶ the contents. However, where there is evidence of a failing mind, the court might require further proof that the document was explained.¹⁷ The time-honoured presumption of knowledge and approval is backed by a policy argument that a ready acceptance of such challenges would undermine the fundamental principle that testators are free to leave their estate as they choose, and encourage litigation.¹⁸

Lord Neuberger's one stage approach seems to eject this presumption and shift the burden of proof to the propounder, who will have to prove knowledge and approval in addition to testamentary capacity. Thus, given its vagueness, it is submitted an attempt should not have been made to

10. *Barry v Butlin* (1838) 2 Moo PC 480 (Parke B) quoted in *Tyrrell v Painton* [1894] P 151, 156-157 (Lindley LJ)

11. *Crerar v. Crerar* (unreported) (Sachs J) cited in *Re Morris* [1971] P 62, 78E-G (Lacey J)

12. (Unknown Author), 'Legal News Update on Probate, Wills & Trusts' <http://www.stjohnschambers.co.uk/latest_news/624/legal-news-update-on-probate-wills-trusts> [accessed 10 February 2011].

13. 'Particularly in a case with a large number of witnesses, heard over many days, it does not seem to me to consider an issue in two stages', *Gill v RSPCA* [2010] EWCA Civ 1430 [64] (Lord Neuberger)

14. *Gill v RSPCA* [2010] EWCA Civ 1430 [23] (Lord Neuberger); [2010] N.P.C. 126

15. *Gill v RSPCA* [2010] EWCA Civ 1430 [14] (Lord Neuberger); [2010] N.P.C. 126

16. *Re Morris* [1971] 1 P 62 (Lacey J)

17. *Hoff v Atherton* [2005] WTLR 99 (Chadwick LJ)

18. (Unknown Author), 'Legal News Update on Probate, Wills & Trusts' <http://www.stjohnschambers.co.uk/latest_news/624/legal-news-update-on-probate-wills-trusts> [accessed 10 February 2011].

modify the test. However, we will have to wait and see whether the test will be universal in its application or limited to this case.

It is submitted that the Court of Appeal was correct in concluding that the fact that the testatrix did not mention the gift to RSPCA to the claimant and did not attempt to amend her will after her husband's death is consistent with her not having appreciated the contents of the will.

3.2 UNDUE INFLUENCE

At the first instance, the judge ruled in favour of the claimant after hearing evidence relating to the character of the claimant's parents,¹⁹ concluding that Mr. Gill was a 'stubborn, self-opinionated, domineering man'²⁰ prone to 'outbursts of fury'²¹ and that his wife had 'an avowed dislike'²² of the RSPCA but was afraid of him. The Court of Appeal did not deal with this ground.

As opposed to the doctrine of equitable undue influence, there is no presumption of undue influence in testamentary matters,²³ the party alleging it must discharge the burden of proof by clear evidence that the undue influence was in fact exercised²⁴. Mere influence or persuasion is not illegitimate in itself, even when exerted by a husband on his wife,²⁵ as it must amount to coercion which destroys free agency.²⁶ If there is evidence which shows that the testator is enfeebled in mind such influence can amount to undue influence under the circumstances.²⁷ However, it is not enough to prove that the facts are consistent with the hypothesis; what must be shown is that the facts are inconsistent with any other hypothesis.²⁸ On the facts, it

19. Andrew Norfolk, 'RSPCA ordered to pay lecturer's £1.3 million legal costs', *The Times The Sunday Times* <http://women.timesonline.co.uk/tol/life_and_style/women/families/article7016782.ece> [accessed 7 February 2011].

20. *Gill v RSPCA* [2009] EWHC 834 (Ch) [490] (Allen J)

21. *Gill v RSPCA* [2009] EWHC 834 (Ch) [340] (Allen J)

22. *Gill v RSPCA* [2009] EWHC 834 (Ch) [492] (Allen J)

23. *Boyse v Rossborough* (1857) 6 HL Cas 2, 48, 51 (Lord Cranworth)

24. *Gill v RSPCA* [2009] EWHC 834 (Ch) [484] (Allen J)

25. *Cattermole v Prisk* [2006] 1 FLR 693, 700 (Norris J); *Parfitt v Lawless* (1872) 2 P&D 462 (Lord Penzance)

26. *Willaims v Goude* (1828) 1 Hag Ecc 577, 581 (Sir J Nicholl); *Wingrove v Wingrove* (1885) 11 PD 8, 82 (Sir J Hannen P)

27. *Killick v Pountney* [1999] All ER (D) 365 (Munby J)

28. *Edwards v Edwards* [2007] EWHC 1119 (Ch) [47] (Lewison J), [2007] W.T.L.R. 1387; Halsbury's Laws of England, Wills and Intestacy, Vol 102 (2010), 5th Edition, Para 56

is not necessarily clear that actual undue influence was the only conclusion capable of being drawn from the surrounding facts.²⁹

Assuming that there was knowledge and approval, one unresolved issue was that the testatrix did not change her will in the seven years after the death of her husband – which goes against the inference of coercion.³⁰ However, the doctrine of mutual wills, if applied to the ‘matching’³¹ and ‘mirror wills’³², may be used to answer this conundrum. The doctrine applies where two testators make wills containing identical and reciprocal provisions as to the distribution of their estates and agree that they will not revoke their wills, except with the consent of both parties.³³ The first that dies carries his part of the agreement into execution,³⁴ thereby preventing the other party from revoking the will.³⁵ The principles are quite clear but it poses evidential problems.³⁶ Since the doctrine curbs the freedom of testamentary disposition, evidence required must be ‘clear and satisfactory’.³⁷ Although on the facts of this case the wills have identical terms, in the absence of additional evidence, the doctrine will be difficult to establish as mirror wills are not necessarily mutual wills.³⁸

While the law is stated correctly, the court is not convincing in its application. The judge noted that there was evidence which ‘appeared to negate coercion’³⁹ but nonetheless held that, on the whole, the burden of proof had been discharged by the claimant.⁴⁰ The fact that there was no evidence of actual undue influence, and that it was not the only possible

29. Richard Norridge, ‘To inherit the earth: challenging a Will’ <<http://www.allenoverly.com/AOWEB/AreasOfExpertise/Editorial.aspx?contentTypeID=1&itemID=53985&prefLangID=410>> [accessed 15 February 2011].

30. *Gill v RSPCA* [2009] EWHC 834 (Ch) [497] (Allen J)

31. *Gill v RSPCA* [2010] EWCA Civ 1430 [5] (Lord Neuberger), [2010] N.P.C. 126

32. *Gill v RSPCA* [2009] EWHC 834 (Ch) [22] (Allen J)

33. *Dufor v Pereira* (1769) 1 Dick 419 (Lord Camden LC)

34. *Re Hobley* [2006] WTLR 467 (Aldous J)

35. John McGhee (ed), *Snell's Equity* (32nd edn, Thomson Reuters/Sweet & Maxwell, London 2010) Paragraph 22-31

36. Francis Barlow (eds. et al), *Williams on wills* (9th edn, LexisNexis/Butterworths, London 2008) Paragraph 2.3

37. *Re Cleaver* [1981] 1 W.L.R. 939, 948A; *Walters v Olins* [2008] EWCA Civ 782 [36], [2009] Ch. 212

38. *Re Oldham* [1925] Ch 75 (Astbury J)

39. *Gill v RSPCA* [2009] EWHC 834 (Ch) [498] (Allen J)

40. William Hazlitt, ‘Challenging a will – “It’s going to be fun to watch and see how long the meek can keep the earth after they inherit it” *Views and Opinions Maurice Turnor Gardner*’ <<http://www.mauriceturnorgardner.com/article-view-print.php?viewID=23>> [accessed 8 February 2011].

conclusion, coupled with the fact there was no evidence to establish the doctrine of mutual wills, it seems that the High Court was wrong to set aside the will on this ground.

3.3 PROPRIETARY ESTOPPEL

The High Court held that the claimant had relied on assurances over many years which were given in the context of a loving relationship that she shared with each of her parents, the tradition of inheritance of farms in Yorkshire farming families, and the approval of that tradition by the testatrix.⁴¹ Apart from undertaking physical labour, her career choice reflected reliance on the assurances made to her, which led to a loss of income. She had purchased the adjoining farm and invested significant sums renovating it; it was in an inconvenient location and she would not have purchased it save for the fact that it adjoined the family farm. Based on these findings, the judge held that a claim of proprietary estoppel had been established and granted the claimant the entire property. The Court of Appeal did not deal with this ground.

As set out in *Thorner*,⁴² three key elements are required to be established before a claim of proprietary estoppel can be successful: 1) there must be an assurance made to the claimant pertaining to an interest in identified property;⁴³ 2) reasonable reliance on it by the claimant and 3) detriment to the claimant arising from that reliance. The claimant must show that it would be unconscionable for the person who made the assurance or representation to deprive the claimant of the proprietary interest that he had been led to expect. On the facts, the claimant does have a valid claim; however, we need to inspect the extent of it.

Once proprietary estoppel has been established, there is an element of the judgment of Solomon when deciding how to divide up the estate.⁴⁴ Generally, the extent of the equitable relief is the minimum necessary to do justice⁴⁵ to the claimant while preventing unconscionable conduct⁴⁶ and

41. *Gill v RSPCA* [2009] EWHC 834 (Ch) [536] (Allen J)

42. *Thorner v Majors* [2009] UKHL 18, [2009] 1 W.L.R. 776

43. Halsbury's Laws of England, Wills and Intestacy, Vol 102 (2010), 5th Edition, para 20.

44. William Hazlitt, 'Challenging a will – "It's going to be fun to watch and see how long the meek can keep the earth after they inherit it" *Views and Opinions Maurice Turnor Gardner* <<http://www.mauriceturnorgardner.com/article-view-print.php?viewID=23>> [accessed 8 February 2011].

45. *Crabb v Aran District Council* [1976] Ch 179

46. Martin Dixon, 'Estoppel and Testamentary Freedom', Conv 2008, 1, 65, 68

disproportionate result⁴⁷ – the minimum extent may mean that the award is less than that which fulfils the claimant's expectation. The court must take a principled approach⁴⁸ and cannot exercise unfettered discretion;⁴⁹ however, it does retain discretion in relation to proprietary estoppel remedies.⁵⁰

In this case, it seems like the court exercised its discretion to grant a remedy that is driven by a desire to give effect to the claimant's expectation rather than offset the claimant's detriment. The decision seems to follow *Thorner*⁵¹ in that the judge makes the familiar argument that detriment could not 'be quantified in monetary terms'⁵² and, unsatisfactorily, grants the claimant the highest possible remedy because of the practical difficulties in calculating the lesser remedy which he might more justly be granted.⁵³

To make matters definite, in theory at least, the claimant could have sought a declaration from the Court during her mother's lifetime in respect of her equitable claim to the farm on grounds of proprietary estoppel, even though that claim was only due to crystallise upon her mother's death.⁵⁴

The doctrine of proprietary estoppel is a complex area of law⁵⁵ and the nature of the equitable jurisdiction makes it difficult to predict the outcome of cases of this type. This judgment does not provide any more certainty in this area.⁵⁶

47. Halsbury's Laws of England, Wills and Intestacy, Vol 102 (2010), 5th Edition, para 20.

48. Margaret Halliwell, 'Perfecting imperfect gifts and trusts: have we reached the end of the Chancellor's foot?', *Conv* 2003, May/June, 192-202

49. *Jennings v Rice* [2002] WTLR 367, 382 (Walker J)

50. John Mee, 'The Limits of Proprietary Estoppel: *Thorner v Major*', [2009] CFLQ 367

51. "... attempting to place a monetary value would be to take on a virtually impossible task" in *Thorner v Major* [2007] EWHC 2422 (Ch) [142] (Judge John Randall QC), [2008] W.T.L.R. 155

52. *Gill v RSPCA* [2009] EWHC 834 (Ch) [550] (Allen J)

53. Martin Dixon, 'Estoppel and Testamentary Freedom', *Conv* 2008, 1, 65, 67

54. Andrew Playle and Jonathon Grogan, 'Reflections on *Gill v. RSPCA* – protecting interests prior to death' (Article for StepJournal February 2010) <http://www.stepjournal.org/journal_archive/2010/tqr_2010_issue_1/reflections_on_gill_v_rspca.aspx> [accessed 10 February 2011].

55. William Hazlitt, 'Challenging a will – "It's going to be fun to watch and see how long the meek can keep the earth after they inherit it" *Views and Opinions Maurice Turnor Gardner* <<http://www.mauriceturnorgardner.com/article-view-print.php?viewID=23>> [accessed 8 February 2011].

56. Richard Norridge, 'To inherit the earth: challenging a Will' <<http://www.allenoverly.com/AOWEB/AreasOfExpertise/Editorial.aspx?contentTypeID=1&itemID=53985&prefLangID=410>> [accessed 15 February 2011].

4. ISSUES

4.1 TESTAMENTARY FREEDOM

Since the will was drafted by a solicitor and clearly explained the reason behind excluding the claimant, *prima facie*, the will should not have been open to challenge. Although, the will was exceptional in that it left everything to charity and nothing to the testatrix's only daughter, the common law, with some limited exceptions,⁵⁷ allows a testatrix to be as erratic and whimsical as she likes in making her testamentary dispositions; there is no forced heirship⁵⁸ regime.

At first glance, the decision seems to erode testamentary freedom; however, we must inquire further. The idea behind this freedom is to uphold the intention of the testator; it is not about the wording of the will. Therefore, assuming that the court was correct in its findings, this decision upholds the testamentary intentions rather than limiting it.

4.2 THE VULNERABLE TESTATOR

It has been argued that while it is easy, in this jurisdiction, to coerce a vulnerable testator into making a will, it is difficult to challenge a suspicious will when one comes to light.⁵⁹ Commentators⁶⁰ have expressed concerns about the level of protection offered by the doctrine of undue influence in the probate context and have called for reform.

The traditional exclusion of equitable undue influence from testamentary gifts lay in the jurisdictional divide between probate and equity, social acceptability of pursuing testators⁶¹ and an individualistic approach to property rights⁶² of the mid-nineteenth century - factors that do not have much ground in this century. Therefore, it has been suggested that the presumption of undue influence be introduced in the probate context. However, these reforms must be balanced against the realistic fear of creating

57. E.g., Inheritance (Provision for Family and Dependents) Act 1975 c. 63

58. Kaye Senior, "Revolt relations" and other objectors to a will', 149 NLJ 1852

59. Roger Kerridge, 'Wills made in suspicious circumstances: the problem of the vulnerable testator', (2000), 59(2) CLJ 310, 328

60. N.S.W.L.R.C., Wills: Execution and Revocation, Report N47 (1986) at paras 8.21; Roger Kerridge, 'A case of a "suspicious" will', (2003), 119 LQR 39, 43

61. *Hall v Hall* (1868) P&D 481, 482

62. *Re Teddy* [1940] SASR 354, 358 (Napier J)

too great an evidential burden on the beneficiary, inviting unmeritorious litigation. An alternative suggestion has been that a rebuttable presumption of undue influence be introduced against potential suspects⁶³ but that poses problems with classification.⁶⁴ We need to be mindful of the fact that while the introduction of a presumption would be aimed at upholding testamentary freedom, it will also create a higher evidential burden which might curb it.

Thus, whilst a change in this area of law is desirable to afford a higher level of protection to vulnerable testators, reform is not clear-cut. Further, we also need to weigh in whether legislation might be a more desirable alternative instead of the equitable doctrine.⁶⁵ In the present case, a presumption of undue influence would help justify the High Court's decision.

4.3 *MEDIATION AND LEGAL COSTS*

The facts of this case are somewhat similar to those of the novel '*A Good Year*',⁶⁶ where Mr. Skinner, like the respondent, inherits some property and is keen on selling it while the farmer, Mr. Duflot, like the claimant, wishes to continue to make use of the land. Whilst the novel concludes on an amicable note, as the parties reconcile their differences and try to jointly run the farm, in the present case, the termination of proceedings left the respondent with no legacy. Additionally, they were ordered to bear the legal costs, while the claimant had to live through difficult and uncertain times.

In *Perrins v Holland*,⁶⁷ the judge quoted earlier observations that 'the evidential fog cannot but recall the opening of *Bleak House*; just as the exhaustion of the estate in legal costs cannot but recall its ending.' These remarks are equally applicable in the present case. While there is a public interest that where reasonable suspicions about the validity of a will are raised it should be brought before the court it cannot justify the potential exhaustion of the estate in legal costs. There seems to be public interest in encouraging sensible settlements.⁶⁸

The courts have an expectation that the charity will act reasonably

63. Report on Home-Made Wills prepared by the Sub-Committee on Civil Justice and was endorsed by the Council of Justice cited in Roger Kerridge, 'Wills made in suspicious circumstances: the problem of the vulnerable testator', *Cambridge Law Journal*, (2000) 59(2) C.L.J. 310, 331

64. *Re Stott* [1980] 1 All ER 259

65. Pauline Ridge, 'Equitable undue influence and wills', (2004) 120 LQR 617, 639

66. Peter Mayle, *A Good Year*, (edn Knopf Doubleday Publishing Group, New York, 2005)

67. *Perrins v Holland* [2010] EWCA Civ 1398 [9]

68. Michael Tringham, 'Will & Probate: Expensive Disputes' 161 NLJ 54

towards family members.⁶⁹ The judge criticised the charity for being indifferent to mediation while the claimant demonstrated a willingness to settle the matter through the same.⁷⁰ Although the respondent should have been mindful of previous decisions like *Kostic*,⁷¹ where there were substantial legal costs, they could have potentially argued that mediation had no reasonable prospect of success,⁷² a reason given in *Halsey*.⁷³

The problem with this order for costs is that it puts the charity trustees between the legal duty to secure assets to which the charity is entitled and the threat of huge legal costs being imposed for attempting to do so.⁷⁴ Given that the parties risk losing everything when the matter comes before the court,⁷⁵ it is submitted, the parties should have given mediation a second thought as the cost would have been miniscule in comparison with the costs eventually at stake.⁷⁶

4.4 FLOODGATES

Given that sixty per cent of people die intestate it is not surprising that court figures suggest that disputes over wills rose by 175 per cent between 2006 and 2007.⁷⁷ In the present case, the court recognises the danger that the

69. Andrew Norfolk, 'RSPCA ordered to pay lecturer's £1.3 million legal costs', *The Times* <http://women.timesonline.co.uk/tol/life_and_style/women/families/article7016782.ece> [accessed 7 February 2011].

70. Andrew Norfolk, 'RSPCA ordered to pay lecturer's £1.3 million legal costs', *The Times* <http://women.timesonline.co.uk/tol/life_and_style/women/families/article7016782.ece> [accessed 7 February 2011].

71. *Kostic v Chaplin* [2007] EWHC 2909, [2008] 2 Costs L.R. 271

72. Tony Allen, 'A costs sanction order for not mediating: but was it enough?' <http://www.cedr.com/?location=/library/articles/20100326_278.htm> [accessed on 10 February 2011].

73. *Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 576, [2004] 1 W.L.R. 3002

74. Tania Mason, 'RSPCA warns on legacy appeal case' <http://www.civilsociety.co.uk/fundraising/news/content/6236/rspca_warns_on_legacy_appeal_case> [accessed 10 February 2011].

75. (Unknown Author), 'Charity Legacies Team – Autumn Bulletin', <<http://www.freethcartwright.co.uk/newsandbriefings/2010/09/17/briefing-template-date-here-85/#anchor6>> [accessed 10 February 2011].

76. Tony Allen, 'A costs sanction order for not mediating: but was it enough?' <http://www.cedr.com/?location=/library/articles/20100326_278.htm> [accessed on 10 February 2011].

77. Phillip Gregory, 'Gill v RSPCA' <<http://www.stephens-scown.co.uk/news/142/gill-v-rspca>> [accessed 16 February 2011].

decision may be construed as a 'green light'⁷⁸ for disappointed beneficiaries to challenge wills and attempts to reiterate that the judgment is restricted to the facts. However, in spite of what the judges have stated, it will be difficult to contain litigation.

On the other hand, while the right of testamentary freedom together with an ageing and vulnerable population brings with it the unavoidability of more challenges, it is not necessarily hazardous when the objective is to ensure the will truly represents the testator's last wishes.⁷⁹

5. ANALYSIS & COMMENTARY

The case was unique in that it lacked fundamental evidence which would typically be available – the mental condition was debated and the disputed medical evidence did not provide any direct evidence pertaining to it from any doctor who had treated the testatrix. Further, the solicitor had destroyed the file containing the instructions. Additionally, there was no reasoning available as to why the testatrix wanted to benefit the respondent and not her only daughter.⁸⁰

The High Court states the law accurately but it does not sufficiently justify its approach. On the facts, which were based on a balance of probabilities, it was wrong to conclude that there was knowledge and approval. The court erred in inferring undue influence from the surrounding facts. Further, it went against the principle of doing minimum equity to grant the claimant the entire property as equitable relief under the proprietary estoppel claim.

On the other hand, the Court of Appeal seems to have taken the high road to give a decision in favour of the claimant. It acknowledges the 'very full judgment' of the High Court and recognises the 'well established principle' that the court does not typically second-guess the findings of fact made by the trial judge⁸¹ and then overturns the findings of fact on an 'unusual basis'.⁸²

Assuming that the Court of Appeal wished to decide in favour of the

78. *Gill v RSPCA* [2010] EWCA Civ 1430 [65] (Lord Neuberger), [2010] N.P.C. 126

79. (Unknown Author), 'Will Cases Likely to Become More Frequent' (Lexis Nexis UK Legal News Analysis 27 November 2009)

80. Nicola Evans, 'The RSPCA Appeal - Gill v Woodall – Lessons from the Court of Appeal's judgment' <<http://bdb-law.co.uk/content/v2/rspca-appeal-gill-v-woodall-%E2%80%93-lessons-court-appeal-%E2%80%99s-judgment>> [accessed 17 February 2011].

81. *Gill v RSPCA* [2010] EWCA Civ 1430 [18] (Lord Neuberger), [2010] N.P.C. 126

82. *Gill v RSPCA* [2010] EWCA Civ 1430 [65] (Lord Neuberger), [2010] N.P.C. 126

claimant, it is submitted that to establish that there was no knowledge and approval of the contents was the least risky route to restore 'natural order'.⁸³ Although the court's decision directly follows from the facts it sets out, it probably should not have been open to them to second-guess the findings of fact by the High Court in the first place as they were not unreasonable.⁸⁴ It is submitted that deciding in favour of the claimant on the ground of undue influence would be complicated as it is notoriously difficult to establish it in the probate context.⁸⁵ Further, verdict on the claim of proprietary estoppel would be complex as, even if the court could allow such a claim to be established, granting the maximum equitable relief to the claimant would require it to tread troubled waters.

Similar to the outcome in favour of *Wintle*⁸⁶, it is not the judgment in favour of the claimant but the way in which it was achieved that appears slightly unsatisfactory.⁸⁷ By the time *Wintle*'s case reached the appeal courts, 'it must have been apparent that everything would be done which could be done to ensure that the brave colonel, who had taken on the legal establishment, would emerge victorious.'⁸⁸ Similarly, in this case, it seems like the courts were inclined on handing out '*Denning-esque*'⁸⁹ to the daughter of the testatrix who dared to take on the large institution which was trying to use its wealth and power to oust her claim.⁹⁰

The judgments seem to suggest that where there is tension between a charity as a sole beneficiary and family members, judges seek to achieve a result which appears objectively to be fair and reasonable, and side with the

83. Nicola Evans, 'The RSPCA Appeal - Gill v Woodall – Lessons from the Court of Appeal's judgment' <<http://bdb-law.co.uk/content/v2/rspca-appeal-gill-v-woodall-%E2%80%93-lessons-court-appeal%E2%80%99s-judgment>> [accessed 17 February 2011].

84. *Gill v RSPCA* [2009] EWHC 834 (Ch) [18] (Allen J)

85. Pauline Ridge, 'Equitable undue influence and wills', (2004) 120 LQR 617, 629; Roger Kerridge, 'Wills made in suspicious circumstances: the problem of the vulnerable testator', (2000) 59(2) CLJ 310, 327

86. *Wintle v Nye* [1959] 1 WLR 284

87. Roger Kerridge, 'Wills made in suspicious circumstances: the problem of the vulnerable testator', (2000) 59(2) CLJ. 310, 322

88. Roger Kerridge, 'Wills made in suspicious circumstances: the problem of the vulnerable testator', (2000) 59(2) CLJ. 310, 322

89. Nigel J Jamieson, 'Codes, Contracts, and commerce: the Contractual Mistakes Act: Part 2: releasing more light than heat', (2010) 31(2) Stat L R 107

90. (Unknown Author), '5 live: Dr Christine Gill took on the RSPCA and won' <<http://www.bbc.co.uk/news/uk-england-12060357>> [accessed 17 February 2011].

family.⁹¹ The judges seem to favour those with a closer relationship to the deceased, even going against the principles of testamentary freedom, and the charities will find it difficult to establish a moral claim.⁹²

6. ALTERNATIVE SOLUTION

Assuming that Mr. Gill's intention was that his estate passes to the RSPCA on his wife's death, the ruling of the court has defeated it. To ensure that his wishes are carried out, rather than leaving the assets to his wife absolutely, he could have executed a will trust for her for life and left the remainder to the respondent. Further, by severing the joint tenancy in all joint assets, they would have been free to dispose of their respective shares in the property.⁹³ A trust structure would have provided a two-fold benefit – it would have ensured that his wife was provided for during her lifetime and ensure that the respondent benefited after her death. Additionally, given the testatrix's apparent vulnerability, a trust of Mr Gill's estate would have also assisted with providing further protection of his estate beyond his death.⁹⁴

Alternatively, the respondent could have resolved the dispute by making an *ex gratia* payment⁹⁵ under s.27⁹⁶ or a payment under s.26⁹⁷ in the interests of charity, with authority from the Charity Commission or Attorney-General. The trustees, to protect themselves from personal liability⁹⁸ arising

91. (Unknown Author), 'Gill v Woodall, Lonsdale and RSPCA', <<https://wiki.qut.edu.au/display/CPNS/Gill+v+Woodall,+Lonsdale+and+RSPCA>> [accessed 15 February 2011].

92. Clarissa Dann, 'RSPCA loses in the Court of Appeal', <<http://www.charitiesdirect.com/caritas-magazine/rspca-loses-in-the-court-of-appeal-876.html>> [accessed 15 February 2011].

93. Andrew Playle and Jonathon Grogan, 'Reflections on Gill v. RSPCA – protecting interests prior to death' <http://www.stepjournal.org/journal_archive/2010/tqr_2010_issue_1/reflections_on_gill_v_rspca.aspx> [accessed 17 February 2011].

94. Andrew Playle and Jonathon Grogan, 'Reflections on Gill v. RSPCA – protecting interests prior to death' <http://www.stepjournal.org/journal_archive/2010/tqr_2010_issue_1/reflections_on_gill_v_rspca.aspx> [accessed 17 February 2011].

95. *Re Snowden* (1979) 3 All ER 172

96. Charities Act 1993 c. 10

97. Charities Act 1993 c.10

98. (Unknown Author), 'Where did it all go wrong? Gill v. RSPCA' <www.thomaseggar.com/webfiles/pdfs/PCDR-%20Gill%20v%20RSPCA.pdf> [accessed 17 February 2011].

out of inappropriate use of charity funds,⁹⁹ could have sought formal advice from the Charity Commission under s. 29¹⁰⁰ as to whether they are authorised to make a payment or take a certain step.¹⁰¹

7. LESSONS & IMPLICATIONS

The principles of law invoked by the claimant were not straightforward ones, and it would be very difficult to argue that the legal issues were clear cut and that the respondent had no chance of success. However, this decision reflects badly on the respondent, especially considering that the costs incurred by them came from public donations. The RSPCA have become the most complained about charity in the UK¹⁰² and the bad press could harm the donations they receive. Whilst this does not mean that charities should give up on pursuing legacies donated to them, they should take proper advice, consider the risks of the case¹⁰³ and make a decision in the best interests of the charity.¹⁰⁴

When a solicitor takes instructions from a third party, as opposed to taking them from the testator, and fails to check that the testator has understood his instructions properly¹⁰⁵ and furthermore fails to keep practice notes,¹⁰⁶ it is reasonably foreseeable that the document will be challenged and the costs thereby incurred are also foreseeable. Although it

99. ‘The RSPCA said it had been “legally obliged to seek the funds under charitable law” - Andrew Norfolk, ‘RSPCA ordered to pay lecturer’s £1.3 million legal costs’, *The Times* <http://women.timesonline.co.uk/tol/life_and_style/women/families/article7016782.ece> [accessed 7 February 2011].

100. Charities Act 1993 c.10

101. (Unkown Author), ‘Bates Wells & Braithwaite’s Guide to Protecting Trustees Against Liability for Legal Costs, Beddoe Orders & the Role of the Charity Commission’ <<http://www.bwbllp.com/Files/Publications/Guide%20to%20Protecting%20Trustees%20Against%20Liability%20for%20Legal%20Costs,%20Beddoe%20Orders%20and%20the%20Role%20of%20the%20Charity%20Commission.pdf>> [accessed 17 February 2011].

102. Tania Mason, ‘RSPCA loses appeal over Gill legacy case’ <http://www.civilsociety.co.uk/governance/news/content/7879/rspca_loses_appeal_over_gill_legacy_case> [accessed 17 February 2011].

103. Nicola Evans, ‘The RSPCA Appeal - Gill v Woodall – Lessons from the Court of Appeal’s judgment’ <<http://bdb-law.co.uk/content/v2/rspca-appeal-gill-v-woodall-%E2%80%93-lessons-court-appeal-%E2%80%99s-judgment>> [accessed 17 February 2011]

104. (Unknown Author), ‘Charity law duties and responsibilities’ *Compliance Toolkit: Protecting Charities from harm* <<http://www.charity-commission.gov.uk/Library/tkch1mod8.pdf>> [accessed 15 February 2011],

105. *Sifri v Clough & Willis* [2007] EWHC 985 (Ch), [2007] W.T.L.R. 1453 (Kaye J)

106. *Key v Key* [2010] EWHC 408 (Ch), [2010] 1 W.L.R. 2020

might seem onerous, practitioners should consider whether it is preferable to send mirror wills in separate envelopes and ask for a signed confirmation from each party.¹⁰⁷ Further, practitioners should take instructions from testators separately, even when they are husband-wife.

The case also raises the difficult issue of how to deal with vulnerable testators. The 'golden rule'¹⁰⁸ is that where capacity is in doubt, a medical opinion¹⁰⁹ should be obtained before proceeding with the will.¹¹⁰ This would have especially helped this case as the decision seems to suggest that if the solicitor had read over the clauses separately, it may have been sufficient to justify a finding of knowledge and approval.

In light of this judgment, testators who are concerned about their intentions in the will being upheld should take steps to make their intentions known to family members. They should also consider leaving a letter in the will explaining the reasons behind excluding a potential beneficiary from the will¹¹¹ and check with their solicitor to make sure that the file containing the instructions will be retained.¹¹²

8. CONCLUSIONS

Overall, the result is unsurprising but the reasoning is inadequate. The decision seems to reflect the court wielding a mild version of a '*Denningesque sword of justice*'.¹¹³ On the facts, the Court of Appeal was right in overruling the High Court on the ground of knowledge and approval of the will. However, it should have set out the proper test in more detail.

107. Lesley King, 'Probate update: RSPCA appeals' <<http://www.lawgazette.co.uk/in-practice/probate-update-charitable-decisions>> [accessed 17 February 2011].

108. Roger Kerridge, 'Wills made in suspicious circumstances: the problem of the vulnerable testator', (2000) 59(2) CLJ, 310, 312

109. *Kenward v Adams* [1975] CLY 591 reported in the Times Law Reports on 29 November 1975 (Templeman J.), applied in *Re Simpson* (1977) 121 Sol. Journal 224 and *Buckenham v Dickinson* [2000] WTLR 1083

110. Andrew Playle and Jonathon Grogan, 'Reflections on Gill v. RSPCA – protecting interests prior to death' <http://www.stepjournal.org/journal_archive/2010/tqr_2010_issue_1/reflections_on_gill_v_rspca.aspx> [accessed 17 February 2011].

111. John Biggar, 'Charity Begins at Home? A Scottish view following lecturer's £2m will challenge win against RSPCA in England' <<http://www.andersonstrathern.co.uk/legal-updates/charity-begins-at-home/>> [accessed 17 February 2011].

112. Nicola Evans, 'The RSPCA Appeal - Gill v Woodall – Lessons from the Court of Appeal's judgment' <<http://bdb-law.co.uk/content/v2/rspca-appeal-gill-v-woodall-%E2%80%93-lessons-court-appeal-%E2%80%99s-judgment>> [accessed 17 February 2011].

113. Lord Neuberger of Abbotsbury, 'The stuffing of Minerva's owl? Taxonomy and taxidermy in equity', (2009) 68(3) CLJ 537

Further, the Court of Appeal should have dealt with the other two grounds as it would have granted some clarity with respect to the circumstances under which influence becomes illegitimate and the extent and purpose of the relief with respect to a proprietary estoppel claim.

The case, sheltering several lessons for all lawyers, potential beneficiaries and testators, shows the tactical disadvantages a charity faces in these circumstances and embodies the practical advantages of resorting to mediation. Prevention is better than cure and with increasing probate litigation,¹¹⁴ it is important that everyone should try and protect their interests.

At the end of the whole process, the respondent finds itself not only without a legacy, which it had a *prima facie* legitimate claim to, but also legal costs to pay out of its own pockets and a lot of bad press. RSPCA's state reminds us of the character of Shylock, especially where he is reminded:

*"For, as thou urgest justice, be assured
Thou shalt have justice, more than thou desirest."*¹¹⁵

114. "The Times newspaper recently reported on the increasing number of inheritance disputes reaching the High Court – up by 38% from 2008 to 2009" – Donna King, 'Attacking estates: what's in it for me?' <http://www.hilldickinson.com/downloads/client_services/knowledge_and_publications/family/insights/16_december_2010.aspx> [accessed 15 January 2011].

115. William Shakespeare, Merchant of Venice, Act IV, Scene 1



KING'S STUDENT LAW REVIEW

BEHIND THE WALLS OF
THE FORBIDDEN COURT:
HOW US COURTS BAR
ACCESS TO FOREIGN
CLAIMANTS

JACOPO CRIVELLARO

3rd Year LLB (English & American Law) Student, King's College London

ABSTRACT

This article considers recent U.S. Supreme Court jurisprudence and its effect on foreign plaintiffs seeking access to the federal court system. The seminal case of Bell Atlantic v Twombly has significantly heightened the pleading standards, and Sinochem International v Malaysia International Shipping has reinvigorated the use of the forum non conveniens doctrine. The consequence is that foreign plaintiffs will find it more difficult to gather sufficient information to satisfy the pleading standards and the forum non conveniens analysis. While restricting foreign access to US courts will homologize American civil procedure to its continental counterparts it will also invariably demagnetize its appeal for foreign litigants.

1. INTRODUCTION

*"As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune."*¹

As Lord Denning opined, the US federal court system has long been an attractive venue for foreign litigants. It is perceived as offering a foreign plaintiff significant procedural and substantive advantages. These include: the availability of contingent fee lawyers,² the American Rule for litigation costs,³ the presence of causes of action that are unique to the United States,⁴ the readiness to accept class action suits (thus permitting litigation in cases where the individual damages are likely to be small but the aggregate amount would be significant),⁵ permissive rules of discovery,⁶ the more extensive role of the jury,⁷ the frequency with which punitive or multiple damages are awarded⁸ and a perception that US Courts might be 'more efficient, less biased, and better insulated from corruption' than other alternative forums.⁹ 'Simply put, compared with foreign courts, United States forums offer both lower costs and higher recovery'.¹⁰

1. *Smith Kline & French Laboratories Ltd v Bloch* [1983] 1 WLR 730, 733 (Lord Denning).

2. *Piper Aircraft v Reyno* 454 US 235, 252 n18 (1981); Cassandra Burke Robertson, 'Transnational Litigation and Institutional Choice' (2010) 51 BCLR 1081, 1087.

3. *Piper Aircraft* (n 2) 252 n18; R. Schlesinger, *Comparative Law: Cases, Text, Materials* 275-277 (3d ed.1970).

4. Like RICO (Racketeering Influenced and Corrupt Organizations) or other particular securities laws. John Fellas, 'Strategy in International Litigation' (2009) 14 ILSAJICL 317, 320.

5. Fellas, 'Strategy in International Litigation' (n 4) 320; Burke Robertson, 'Transnational Litigation and Institutional Choice' (n 2) 1087.

6. *Piper Aircraft* (n 2) 252 n18; Stephen B. Burbank and Linda J. Silberman, 'Civil Procedure Reform in Comparative Context: The United States of America' (1997) 15 AMJ COMP L 675, 678: "Both inside and outside the United States, American pretrial has been criticized for encouraging 'easy' pleadings."

7. *Piper Aircraft* (n 2) 252 n18.

8. The quantum of ordinary, compensatory damages in America is also greater than in other countries. Russell J. Weintraub, 'International Litigation and Forum Non Conveniens' (1994) 29 TEX INT'L LJ 321, 323; Beth Stephens, 'Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations' (2002) 27 YALE J INT'L L 1, 31.

9. Alan O. Sykes, 'Transnational Forum Shopping As A Trade and Investment Issue' (2008) 37 JLEGST 339, 342.

10. Weintraub, 'International Litigation' (n 8) 323.

As a consequence, national defendants would often 'go to great lengths to avoid suits in the US'.¹¹ This essay seeks to clarify how recent decisions of the US Supreme Court have done much to favour national defendants and 'demagnetize' American federal courts.¹²

2. TRADITIONAL STRUCTURE OF LITIGATION IN THE US COURTS

When the Federal Rules of Civil Procedure regulating procedure in federal courts were introduced in 1938 the drafters sought to subvert the formalized system of writs and single pleading and introduce a liberal model inspired by the flexibility of equity.¹³ The philosophical premise was 'equality of treatment of all parties and claims in the civil adjudication process'.¹⁴

When compared with the former system, the Rules provided expansive means of discovery,¹⁵ and even encouraged parties to assert unrelated claims so as to resolve the dispute in a 'just, speedy and inexpensive' manner.¹⁶ In particular, the liberality of pleadings was hailed as the countermark of the new system.¹⁷ Given the elasticity of the procedural requirements and the overarching 'liberal ethos', cases were unlikely to be dismissed at the pleading

11. Fellas, 'Strategy in International Litigation' (n 4) 320.

12. "Demagnetization" was expressly advocated by Professor Weintraub. Russell J. Weintraub, 'The United States as a Magnet Forum and What, if Anything, to Do About It' in Jack L. Goldsmith (ed), *International Dispute Resolution: the Regulation of Forum Selection* (Transnational Publishers 1997) 213; Weintraub, 'International Litigation' (n 8) 352.

13. The 1848 Field Code for example required the plaintiff to plead "ultimate facts" as opposed to evidence or "evidentiary facts." Scott Dodson, 'Comparative Convergences in Pleading Standards' (2010) 158 UPALR 441. Christopher M. Fairman, 'Heightened Pleading' (2002) 81 TEX L REV 551, 554-57: "The Federal Rules remove these 'procedural booby traps' [referring to the procedural obstacles caused by the former Codes." See also Charles E. Clark, 'Pleading Under the Federal Rules' (1958) 12 WYO L J 177, 188, 190; Stephen N. Subrin, 'How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective' (1987) 135 U PA L REV 909, 943-975.

14. Arthur R. Miller, 'A Double Play on the Federal Rules' (2010) 60 Duke Law Journal 1, 5.

15. Clark, 'Pleading Under the Federal Rules' (n 13) 190.

16. Federal Rules of Civil Procedure 13, 14, 15, 18, 20 (for the liberal rules on joinder of parties, claims, counterclaims, and amendments) Rules 26-37 (for the rules on discovery and disclosure) and Rule 1 for the canon of construction.

17. Fairman, 'Heightened Pleading' (n 13) 551.

stage.¹⁸ Discernment of meritorious claims would occur only after discovery had commenced, at summary judgment stage.¹⁹

A foreign plaintiff bringing suit in America would benefit from this structural permissiveness in his litigation. Like all plaintiffs he must satisfy the requirements of personal and subject matter jurisdiction and venue. Yet, as the plaintiff can choose the forum, and as an American defendant will invariably be subject to a federal court's jurisdiction in one of the states, these are but 'minimal obstacles.'²⁰

This article suggests that in the past decade by reinterpreting the Federal Rules of Civil Procedure and altering common law doctrines, the Supreme Court has quickened discernment of claims and restricted a foreign plaintiff's access to a full scale trial.

3. HEIGHTENED PLEADING REQUIREMENT UNDER RULE 12(B)(6)

3.1 SUPREME COURT PLEADING STANDARDS

Historically the standard to dismiss a claim for insufficient pleadings was set comparatively low.²¹ The text of FRCP Rule 8 only requires a claim for relief to contain 'a short and plain statement of the ground for the court's jurisdiction'²² and even permits claims in the alternative, 'regardless of consistency'.²³

Charles E. Clark, one of the drafters of the Rules, repeatedly

18. Richard L. Marcus, 'The Revival of Fact Pleading under the Federal Rules of Civil Procedure' (1986) 86 COLUM L REV 433, 439: "The preferred disposition is on the merits, by jury trial, after full disclosure through discovery." Charles E. Clark, 'The Handmaid of Justice' (1938) 23 WASH U LQ 297, 318-19: "To attempt to make the pleading serve as such substitute [as a trial], is in very truth to make technical terms the mistress and not the handmaid of justice."

19. Miller, 'A Double Play on the Federal Rules' (n 14) 5: "...discovery and summary judgment were designed to expose and separate the meritorious from the meritless."

20. Sykes, 'Transnational Forum Shopping As A Trade And Investment Issue' (n 9) 342.

21. Dodson, 'Comparative Convergences in Pleading Standards' (n 13) 443 with reference to civil law countries.

22. Federal Rules of Civil Procedure Rule 8(a)(1). The pleading also requires Rule 8(a)(2) "short and plain statement of the claim showing that the pleader is entitled to relief" and Rule 8(a)(3) "a demand for the relief sought, which may include relief in the alternative or different types of relief."

23. Federal Rules of Civil Procedure Rule 8(d)(3).

emphasised how “the notice in mind [for Rule 8 is]... that of the general nature of the case and the circumstances or events upon which it is based... to inform the opponent of the affair or transaction to be litigated... and to tell the court of the broad outlines of the case.”²⁴

Sitting as Circuit Judge for the Second Circuit Judge Clark coined the famous “day in court” maxim to entitle Mr Dioguardi access to justice regardless of the imperfections in his complaint.²⁵ The Supreme Court then lowered the standard in *Conley v Gibson*.²⁶ Justice Hugo Black asserted that ‘the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim’ but only required ‘simplified notice pleading.’²⁷ Therefore, a motion to dismiss a case for failure to state a claim will only succeed ‘if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’²⁸

Despite attempts by the lower federal courts to raise the requirements for pleadings in civil rights cases²⁹ and antitrust cases³⁰ the standard applied relatively uniformly until the landmark *Bell Atlantic v Twombly* Supreme Court judgment of 2007.³¹ The Court held that plaintiffs now had to prove by non-conclusory allegations the plausibility of their claim.³² The complaint must contain ‘direct or inferential allegations respecting all the material elements’³³ with enough facts to raise ‘a reasonable expectation that

24. Charles E. Clark, ‘Simplified Pleading’ in ‘Opinions Decisions and Rulings Involving the Federal rules of Civil Procedure’, Vol 2 (West Publishing 1943) 456, 460-61.

25. *Dioguardi v Durning* 139 F.2d 774, 775 (2d Cir. 1944); Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure: Civil*, vol 5 (3rd edn) para 1220 (stating how Dioguardi is illustrative of the pleading philosophy created by the Federal Rules of Civil Procedure); Miller, ‘A Double Play on the Federal Rules’ (n 14) 6: “[Dioguardi] best represents the access-minded and merit-oriented ethos at the heart of the original Federal Rules.”

26. [1957] 355 US 41.

27. *Conley* (n 26) 47.

28. *Conley* (n 26) 47-48.

29. *Leatherman v Tarrant Country Narcotics Intelligence and Coordination Unit* 954 F.2d 1054 (5th Cir. 1992); *Elliot v Perez* 751 F.2d 1472 (5th Cir. 1985).

30. Harvey Kurzweil, Eamon O’Kelly and Susannah P. Torpey, ‘Twombly: Another Swing of the Pleading Pendulum’ (2008) 9 *Sedona Conf J* 115, 118.

31. [2007] 550 US 544. With the exception of limited statute based heightened pleading standards in the Private Securities Litigation Reform Act of 1995, and the Y2K Act. See also Dodson, ‘Comparative Convergences in Pleading Standards’ (n 13) 455-456.

32. *Bell Atlantic Corp* (n 31) 570: “enough facts to state a claim to relief that is plausible on its face.” Kevin M. Clermont, ‘Three Myths About *Twombly-Iqbal*’ [2010] *Wake Forest Law Review* 101, 102; Miller, ‘A Double Play on the Federal Rules’ (n 14) 14.

33. *Bell Atlantic Corp* (n 31) 562.

discovery will reveal evidence of the alleged misconduct giving rise to the cause of action.³⁴

The *Twombly* standard was confirmed two years later by the Supreme Court in *Ashcroft v Iqbal*.³⁵ The Court clarified how *plausibility* is a factual sufficiency standard that applies 'independently of notice'³⁶ and transubstantively.³⁷

Procedurally, the *Iqbal* standard requires federal district court judges to first distinguish 'factual allegations from legal conclusions, since only the former need be accepted as true.'³⁸ Secondly, judges must conclude whether a claim for relief that is plausible has been presented based on the factual allegations presented, 'their judicial experience and common sense.'³⁹

3.2 TWOMBLY/IQBAL IMPLICATIONS ON FOREIGN PLAINTIFFS

The Supreme Court did not acknowledge raising the pleading standards for a plaintiff's complaint.⁴⁰ Previous case law was not overruled,⁴¹ and the loosely-worded Official Form 9 (now Official Form 11) complaint for negligence was reaffirmed.⁴² In practice, the recent Court's judgments will have adverse implications on a plaintiff's access to evidence through the

34. *Bell Atlantic Corp* (n 31) 556.

35. [2009] 129 S. Ct. 1937; Miller, 'A Double Play on the Federal Rules' (n 14) 27 suggests *Iqbal* might establish "a more demanding pleading standard than *Twombly*" as it requires more than mere plausibility but even a reasonable inference of plausibility, and it favours a somewhat "sterilized evaluation of the complaint" by focusing solely on "purely factual allegations."

36. Dodson, 'Comparative Convergences in Pleading Standards' (n 13) 461 suggesting that the *Ashcroft* court did not even consider elements of "notice" in its new standard of pleading.

37. *Twombly* is not restricted to the anti-trust setting but applies to "all civil actions." *Ashcroft* (n 35) 1953; Miller, 'A Double Play on the Federal Rules' (n 14) 36.

38. Miller, 'A Double Play on the Federal Rules' (n 14) 23-24.

39. *Ashcroft* (n 35) 1950; Miller, 'A Double Play on the Federal Rules' (n 14) 29 criticizes the "palpably subjective factors of judicial experience, and common sense."

40. *Bell Atlantic Corp* (n 31) 570: "Here... we do not require heightened fact pleading of specifics..."

41. *Bell Atlantic Corp* (n 31) 569-570 the Supreme Court cited but did not claim to overrule its own precedent in *Swierkiewicz v Sorema* 122 S.Ct. 992 (2002).

42. *Bell Atlantic Corp* (n 31) 565 n10; Miller, 'A Double Play on the Federal Rules' (n 14) 40: "the *Twombly* Court was careful to assert the continuing validity of Form 11". Federal Rules of Civil Procedure, Official Form 11, reads "On <Date>, at <Place> the defendant negligently drove a motor vehicle against the plaintiff."

discovery process.⁴³ In fact, the Court was firm in concluding that Rule 8, as now understood, only permits discovery to begin once the plausibility standard has been met.⁴⁴ As such, it adopted a draconian stance and in fear of excessive discovery costs⁴⁵ ignored case management and other forms of judicial involvement to permit limited pre-trial discovery.⁴⁶ Professor Miller is critical of the way what is termed 'abusive', 'excessive' or 'frivolous' discovery is used to justify the need for earlier dismissal of cases without addressing these perceived wrongs with the appropriate 'sanction structure, the discovery regime or more effective judicial oversight'.⁴⁷

The difficulties a plaintiff faces in meeting the new standard are particularly evident when his foreign status complicates the gathering of even the simplest facts without the compulsive powers of the discovery rules.⁴⁸ As a consequence, it is foreseeable to expect that the new standards 'will chill a potential plaintiff's or lawyer's willingness to institute an action'.⁴⁹

43. Miller, 'A Double Play on the Federal Rules' (n 14) 43; "It is uncertain how plaintiffs with potentially meritorious claims are expected to plead with factual sufficiency without the benefit of some discovery, especially when they are limited in terms of time or money, or have no access to important information that often is in the possession of the defendant, especially when the defendant denies access."

44. *Ashcroft* (n 35) 1950-1954: "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions...Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise."

45. *Bell Atlantic Corp* (n 31) 559 "the threat of discovery expense will push cost-conscious defendants to settle even anaemic cases."

46. cf *Ashcroft* (n 35) 1961-1962 (Bryer J dissenting): "a trial court, responsible for managing a case and mindful of the need to vindicate the purpose of the qualified immunity defence, can structure discovery in ways that diminish the risk of imposing unwarranted burdens upon public officials." Miller, 'A Double Play on the Federal Rules' (n 14) 60 Professor Miller considers the Court's dismissal of case management techniques "dubious" as "none of the then-sitting Justices had been a federal district court judge and therefore they collectively lacked federal civil trial experience."

47. Miller, 'A Double Play on the Federal Rules' (n 14) 61, 68, 81-82 Professor Miller suggests the Supreme Court's negative view of case management is a "reminder of how much is not known about litigation cost and delay" as it is a "one-sided" appraisal which ignores how costs have been shifted to the other party, "in the form of imposing higher costs for entering and surviving in the system."

48. Stephen B. Burbank, 'Pleading and the Dilemmas of General Rules' [2009] WIS L REV 535, 561: "Perhaps the most troublesome possible consequence of Twombly is that it will deny court access to those who, although they have meritorious claims, cannot satisfy its requirements either because they lack the resources to engage in extensive pre-filing investigation or because of informational asymmetries." cf Paul R. Dubinsky, 'Is Transnational Litigation A Distinct Field? The Persistence of Exceptionalism in American Procedural Law' (2008) 44 STJIL 301, 338: "Undesirable results may follow from U.S. courts routinely granting foreign litigants access to information on the same scale as that which prevails under U.S. domestic discovery norms."

49. Miller, 'A Double Play on the Federal Rules' (n 14) 71.

Professor Miller suggests that the Supreme Court's concerns of excessive discovery could have been solved in other ways. In fact, he proposes the following remedies to confront the informational asymmetry which now plagues the plaintiff/defendant balance: 1) some form of limited pre-institution discovery to provide access to critical information,⁵⁰ 2) a limited 'pinpoint' or flash discovery ordered once the defendant files a motion to dismiss,⁵¹ 3) lowering the *Twombly* plausibility requirement where the plaintiff can demonstrably allege 'the inaccessibility of critical information and articulates a reasonable basis for the information's existence and the defendant's control over it',⁵² or 4) dramatically modifying the American litigation system introducing a tracking system based on the quantum of the case, operating like the English system.⁵³

4. *FORUM NON CONVENIENS* REPERCUSSIONS FOR FOREIGN PLAINTIFFS

4.1 *SINOCHEM INTERNATIONAL CONSEQUENCES*

As well as the new standards for 'plausibility' of pleadings the Supreme Court has recently addressed the doctrine of *forum non conveniens* enlarging its scope and favouring early dismissal of foreign suits.

Forum non conveniens originated as a Scottish common law principle⁵⁴ providing judges with the discretionary power to decline jurisdiction where they

50. Lonny S. Hoffman, 'Using Presuit Discovery to Overcome Barriers to the Courthouse' (2008) 34 LITIGATION 31-35. See also Miller, 'A Double Play on the Federal Rules' (n 14) 106, 113 quoting as an illustrative example of the possible amendment the Texas Rules of Civil Procedure 202.1(b), a rule which permits the court to order discovery to "investigate a potential claim or suit," or alternatively, expanding the role of Federal Rules of Civil Procedure Rule 26(a)(1) on mandatory disclosures.

51. Miller, 'A Double Play on the Federal Rules' (n 14) 107, 108: "discovery would focus solely on what is necessary to meet the plausibility requirement."

52. Miller, 'A Double Play on the Federal Rules' (n 14) 110 proposing that if this procedural change were adopted, and the burden met by the plaintiff, then the burden would shift on the defendant to provide the plaintiff with the relevant information.

53. Miller, 'A Double Play on the Federal Rules' (n 14) 119-124 this tracking system would then tailor particular discovery rules depending upon the harm extensive discovery could cause in each particular case.

54. Robert Braucher, 'The Inconvenient Federal Forum' (1947) 60 HARV L REV 908, 909; Alexander Reus, 'Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, The United Kingdom, and Germany' (1994) 16 LOY LA INT'L & COMPL J 455, 459.

reasonably believed that another forum was more appropriate.⁵⁵ Yet, the doctrine received minimal attention until the Supreme Court determined the claims of Scottish plaintiffs in the *Piper Reyno* aircraft litigation.⁵⁶ Applying a series of private and public interest factors,⁵⁷ the Court dismissed the case finding Scotland the appropriate forum.

While deferring to the plaintiff's forum choice, courts have held that the plaintiff's preference in a forum is not dispositive;⁵⁸ and can be displaced on a case by case basis depending on the underlying principles of 'convenience, fairness and judicial economy'.⁵⁹ However, the forum

55. J. Stanton Hill, 'Towards Global Convenience, Fairness, And Judicial Economy: an Argument in Support of Conditional Forum Non Conveniens Dismissals Before Determining Jurisdiction in United States Federal District Courts' (2008) 41 VNJTL 1177, 1182: "Scottish courts held, independent of the issue of whether the court had jurisdiction, that the convenience and expediency of the forum should be satisfied to the discretion of the court before passing judgment."

56. *Piper Aircraft* (n 2); Michael Greenberg, 'The Forum Non Conveniens Motion And The Death Of The Moth: A Defense Perspective In The Post-Sinochem Era' (2009) 72 ALBLR 321, 328: "Seemingly dead in the domestic litigation context, the federal doctrine of forum non conveniens received minimal attention by the Supreme Court... [until *Piper Aircraft v Reyno*]."

57. Charles Alan Wright, Arthur R. Miller and Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters*, vol 14D (3rd edn) para 3828.4. The private interest factors were summarised by the Supreme Court as "Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained." *Gulf Oil Corp v Gilbert* 330 US 501, 508 (1947). The private factors are considered first, and in case they strongly favour dismissal the action is dismissed. If the private factors are "nearly equivalent", then the court must inquire into the public factors. *Brokerwood Int'l Inc v Cuisine Crotone Inc* 104 Fed.Appx. 376, 383 (5th Cir. 2004); Greg Vandenberg, 'Civil Procedure--Convenience For Whom? When Does Appellate Discretion Supercede A Plaintiff's Choice Of Forum?--*Aldana v Del Monte Fresh Produce*' (2010) 15 SFKJTAA 307, 314. The public interest factors were considered by the Supreme Court as: "Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." *Gulf Oil Corp v Gilbert* 330 US 501, 508-509 (1947).

58. *Gulf Oil* (n 57) 508: "Unless the balance is strongly in favour of the defendant" and another foreign forum is available, the "plaintiffs choice of forum should rarely be disturbed."

59. Stanton Hill, 'Towards Global Convenience' (n 55) 1195: "Convenience, fairness, and judicial economy are recurring themes in the Supreme Court's forum non conveniens jurisprudence from *Gilbert* to *Sinochem*."

where the defendant seeks to relocate the trial must be both available and adequate.⁶⁰

The Supreme Court has significantly strengthened the reach of the doctrine in its recent case law. *Sinochem International v Malaysia International Shipping*⁶¹ established how a court may dismiss a case under *forum non conveniens* as a preliminary step even before addressing questions of personal or subject matter jurisdiction.⁶²

60. This is a two prong test, where both adequacy and availability must be satisfied. *McLennan v Am Eurocopter Corp* 245 F.3d 403, 424 (5th Cir. 2001); *Norex Petroleum Ltd v Access Indus* 416 F.3d 146, 157-60 (2d Cir. 2005): "An alternative forum is adequate if the defendants are amenable to service of process there, and if it permits litigation of the subject matter of the dispute." *Piper Aircraft* (n 2) 254 n 22; Walter W. Heiser, 'Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic' (2008) 56 UKSLR 609, 612, 614 Availability means that the "defendant is subject to personal jurisdiction... and no other procedural bar, such as the statute of limitation, prevents resolution of the merits in the alternative forum." John Bies, 'Conditioning Forum Non Conveniens' (2000) 67 U CHI L REV 489, 501 nn 54-57 suggests, that this is rarely a problem as the relocation of cases under the doctrine is usually conditional on the defendant waiving all procedural defences. An alternative forum is adequate, unless there are "clearly inadequate and unsatisfactory" circumstances in the presumptive forum, such as specific evidence of danger to the plaintiffs, or no "remedy at all" is offered to the plaintiffs. *Piper Aircraft* (n 2) 254. Arguments that the alternative forum is inadequate because of "procedural deficiencies" are rarely successful, as "Courts in the United States are hesitant to label the court system of another country procedurally inadequate." Walter W. Heiser, 'Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic' (2008) 56 UKSLR 609, 616; *Chesley v Union Carbide Corp* 927 F.2d 60, 66 (2d Cir. 1991). "[i]t is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation." "But even from an early time, the forum non conveniens doctrine has not been limited to these prudential goals [of judicial efficiency]; instead, it also captures broader policy considerations that could be affected by court access." Burke Robertson, 'Transnational Litigation And Institutional Choice' (n 2) 1096. Professor Cassandra Burke Robertson suggests that these policy considerations include the relevance of the litigation to the taxpaying community that funds the courthouse operations, substantive economic goals, as well as personal assessments such as distaste for "contingent fee lawyers for foreign plaintiffs who seek higher damage awards than their own countries would be willing to award." See also Alexandra Wilson Albright, 'In Personam Jurisdiction: A Confused and Inappropriate Substitute for Forum Non Conveniens' (1992) 71 TEX L REV 351, 398."In making decisions about forum non conveniens, the state is making public policy decisions that affect the state's economy as well as the influence that the state's laws may have in foreign countries."

61. [2007] 127 S. Ct. 1184 .

62. *Sinochem Int'l Co* (n 61) 1187-1188: "a forum non conveniences motion does not entail any assumption by the court of substantive law-declaring power [and therefore] a federal district court has discretion to respond at once to a defendant's forum non conveniens plea, and need not take p first any other threshold objection;" Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters* (n 57) para 3828.

The Supreme Court judgment resolves a split in former appellate case law,⁶³ and clarifies how dismissal for *forum non conveniens* is not a dismissal on the merits as it is just a 'brush with factual and legal issues of the underlying dispute' insufficiently superficial to be an assessment of the underlying merits.⁶⁴ In essence, the Justices of the Supreme Court were concerned that preliminary discovery and research to ascertain personal or subject matter jurisdiction, could burden the defendant with 'expense and delay'⁶⁵ and therefore efforts should be 'limited... solely to proving the requisite adequacy of the alternative forum and compliance with the private and public interest factors'.⁶⁶

Yet, if the court can dismiss the case before ascertaining whether the alternative forum has jurisdiction over the case in the 'worst-case scenario [the foreign plaintiff] may well be left in a ... jurisdictional limbo'.⁶⁷ The plaintiff's case worsens where he loses the opportunity to sue in the alternative forum because of a statute of limitations, or because of other procedural implications.⁶⁸ The likely result of these early dismissals will be that many foreign plaintiffs will settle or abandon cases rather than resort to alternative courts.⁶⁹ In these cases, the greater efficiency of the federal courts comes at the expense of the foreign plaintiff's rights.⁷⁰

63. Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters* (n 57) para 3828. Stanton Hill, 'Towards Global Convenience, Fairness' (n 55) 1181.

64. *Sinochem Int'l Co* (n 61) 1187-1188; Stanton Hill, 'Towards Global Convenience' (n 55) 1192.

65. *Sinochem Int'l Co* (n 61) 1194.

66. Desmond T. Barry, 'Foreign Corporations: Forum Non Conveniens and Change of Venue' (1994) 61 DEF COUNS J 543, 551; Greenberg, 'The Forum Non Conveniens Motion' (n 56) 335.

67. Nathan Viavant, 'Sinochem International Co v Malaysia International Shipping Corp: The United States Supreme Court Puts Forum Non Conveniens First' (2008) 16 TLNJICL 557, 570.

68. Such as if the plaintiff is precluded from bringing a case in his home state if he chose to initially pursue the action in a foreign forum.

69. Laurel E. Miller, 'Forum Non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions' (1991) 58 U CHI L REV 1369, 1388: "few cases dismissed... on forum non conveniens grounds ever reach trial abroad"; David W. Robertson, 'Forum Non Conveniens in America and England: "A Rather Fantastic Fiction"' (1987) 103 LQR 398, 418-20; Weintraub, 'International Litigation' (n 8) 335: "faced with higher costs and lower returns abroad... the vast majority of foreign plaintiffs decide not to sue or settle for a fraction of the claim's 'estimated value.'"

70. Viavant, 'Sinochem International' (n 67) 570.

4.2 OTHER RELEVANT FORUM NON CONVENIENS JUDICIAL PRACTICES

The higher tiers of the federal courts have also endorsed another practice to extend and anticipate *forum non conveniens* dismissals. Under the traditional doctrine, an alternative forum was considered inadequate where that court lacked jurisdiction or in other ways prohibited the plaintiff's access or where the court was perceived as biased or corrupt.⁷¹

However, recent case law confirmed how federal courts can dismiss cases under the doctrine without an alternative forum, if the 'foreign forum is unavailable as a result of plaintiffs' early choices in litigation.'⁷² Such an expansion of the doctrine seems to undermine the history, the theory and the policy underpinning dismissals under the *forum non conveniens*.

In addition, federal courts take a restrictive view of what counts as an inadequate forum.⁷³ The burden plaintiffs must discharge 'is difficult to overcome'⁷⁴ often serving the convenience of the courts rather than necessarily the interests of the parties.

In response to the greater number of dismissals under the *forum non conveniens* doctrine several nations have enacted blocking statutes, or statutes which bar resort to national courts if any "action by one of their residents... was previously commenced in another country and later dismissed based on *forum non conveniens*".⁷⁵ These statutes serve to render the court of the foreign national permanently inadequate under the *forum non conveniens* analysis

71. Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters* (n 57) para 3828.3.

72. *Veba-Chemie AG v M/V Getafix* 711 F.2d 1243, 1248 n10 (5th Cir. 1983): "Perhaps if the plaintiffs plight is of his own making--for instance, if the alternative forum was no longer available at the time of dismissal as a result of the deliberate choice of an inconvenient forum--the court would be permitted to disregard [the available forum requirement] and dismiss. As we have pointed out, *forum non conveniens* is sensitive to plaintiffs motive for choosing his forum, at least in the extreme case where his selection is designed to 'vex, harass, or oppress the defendant'; Burke Robertson, '*Transnational Litigation And Institutional Choice*' (n 2) 1103.

73. *Eastman Kodak Co v Kavlin* 978 F. Supp. 1078, 1084 (S.D. Fla. 1997): "The "alternative forum is too corrupt to be adequate" argument does not enjoy a particularly impressive track record. The Court has been unable to locate any published opinion fully accepting such an argument," Virginia A. Fitt, '*The Tragedy of Comity: Questioning The American Treatment Of Inadequate Foreign Courts*' (2010) 50 VAJIL 1021, 1029.

74. Fitt, '*The Tragedy Of Comity*' (n 73) 1028.

75. Heiser, '*Forum Non Conveniens and Retaliatory Legislation*' (n 60) 610; Henry Saint Dahl, '*Forum Non Conveniens, Latin America and Blocking Statutes*' (2004) 35 U MIAMI INTER-AMERI L REV 21, 22-24, 47-63 highlighting examples of blocking statutes.

and, until the aforementioned recent developments, would have impeded all dismissals.⁷⁶ Other countries will accept transfer of the case under the *forum non conveniens* doctrine but have authorized their national courts to apply the procedural rules of the country in which the case was first filed and later dismissed under *forum non conveniens*.⁷⁷ This means applying American tort liability and damages for cases dismissed by U.S. federal courts.⁷⁸

These legislative responses emphasise the serious concerns felt for the unprecedented expansion of the *forum non conveniens* doctrine.⁷⁹ It is likely that the greater the number of cases federal courts will dismiss the stronger the remedies foreign legislatures will adopt to not disfavour their own nationals.⁸⁰ Probably, the underlying fallacy in the Court's enhancement of the *forum non conveniens* doctrine has been to consider the foreign plaintiff's choice of forum invariably motivated by forum shopping.⁸¹ In fact, courts should realise that when defendants file for relocation of lawsuits they will be pursuing a forum which they perceive as favourable, clearly operating as

76. See n 72.

77. Heiser, *'Forum Non Conveniens and Retaliatory Legislation'* (n 60) 610-611.

78. Heiser, *'Forum Non Conveniens and Retaliatory Legislation'* (n 60) 622: "The intent behind these statutes is to make tort litigation in the courts of these countries no more attractive to U.S. defendants than tort litigation in U.S. courts." See also Paul Santoyo, 'Bananas of Wrath: How Nicaragua May Have Dealt Forum Non Conveniens a Fatal Blow Removing the Doctrine as an Obstacle to Achieving Corporate Accountability' (2005) 27 HOUS J INT'L L 703, 727-29; Burke Robertson, *'Transnational Litigation And Institutional Choice'* (n 2) 1083 quoting the Model Law on International Jurisdiction and Applicable Law to Tort Liability and suggesting that they operate to permit national courts to grant damages comparable to what a plaintiff would receive in the US.

79. Burke Robertson, *'Transnational Litigation And Institutional Choice'* (n 2) 1083.

80. See for example the facts of Chevron's Environmental lawsuit in Ecuador, (following the forum non conveniens dismissal in America in *Aguinda v Texaco Inc* 142 F. Supp. 2d 534, 554 (S.D.N.Y. 2001); summarised in Burke Robertson, *'Transnational Litigation And Institutional Choice'* (n 2) 1082-1084.

81. *Piper Aircraft* (n 2) 256: "...[b]ecause the central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference." Stanton Hill, *'Towards Global Convenience'* (n 55) 1185: "these statements create a suspicion--if not presumption--that the foreign plaintiff comes to the federal forum for vexatious purposes." Heiser, *'Forum Non Conveniens and Retaliatory Legislation'* (n 60) 613-614: "consequently, a foreign plaintiff's choice of a U.S. forum is rarely a significant factor in favor of retaining jurisdiction."

'reverse forum shopping' and thus of equal reprehensibility.⁸²

5. EXPANSION OF PERSONAL JURISDICTION OVER FOREIGN DEFENDANTS

While access to federal courts for foreign plaintiffs has been limited by recent judicial decisions and practices, the Supreme Court is currently considering whether to extend personal jurisdiction over foreigners as defendants to a suit brought in the US.

Historically a federal court's personal jurisdiction was limited by territoriality and service of process⁸³ but throughout the twentieth century it gradually extended to 'vague concepts labelled with precise sounding names'⁸⁴ such as the minimum contacts analysis, the 'test being whether, under those facts, the forum state has a sufficient relationship with the defendant and the litigation to make it reasonable ["fair play"] to require him or her to defend the action in a federal court located in that state.'⁸⁵ In other words, for an out-of-state defendant to be liable to suit, he must "purposefully avail himself" of the privilege of doing business in the forum state.⁸⁶

The current position of the law was stated in a foreign suit concerning liabilities between a Japanese valve producer and a Taiwanese tyre manufacturer: *Asahi Metal Industries v Superior Court of California*.⁸⁷ The

82. *Stangvik v Shiley Incorporated* 819 P.2d 14, 25 (CA 1991); Heiser, 'Forum Non Conveniens and Retaliatory Legislation' (n 60) 609-613. Linda J. Silberman, 'Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard' (1993) 28 TEX INT'L L J 501, 525; Martin Davies, 'Time to Change the Federal Forum Non Conveniens Analysis' (2002) 77 TUL L REV 309, 315-16; David Boyce, 'Foreign Plaintiffs and Forum Non Conveniens: Going Beyond Reyno' (1985) 64 TEX L REV 193, 215-16.

83. *International Shoe v State of Washington* 66 S.Ct. 154, 158 (1945): "Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of court was prerequisite to its rendition of a judgment personally binding him."

84. Mark P. Chalos, 'Successfully Suing Foreign Manufacturers' (2008) 44 NOV JTLATRIAL 32, 33.

85. Hon. William W Schwarzer, Hon. A. Wallace Tashima and James M. Wagstaffe, *Practice Guide: Federal Civil Procedure Before Trial – National Edition*, (2009) Chapter 3:77:2.

86. *International Shoe* (n 83) 158 establishing the "minimum contacts" test; *Hanson v Denckla* 357 US 235, 253: holding that to warrant exercise of personal jurisdiction, there must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state."

87. [1987] 480 U.S. 102.

court *prima facie* found sufficient minimum contacts under the ‘stream of commerce’ inquiry although the fairness factors ultimately prevented the State of California from asserting personal jurisdiction.⁸⁸

Yet, the law is likely to change as the Supreme Court is currently evaluating the reach of personal jurisdiction in two leading cases: *McIntyre Machinery v Nicastro*⁸⁹ and *Goodyear Luxembourg Tires v Brown*.⁹⁰

Nicastro addresses the *Asahi* stream of commerce terminology and will seek to clarify what conduct by a foreign manufacturer suffices to establish minimum contacts. The appellee, Mr Roberto Nicastro was operating a recycling machine when his right hand was caught in the blades and an accident ensued. The machinery had been manufactured in the United Kingdom by the appellants, and had been sold in America exclusively through the United States distributor, McIntyre Machinery America. Justice Albin for the Supreme Court of New Jersey concluded (rather ominously) that ‘[a] manufacturer that wants to avoid being hauled into a New Jersey court need only make clear that it is not marketing its products in this State.’⁹¹ The Court found sufficient minimum contacts in McIntyre’s targeting of the US market through its US based subsidiary, and in McIntyre’s awareness that the distribution system extended to New Jersey. This awareness matured after the officials of the company attended scrap metal conventions in America where they saw their products advertised.⁹²

Goodyear examines whether a foreign corporation can be subject to general personal jurisdiction because of its extensive contacts with the US. General jurisdiction means the defendant can be sued for activities which are unrelated to its specific contacts with the forum state. The appellants are the co-administrators of the estates of two young American boys who died in a road accident in Paris after one of the Goodyear tyres of the bus in which they were travelling burst.⁹³ The North Carolina Court of Appeals held that the appellants had ‘purposefully injected [their] product into the stream of commerce without any indication that [they] desired to limit the

88. *Asahi Metal* (n 87) 114-116; Weintraub, *The United States as a Magnet Forum* (n 12) 229 suggests the reasons given by Justice O’Connor to determine the unconstitutionality of subjecting Asahi to federal jurisdiction “echo the public and private interest factors of forum non conveniens.”

89. [2010] 987 A.2d 575 (NJ 2010); and certiorari granted 131 S.Ct. 62 .

90. *Brown v Meter and others* 681 S.E.2d 382 (NC Court of Appeals 2009); leave to appeal denied 695 S.E.2d 756 (NC 2010); certiorari granted 131 S.Ct. 63 as *Goodyear Luxembourg Tires v Brown*.

91. *Robert Nicastro* (n 89) 987 A.2d 575, 591.

92. *Robert Nicastro* (n 89) 987 A.2d 575, 592.

93. *Brown v Meter and others* (n 90) 681 S.E.2d 382, 384.

area of distribution of [their] product so as to exclude North Carolina⁹⁴ and upheld the trial court's finding that the cause of action was 'closely related to the contacts with the defendants' and in the 'substantial interest' of North Carolina to pursue in order to provide a forum for its citizens to redress their grievances.⁹⁵

The Supreme Court is scheduled to address these issues by the end of its term in early summer. However, it is indicative that at the highest state tribunal, both North Carolina's and New Jersey's judiciary saw it advisable to extend personal jurisdiction.

6. CONCLUSION

As this article has presented, in recent years federal courts have limited foreigners' access to the court system as plaintiffs. It is legitimate to ask what purpose such restriction serves.

Professor Weintraub had suggested the need to demagnetize American courts in order that 'forums that are more appropriate for adjudicating the matters in dispute' are selected.⁹⁶ However can the *ad hoc* set of disparate standards really serve this policy objective well? Will it not only serve to antagonize foreign legislatures, and 'backfire as foreign courts... [adapt themselves to American judicial standards, for example by awarding] large judgment against U.S. defendants?'⁹⁷ Furthermore, given the limitations on foreign plaintiffs is it wise to be contemporaneously expanding jurisdiction over foreign defendants?

On the other hand, these procedural changes can be seen as an attempt to standardize American procedural practice to the rules adopted in most other countries, and are aims that could be legitimately pursued by increasing the pleading requirements or thinning the docket with common law doctrines such as *forum non conveniens*.⁹⁸ However, if so radical a change

94. *Brown v Meter and others* (n 90) 681 S.E.2d 382, 395.

95. *Brown v Meter and others* (n 90) 681 S.E.2d 382, 395: "The trial court's findings are supported by competent evidence, and the findings in turn support the conclusion that the exercise of general personal jurisdiction over Goodyear Luxembourg, Goodyear Turkey, and Goodyear France was appropriate pursuant to N.C. Gen.Stat. § 1-75.4(1)(d) [the North Carolina long-arm statute] and the due process clause."

96. Russell J. Weintraub, *International Litigation And Arbitration: Practice And Planning* 224 (5th ed. 2006).

97. Burke Robertson, '*Transnational Litigation And Institutional Choice*' (n 2) 1085.

98. Dodson, '*Comparative Convergences in Pleading Standards*' (n 13) 442-443.

is undertaken with so little notice, it cannot help but cause injustice to individual plaintiffs which will see their forum of preference unexpectedly different.

In conclusion, when focusing on the greater picture of federal civil procedure, it is clear courts have favoured early disposition of cases and restrictions on plaintiff's access. Yet, as Professor Miller emphasizes while these changes ensure a more 'speedy' and 'inexpensive' resolution of cases, they should not be at the expense of the third founding principle of the Rules of Civil Procedure: justice.⁹⁹

99. Federal Rules of Civil Procedure, Rule 1 "These rules govern the procedure in all civil actions and proceedings in the United States district courts... They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."



KING'S STUDENT LAW REVIEW

CARIBBEAN COURT OF JUSTICE
OR THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL?
A DISCUSSION ON THE FINAL
APPELLATE COURT FOR THE
COMMONWEALTH CARIBBEAN

MATTHEW GAYLE
3rd Year LLB Student, University of Birmingham

1. INTRODUCTION

The Caribbean Court of Justice (CCJ) was established by the 2001 Agreement Establishing the Caribbean Court of Justice and inaugurated in 2005, to serve two functions. Firstly, the CCJ is the sole and final arbiter on the Treaty Establishing the Caribbean Community (The Treaty).¹ Secondly, the CCJ was established to replace the Judicial Committee of the Privy Council (JCPC) as the final appeals court for the contracting parties, the member states of the Caribbean Community (CARICOM). Meanwhile, although the jurisdiction of the JCPC throughout the rest of the commonwealth world is in decline, the JCPC remains the final court of appeal for most of the Commonwealth Caribbean; only Guyana, Barbados and Belize look to the CCJ for answers to their most complex legal and constitutionally important questions.

This essay shall address the arguments for and against delinking from the JCPC in favour of acceding to the CCJ. To begin with the history of abolition of appeals to the Privy Council will be examined. Three comparators have been selected: Canada (1949), East Africa (1962) and New Zealand (2004). Canada and New Zealand have both established successful final appellate courts, and while the East African experience is less successful. This shall be used to inform later discussions. Secondly, the question as to whether there is a need for a distinct body of jurisprudence unique to the Caribbean will be addressed, and the CCJ in will be examined in this context.

Lastly, the overall objective suitability of the CCJ to the role of final appeals court for the region will be addressed, along with sovereignty and legitimacy issues.

Before beginning the substantive analysis, an understanding about the anatomy of the region's jurisdictions will assist to facilitate the overall discussion.

2. CONTEXT: ANATOMY OF THE REGION

CARICOM seeks to unite much of the geographical region known as the West Indies on the basis of the Caribbean Single Market,² and the union has much to offer in terms of economic, political and legal development for the region.

1. The Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy, 2001

2. *ibid*

Most of the countries in the region retain appeals to the JCPC as a legacy of British Imperialism. The laws of these countries are reminiscent of a fuller history, to the extent that the legal systems of St. Lucia and Guyana may be classified as hybrid because they consist of a mix of both Civil law and Common law systems.³ Furthermore, evidence of Roman-Dutch, French and Spanish Civil law exists in other countries in the region,⁴ as well as limited evidence of aboriginal, religious and customary (Africa) law.⁵ The majority of the laws of the Commonwealth Caribbean are based on the English Common Law.

The CARICOM member states are: Antigua and Barbuda; The Bahamas; Barbados; Belize; Dominica; Grenada; Guyana; Haiti; Jamaica; Montserrat; St. Kitts and Nevis; St. Lucia; St. Vincent and the Grenadines; Suriname; and Trinidad and Tobago. Anguilla, Bermuda, British Virgin Islands, Cayman Islands, and Turks and Caicos Islands are associate members, as they are British overseas territories. All CARICOM member states and associate member states accede to the CCJ's first instance jurisdiction on Treaty matters. To date only Barbados, Belize and Guyana use the CCJ as their court of final appeals. The rest of the member states, and associate member states use the JCPC as their final appellate court.

Barbados delinked from the JCPC and acceded to the CCJ in 2005. Belize followed suit in 2010. Both took place in the context of the discussion found below. Guyana delinked from the JCPC in 1970 under the direction of its then autocratic Premier, thus no discussion occurred at that time.⁶ Guyana acceded to both jurisdictions of the CCJ in 2005.

The Court systems of the Commonwealth Caribbean countries are broadly similar to those of England and Wales, although some regional peculiarities do exist in some countries.⁷ The lowest court of record in each jurisdiction is the High Court, followed in the hierarchy by a Court of Appeal, which is the country's highest local court of appeal.⁸ The notable

3. Rose-Marie Belle Antoine, *Commonwealth Caribbean: Law and Legal Systems*, Routledge-Cavendish (2nd Ed, 2008: London), 60-61

4. *ibid* 60-61

5. Jane Matthews Glenn, *Mixed Jurisdictions in the Commonwealth Caribbean: Mixing, Unmixing, Remixing*, Vol 12.1 Electronic Journal of Comparative Law (May 2008), <<http://www.ejcl.org/121/art121-10.pdf>> accessed October 26th, 2010.

6. Anil Sinanan, *Distant Justice: Rationalizing the role of the Judicial Committee of the Privy Council in the Commonwealth Caribbean, 1876-1996*, PhD Thesis (1998: University of Birmingham), 404

7. For instance, the Gun Court in Jamaica, and the Industrial Court in Trinidad and Tobago

8. Despite the fact that the JCPC is said to constitute a national court of the jurisdiction for which it is constituted to hear appeals, this is clearly a legal fiction.

exception to this is the Eastern Caribbean Supreme Court (ECSC), which operates in the Organisation of Eastern Caribbean States (OECS), which consists of Antigua, Dominica, Grenada, St. Lucia, St. Vincent, St. Kitts and Nevis, Montserrat, Anguilla, and the British Virgin Islands. The OECS states share a High Court, and Court of Appeal. Appeals from the ECSC are to the Privy Council.

3. HISTORY OF ABOLISHING APPEALS TO THE PRIVY COUNCIL

3.1 CANADA

In Canada, tension between the provinces and the federal government over the interpretation of the constitution, and the belief that the JCPC was a champion of minority rights meant that abolition of these appeals was politically difficult.

The first recorded attempt to abolish appeals to the JCPC was in 1875, with the passing of the Bill that established the Supreme Court of Canada, but it was hinted that consent would be refused by the Crown, so the provisions in the Bill which provided for the removal of appeals to the JCPC was removed.⁹ Another attempt was made to abolish Criminal Appeals in 1888, but in 1926 the JCPC in *Nadan v King*¹⁰ ruled that attempt invalid. More successful legislation for the restriction of criminal appeals was passed in 1933, which stood up when challenged, and in 1949 appeals to the JCPC in all other matters were finally abolished. It was the Statute of Westminster 1931 that allowed the successful delinking from the Privy Council. Until this time, the resistance to delinking had been largely facilitated from Westminster.

The final push for delinking was given impetus by the perceived mishandling of the so-called 'New Deal', by the JCPC. This was a package of measures set out by the Canadian government for combating the effects of the Great Depression.¹¹

9. William S Livingstone, *Abolition of Appeals from Canadian Courts to the Privy Council*, Harvard LR Vol 64, No. 1 (Nov, 1950)

10. [1926] A.C. 482

11. Bryan Finlay QC & Frank Walwyn, "Such as they are they are our own" *A talk on Abolishing Canadian Appeals to the Privy Council*, Presentation to the Judicial Education Institute of the Eastern Caribbean Supreme Court 8th February, 2008, see page 18

It has been suggested that the CCJ may encourage the revival of the Civil Law traditions of St. Lucia and Guyana,¹² based on the Quebec experience. The people of Quebec were amongst the strongest supporters for maintaining appeals to the JCPC,¹³ fearing for the integrity of Quebec's civil law.¹⁴ The JCPC, some argued, was better at protecting the individuality of Quebec's legal system. This support was founded in a belief that the Supreme Court was seeking to assimilate the civil code,¹⁵ and a belief that the schooling of the London Judges was superior.¹⁶ Support, however, waned over the years as a result of JCPC's negative treatment of the civil code.¹⁷ It came to be seen that the JCPC gave preference to the common law interpretations.¹⁸

On abolishing appeals to the JCPC, the Supreme Court of Canada was able to "become more open to the uniqueness of Quebec civil law".¹⁹

3.2 NEW ZEALAND

As the country to have most recently delinked from the JCPC, New Zealand's decision is interesting because it was in part, motivated by the creation of the Caribbean Court of Justice.²⁰ There was some national disquiet at being "the only stable and autonomous Commonwealth country with a firmly established local Bar and tradition of independent Courts to continue the appeal to London".²¹

The establishment of the Supreme Court of New Zealand as the final appellate court took significantly less time than in Canada. Like the CCJ the Supreme Court was established specifically for this purpose.

Reasons for delinking were numerous. The 'continuation of appeals

12. Belle Antoine (n3) 72

13. Finlay & Walwyn (n11)

14. Livingstone (n9) 109

15. France Allard, *The Supreme Court of Canada and its Impact on The Expression of Bijuralism*, <<http://www.justice.gc.ca/eng/dept-min/pub/hfl-hlf/b3-f3/bf3a.pdf>> accessed (October 30th, 2010), at 4

16. Michael John Herman, *The Founding of the Supreme Court of Canada and The Abolition of the Appeal to the Privy Council*, 8 *Ottawa L Rev* 7 1976 at 24

17. *ibid*

18. Allard (n15) 10

19. *ibid* 11

20. Andrew S. Butler, *New Zealand's new final appellate structure*, *CJQ* 2004, 23(Apr), 107-118 at 113

21. Richardson M, "*Appeals to the Privy Council – New Zealand*", (1970) 2 *Otago L Rev* 183

to the Privy Council was a remnant of colonialism, which diminished New Zealand's Sovereignty.²² Additionally the accessibility of the JCPC, both in practical and legal terms was limited; the JCPC sat far away, and the class of matters that could be appealed was restricted.²³ It was also said that the effects of European Union jurisprudence were such that the 'judicial approach to interpretation in the United Kingdom is slowly becoming less relevant to a Commonwealth country...'²⁴ Many of these arguments are echoed across the Commonwealth Caribbean.

The reasons voiced against the abolition of appeals to the JCPC were also similar to those that are currently being faced in the Caribbean: Where will sufficiently skilled jurists come from? Are the judges of the JCPC not of superior quality? Is it right for the local judges to be making law?²⁵ Of particular interest are the objections of two (2) specific communities; the indigenous Maori people, and the Business community.

The Maori community voiced strong opposition to the abolition of appeals to London based on a fear that the local Supreme Court would favour the non-Maori New Zealanders.²⁶ The Business community lacked confidence in the ability of the New Zealand Supreme Court to provide "commercially sound, non-activist legal rulings"²⁷ and believed that overseas businesses had more confidence in the JCPC.²⁸

3.3 EAST AFRICA

East Africa replaced appeals to the JCPC with appeals to a regionally based supra national final court of appeal, the East Africa Court of Appeal (EACA).

Following on from the independence of the countries in the Eastern African region,²⁹ and building on a strong regional affinity,³⁰ the East African Community (EAC) was established in December 1967. The EAC

22. Butler (n20) 112

23. *ibid* 113

24. *ibid* 113

25. *ibid* 114

26. *ibid* 113

27. *ibid* 114

28. *ibid* 114

29. Tanzania, 9th December 1961; Uganda, 9th October 1962, and; Kenya, 12th December 1963

30. P Sebalu, *The East African Community*, 345 JAL vol. 16 No. 3 at 345

was one step short of the federation that had been envisioned prior to the independence.³¹ The EACA was constituted as part of this community.

Previously,³² the EACA had been constituted as the Eastern African Court of Appeal (EnAnCA). Appeals from the EnAnCA were to the JCPC. It was presided over primarily by European judges³³ and had existed in form since shortly after the British declared a protectorate over the region in 1897.³⁴ Initially, appeals from the EnAnCA were to Bombay, and from Bombay to the Privy Council. Between 1962 and 1967, no appeals were heard. On the forming of the EAC, appeals to the Privy Council were barred.

Rights of appeal to the EACA existed for Criminal and Civil matters,³⁵ except in the case of constitutional matters from Tanzania,³⁶ and Treason in Uganda.³⁷ Although there is only very limited commentary on the EACA from this period, the experience is still informative.

Unlike the CCJ, the EACA benefitted from having being entrenched in the appeals structure over three-quarters of a century, albeit under a different name at the point of independence. Also, there were no national courts of appeal. It is, therefore, easy to understand why the court was so readily accepted by the governments of the region.

The strong sense of African identity and confidence in the local judiciary can be seen in *Dodhia*,³⁸ a case in which the EACA revisited a point of law that had previously been decided by the EnAnCA and overruled by the JCPC on appeal:³⁹

... while I hold the views of members of the Privy Council in the greatest of respect, it would seem that judges of the independent country of Kenya are in a better position to determine the true construction of Kenya legislation than judges who are unaware of the conditions and needs of the people of Kenya, no matter how eminent those judges may

31. *ibid* 348

32. Between 1909 and 1961/62

33. Sebalu (n30) 352

34. it was established in 1902 by The Court of Appeal of Eastern Africa Order in Council 1902

35. Sebalu (n30)

36. *ibid*

37. *ibid*

38. *Dodhia v National and Grindley's Bank Ltd* [1968] EACA (Kenya) Civ App no.53; [1970] JAL 41

39. *Vallabhji v National and Grindley's Bank Ltd* [1964] EA 442

be.⁴⁰

The EACA in *Dodhia*, expressed a definite intention to develop the common law to become more sensitive to East African life⁴¹ and similar sentiment is echoed in the Caribbean.

The fate of the EACA is instructive as to the importance of the stability and longevity of CARICOM to the success of the CCJ. The EAC collapsed in 1977, and with it the court. Consequently, national appeals courts were established in each country.

The EAC was revived, after years of negotiations in 2000. The East African Court of Justice (EACJ) was then established.⁴² The EACJ consists of original and appellate jurisdictions;⁴³ however, the appellate jurisdiction is limited to appeals from the original jurisdiction.⁴⁴ The original jurisdiction of the EACJ is comparable to that of the original jurisdiction of the CCJ in that it presides over treaty matters. The Common Market Tribunal played this role in the previous EAC.⁴⁵ The EACJ has a further human rights jurisdiction within the EAC⁴⁶ and has the potential to become a final appeals court for national courts within the EAC.⁴⁷ Talks to expand the jurisdiction in this way are said to be ongoing.⁴⁸

40. *Dodhia* (n38)

41. *ibid*

42. Treaty for the Establishment of the East African Community, Chapter 8

43. *ibid*, para 2, Chapter 8

44. Article 35, Treaty for the Establishment of the East African Community

45. Which existed as part of the old East African Community

46. Sebalu (n30) 352

47. Article 27, Para 2, Treaty for the Establishment of the East African Community

48. Harold Nsekela, *Achievements and challenges of the East African Court of Justice under the Treaty for the Establishment of the East African Community*, paper presented at the Conference to Commemorate the 10th Anniversary of the EAC Treaty 1999 and the 1st Anniversary of the TGCL, at the University of Dar es Salaam, September 4th, 2010

4. CARIBBEAN APPEALS TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

4.1 CAN APPEALS TO THE PRIVY COUNCIL BE ABOLISHED?

The Caribbean Commonwealth countries that appeal to the JCPC have the right of appeal entrenched in their constitution.⁴⁹ The delinking procedures vary across the Caribbean.

In Antigua and Barbuda and Grenada a two-thirds majority of a parliamentary vote and of a referendum are required.⁵⁰ Trinidad and Tobago requires a three-quarters majority from the lower house and a two-thirds majority from the upper house.⁵¹ Bahamas requires three-quarters majority parliamentary vote.⁵² Dominica and St. Lucia require an agreement with the United Kingdom and a three-quarters majority parliamentary vote.⁵³ While the need for such an agreement is objectionable on the grounds of sovereignty, in practice it is unlikely to pose much obstacle should the legislature choose to delink.⁵⁴ St. Kitts, the Nevis, and St. Vincent require a two-thirds majority parliamentary vote.⁵⁵ Guyana, Barbados and Belize required parliamentary super-majorities in order to delink.⁵⁶

The JCPC has examined two particular circumstances; firstly in the case of the Grenada revolution of 1979, and secondly Jamaica's attempt to abolish appeals in 2004.

Before going further, it is worth noting that the current mechanism of appeals from the Caribbean to the JCPC is prima facie unsustainable. The UK taxpayer currently pays for the running of the court and the British judiciary are becoming increasingly impatient with the Caribbean

49. Derek O'Brien, *The Caribbean Court of Justice and its appellate jurisdiction: a difficult birth*, 344 Public Law [2006] at pg 359

50. D Pollard, *The Caribbean Court of Justice: Closing the Circle of Independence*, The Caribbean Law Publishing Company, 2004 Kingston at 136; 141

51. *ibid* 154

52. *ibid* 148

53. *ibid* 144

54. See below

55. Pollard (n50) 143; 146

56. *ibid* 152;136;151

jurisdictions' continued reliance on them.⁵⁷ Indeed it has been suggested that the Commonwealth jurisdictions should be forced to pay for the services of the JCPC.⁵⁸ Certainly, should this occur, it would not be viable for the governments to simultaneously fund the CCJ and appeals to the JCPC.

4.2 GRENADA REVOLUTION

In 1979 the Grenada government was overthrown in a coup d'état, led by Maurice Bishop.⁵⁹ The constitution was suspended, and appeals to the JCPC discontinued.⁶⁰ A further uprising occurred led by Bishop's deputy Bernard Coard in which Bishop and others were killed. Foreign intervention then followed, and the pre-1979 revolution Government was reinstated. The reinstated government legislated (The 1985 Act)⁶¹ to affirm all legislation passed since 1979. Coard and his followers were sentenced to death following their conviction for murder.

The defendants appealed the conviction to the JCPC, arguing that the Grenada court had no jurisdiction to try them. The board ruled that appeals had been successfully abolished.⁶² In their advice, delivered by Lord Diplock, the JCPC looked first to the question of their competence to hear any appeal.⁶³ The Board took the view that:

it is in their Lordships opinion impossible to so construe the section as to exclude the power of an individual state to prescribe by or in pursuance of its own constitution that *no* appeal shall lie to Her Majesty in Council in proceedings of any kind originating in that state.⁶⁴

The view taken by the board was that it was the 1985 Act that

57. Statement of Lord Phillips, President of the Supreme Court of the United Kingdom (then Senior Law Lord), <www.bbc.co.uk/caribbean/news/story/2009/09/090922_privyccjphillips.shtml>, accessed 4th November, 2010

58. As Sir Probyn, former Governor General of St. Kitts and Nevis seems to suggest would be the only way this would occur, in an interview with Betram Niles: <www.bbc.co.uk/caribbean/meta/dps/2009/09/nb/090922_innisprivyccj_au_nb.asc> accessed November 5th, 2010

59. Simeon McIntosh, *Kelsen in the 'Grenada Court' Revolutionary Legality Revisited*, 1 Caribbean LR June 1995 at 1

60. Privy Council (Abolition of Appeals) Law 1979, March 1979

61. Confirmation of Validity Act 1985

62. *Andy Mitchell and others v Director of Public Prosecutions and Another* [1986] AC 73

63. *ibid* 78

64. *ibid*

successfully abolished appeals to the JCPC, not the Privy Council (Abolition of Appeals) Law 1979 in its own right.

4.3 JAMAICA ATTEMPT TO DELINK

In 2004, when the then People's National Party (PNP) Government of Jamaica attempted to abolish appeals to the JCPC, the question was 'whether the procedural means of achieving it followed the procedure required by the Constitution.'⁶⁵ Indeed the board was at pains to stress that:

[I]t must be understood that the board, sitting as the final court of appeal of Jamaica, has no interest in its own in the outcome of this appeal. The board exists in this capacity to serve the interests of the people of Jamaica. If and when the people of Jamaica judge that it no longer does so, they are fully entitled to take appropriate steps to bring its role to an end. The question is whether the steps taken in this case were, constitutionally, appropriate.⁶⁶

The Government of Jamaica sought to abolish appeals to the JCPC and establish the CCJ as the final court of appeal for Jamaica by way of three statutes; the first abolished appeals to the JCPC, substituting instead, appeals to the CCJ;⁶⁷ the second gave effect to the CARICOM agreement which established the court;⁶⁸ and the third removed direct appeals to the JCPC from the Court of Appeal in criminal cases.⁶⁹

The attempt to abolish appeals to the JCPC, and accede to the CCJ in Jamaica was vigorously opposed by the then opposition party, the Jamaica Labour Party (JLP). The JLP argued strongly for the status quo when the measures were laid before the Jamaica parliament. Even before the Acts were given assent, the JLP were litigating to have the legislation overturned.⁷⁰

In *Independent Jamaica Council for Human Rights*,⁷¹ the JCPC opined that the entire legislative scheme was not passed in accordance with the

65. *Independent Jamaica Council for Human Rights (1998) Ltd v The Attorney General of Jamaica* [2005] 2 AC 356 at 363

66. *ibid*

67. The Caribbean Court of Justice (Constitutional Amendment) Act 2004, Act 20 of 2004

68. Caribbean Court of Justice Act 2004, Act 21 of 2004

69. Judicature (Appellate Jurisdiction) (Amendment) Act 2004, Act 19 of 2004

70. *Independent Jamaica Council for Human Rights (n65)*

71. *ibid*

constitution and that a higher threshold was required in order to change the entrenched provisions of the constitution. Delinking from the JCPC⁷² may have been possible had it been brought as a stand-alone provision.

Whereas in Grenada there was never any doubt that the correct constitutional procedures had been followed for the 1985 Act, in Jamaica the board said in principle that what the government wanted to do was permissible, but the correct procedure needed to be followed to bring about this change. This has not stopped supporters of the CCJ from arguing bias on the part of the JCPC however:

... judicial colonialism, though slated for death by the agreement to establish the CCJ, cannot yet be dealt its death knell because its execution has been temporarily stayed due to the intervention of the Privy Council.⁷³

However, the Grenada experience suggests that the JCPC is, in fact, willing to rule against its own power to hear appeals and as has already been mentioned, the British Judiciary are keen to be rid of the Caribbean Jurisdictions.⁷⁴ To argue that the JCPC would seek to maintain its jurisdiction on (former) colonial appeals through bias⁷⁵ is to inadvertently strengthen the argument of those arguing against the CCJ.⁷⁶

4.4 COURT POLITICS

Percival Patterson, PNP Prime Minister of Jamaica in 2004 who played a major role in the establishment of the CCJ,⁷⁷ is keen for Jamaica to commit. The then opposition JLP Senator, now Prime Minister, Bruce Golding spoke out vehemently in the Jamaica Senate when the proposals were laid before that Houses of Parliament;⁷⁸ furthermore the debate in both

72. Judicature (Appellate Jurisdiction) (Amendment) Act (n69)

73. J Cross, *Introduction for the Goodwin Seminar Articles: Trade Winds in Caribbean Law – Evolution of Legal Norms and Quest for independent Justice*, 29 Nova LR 131 at 137

74. Statement of Lord Phillips (n57)

75. See D Batts, *Why the Rt. Honourable Mr. Justice Michael de la Bastide P.C. T.C President of the Caribbean Court of Justice is Wrong*, WILJ Vol 32 (1), 2007

76. *ibid* 98

77. See Rickey Singh (Barbados), *Strong Warning on 'Threat' to CCJ*, Guyana Chronicle, Sunday August 29, 2010

78. B Golding, *Let us do it the Right Way*, May 8 2003 in *We Want Justice: Jamaica and the Caribbean Court of Justice* ed. Delano Franklyn, (Ian Randle Publishers: Kingston) 2005 at 131

Houses of Parliament was divided largely on party lines.⁷⁹

The current, JLP Government of Jamaica shows no signs of compromise on the CCJ.⁸⁰

The situation is similar in Trinidad and Tobago. The current Trinidad and Tobago Prime Minister, Kamla Persad-Bissessar, while the leader of the opposition, said in Parliament that she could not support the CCJ unless it had an Indian Judge.⁸¹

In Kenya at the time of independence, one argument in favour of delinking was 'that JCPC jurisprudence favoured the white and Indian communities and prevented the development of local law.'⁸² This goes some way to illustrate the politically compromised nature of the debate that continues today. Keith Rowley, the current leader of the opposition in Trinidad recently said that 'the CCJ as the country's final court of appeal' is long overdue.⁸³ Meanwhile discontent amongst the current Trinidad and Tobago government about the CCJ continue to be reported in the popular press.⁸⁴

Persad-Bissessar's comments may be illustrative of concerns that East Indians may have of becoming a minority group within a Caribbean-wide jurisdiction. The East Indian populations of Guyana and Trinidad and Tobago are 43% and 40% respectively,⁸⁵ but this is not reflected across the rest of the Caribbean where they are a minority ethnic group.

When some 60%⁸⁶ of the Caribbean appeal to the JCPC originate from Jamaica and the Republic of Trinidad and Tobago,⁸⁷ it is difficult to foresee the sustainability of the CCJ's appellate jurisdiction without those two states, particularly as together they are the majority contributors to the Trust fund that maintains the court. Furthermore, it is unlikely that enough

79. Senator D Franklyn, at the time a government minister, serialised the debate which took place in Jamaica in 2003: *We Want Justice: Jamaica and the Caribbean Court of Justice* ed. Delano Franklyn, (Ian Randle Publishers: Kingston) 2005

80. *Don't Make The Charter Of Rights A Victim*, Jamaica Gleaner, Monday December 27th, 2010

81. Hansard (Trinidad and Tobago); Wednesday February 2nd, 2005; Caribbean Court of Justice Bill 2004

82. Sinanan (n6) 401

83. Article (Rowley renews call to PP govt: Replace Privy Council with CCJ) in the Trinidad and Tobago Guardian, Saturday August 28, 2010

84. *ibid*

85. CIA World Factbook, <<https://www.cia.gov/library/publications/the-world-factbook>> accessed: January 11th, 2011

86. Decided appeals 2004-2009

87. Taken from Appeal decisions of the JCPC 2004-2009

litigation would occur to develop the local jurisprudence without them.

4.5 THE DEATH PENALTY

It is unfortunate that the death penalty seemingly plays such a significant role in the debate surrounding the CCJ. Views on the death penalty are broadly different in the United Kingdom, as compared to the Commonwealth Caribbean. Whereas capital punishment was abolished for murder in the UK in 1965,⁸⁸ statutes of Caribbean countries still facilitate the death penalty today.

It is therefore understandable that judges of the JCPC may perceive a moral paradox when presiding over appeals in death penalty cases from the Commonwealth Caribbean countries.⁸⁹ On the one hand, the legal system that they have risen to the highest ranks of (in most cases, a jurisdiction of the United Kingdom), abhors and forbids the death penalty. On the other the one that they find themselves sitting at the apex of demands it.⁹⁰

The Jamaica *Pratt*⁹¹ case is thought to have renewed the impetus for delinking from the JCPC. *Pratt* came before the board 14 years after *Pratt* and *Morgan* had been sentenced to death, on conviction for murder. As a result of the substantial delays in the processing of the appeals through the national courts and to various international human rights bodies, the JCPC quashed the sentence substituting it with life imprisonment. In the process, a limit of 5 years was set for the appeals process to be exhausted and the sentence to be carried out.

Pratt took effect throughout the region, where all national constitutions contained similar provisions to Section 17. Jamaica was forced to commute 105 sentences of death to life; Trinidad 53, and; Barbados 9.⁹² The decision was therefore unpopular with many⁹³ who saw it as a de facto abolition of

88. Murder (Abolition of Death Penalty) Act 1965, although in theory Capital punishment still operated until s36 of the Crime and Disorder Act 1998 abolished Capital Punishment with respect to Treason and Piracy

89. M De La Bastide detects 'distaste' for the death penalty in the *Pratt and Morgan* judgement, see M De La Bastide, *Case for a Caribbean Court of Appeal*, [1995] 5 Carib LR 401 at 409

90. See for instance recent comments by Anand Ramlogan, Attorney General of Trinidad and Tobago "we will pop your neck"! Article, Trinidad and Tobago Guardian, July 21 2010

91. *Pratt and Morgan v AG Jamaica* [1994] 2 AC 1

92. *AG v Joseph and Boyce* [2006] CCJ 3

93. Roget Bryan, *Toward the development of a Caribbean Jurisprudence: The case for establishing a Caribbean Court of Appeal* 7 J Transnat'l Law 181 (1997-1998) at 191

capital punishment.⁹⁴

The *Pratt* judgment was based on the delays experienced in that case being contrary to section 17 of the Jamaica Constitutional, which reads:

17(1) No person shall be subjected to torture or to inhumane or degrading punishment or other treatment.

17(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent the law in question authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day.⁹⁵

However, previously,⁹⁶ 17(2) had been held to be an “unambiguous prohibition”⁹⁷ to delays being caught within 17(1). The test used in *Riley* to determine whether a measure was unlawful was:

(a) it must be an act done under the authority of law; (b) it must be an act involving the infliction of punishment of a description authorised by the law in question, being a description of punishment which was lawful in Jamaica immediately before the appointed day; (c) it must not exceed in extent the description of punishment so authorised.⁹⁸

Lord Bridge, for the majority, opined that the only possible question arose with respect to the satisfaction of the requirement in (c) and looking to the context of the whole held:

... whatever the reasons for or length of delay in executing a sentence of death lawfully imposed, the delay can afford no ground for holding the execution to be a contravention of section 17(1).⁹⁹

94. De La Bastide (n89) 407

95. Appointed day: August 6th, 1962 (s1 Jamaica Constitution)

96. *Riley v AG of Jamaica* [1983] 1 AC 719

97. *ibid* 726

98. *ibid* 719

99. *ibid* 726-727

In *Pratt* the Board unanimously overruled its previous stance,¹⁰⁰ using the same tri-part test used by Lord Bridge in *Riley*.¹⁰¹

But the reasoning in *Pratt* is tenuous. At points in the judgment emotive language was used, for instance their Lordships said '[T]here is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years'.¹⁰² Reference was also made to the jurisprudence of the European Court of Human Rights, which while undoubtedly it is an esteemed court, is not legally relevant. This is reminiscent of concerns in New Zealand of European jurisprudence influencing law there¹⁰³ and raises concerns of the possibility for International treaties, to which Caribbean nations do not subscribe, being applied to them.

The JCPC in *Pratt* opined that the fact that fuller representations, as compared to *Riley*, had been made as to whether the delay would have been lawful prior to independence was determinative. This ignores the majority ruling in *Riley* that was based on a general principle and the 'unambiguous' wording of section 17.¹⁰⁴ The *Pratt* judgment also gives a questionable degree of weighting to the appointed day, and thus English Law, albeit pre-1962 law.

The government structure of the Commonwealth Caribbean countries is largely based on the Westminster system of government. However they have a sovereign codified constitution not a sovereign parliament. This means that parliament cannot always moderate an activist final court of appeal.¹⁰⁵ In such a system the final appeals court arguably has a duty to act in a politically sensitive way. To do so a court must have an intimate understanding of the politics and local situation. It was inconsistent for the JCPC to acknowledge, as they did,¹⁰⁶ the very real difficulties of the Jamaican government, which led to the delays in *Pratt*, then fail to take them into account; the board may have instead, opted for a time-frame better able to facilitate the local and international appeals on capital cases. *Pratt* shows the folly in the submissions of those in New Zealand who argued that retaining the JCPC was a means to guard against judicial activism.¹⁰⁷ The

100. in part based on the judgment of the minority in *Pratt*

101. *Pratt and Morgan* (n91) 28

102. *ibid* 33

103. see above

104. *Riley* (n96) 726; 727

105. D McKoy, *Reshaping Commonwealth Caribbean Jurisprudence: From Pratt and Morgan to Joseph and Boyce* (2007) WILJ 32 (2) 155 at 187

106. *Pratt and Morgan* (n91) 34

107. see above

Pratt judgment has been opined to be 'inappropriate' in Trinidad,¹⁰⁸ and as not conforming to the 'judicial reality of the Caribbean region in Antigua.¹⁰⁹ A mishandled politically sensitive issue may give impetus to a delinking 'movement', as in the Canadian 'New Deal'. There is evidence of this in the popular press in the Caribbean, however, despite the strong words of the politicians regarding the death penalty, reality is less dramatic. Jamaica, for example, has not executed anyone since 1988.¹¹⁰

The more critical debate in *Pratt* speaks directly to the sovereignty of the region as it clearly amounted to little less than judicial legislation.¹¹¹ In this sense, it is justified that *Pratt* should be pointed to as motivation for abandoning the JCPC. As shown above, it is questionable whether the board applied the correct interpretation of the Jamaica constitution. One may even ask whether the board should have been asked to make the interpretation at all.

In *Boyce*¹¹² the CCJ addressed the same issues as *Pratt* and the displayed the ability to strike an appropriate balance, taking account of the claimants' human rights interests.¹¹³ *Pratt* was criticised:

The radical nature of the decision in *Pratt*, the suddenness with which it was sprung, the apparent stringency of the time-period stipulated, the unpreparedness of the authorities to cope in an orderly manner with the far-reaching consequences of the decision, all of these factors raised tremendous concern on the part of Governments and members of the public in the Caribbean. The decision caused disruption in national and regional justice systems. Its effect was that, in one fell swoop, all persons on death row for longer than five years were automatically entitled to have, and had, their sentences commuted to life imprisonment.¹¹⁴

The CCJ did acknowledge the sloppy manner in which the appeals

108. De La Bastide (n89) 408 referring to *Walton and Guerra v Baptiste* Civil Appeals No 65 and 66 of 1994 (Trinidad)

109. Bryan (n93) 197

110. For example, see <<http://news.sky.com/skynews/Home/World-News/Jamaica-Death-Penalty-To-Stay-After-Parliament-Vote-Despite-Human-Rights-Protests/Article/200811415162159>> accessed January 13th 2011

111. De La Bastide (n89) 407

112. *Joseph and Boyce* (n92)

113. McKoy (n106) 158

114. *Joseph and Boyce* (n92) 46

across the region had been conducted.¹¹⁵ The CCJ did not explicitly overrule the 5-year requirement set by the JCPC and instead opted to impose a 'reasonable' time limit on appeals.

One must, however, be conscious of the CCJ's uncertain future in the region. While the various countries consider the appellate jurisdiction, the court may seek to avoid controversy.¹¹⁶ Clearly, overruling *Pratt simpliciter* would have provoked outcry from international organizations and likely would have damaged the CCJ's credibility. The approach of the CCJ may become emboldened should its appellate jurisdiction become enlarged, as was seen in East Africa.

One further issue remains to be mentioned in reference to the death penalty, and generally. It might be suggested that the JCPC's willingness to interpret the Jamaican constitution as it did is illustrative of a deep-rooted conviction to promote Human Rights at any cost. Indeed the JCPC's track record as a Human Rights court cannot be denied.¹¹⁷ However, the region should gain confidence from *Boyce*, which shows that CCJ is willing to stand up to the region's governments in defence of fundamental rights, while adopting an approach more suited to the region's societal requirements.

5. DEVELOPMENT OF A CARIBBEAN JURISPRUDENCE

The unique history of the legal systems of the Caribbean can be said to have developed because of 'battles between different imperialist powers'.¹¹⁸ But this is no basis from which to argue the need for specific jurisprudence. However, there are naturally occurring similarities between culture and lifestyle of persons from the various Commonwealth Caribbean nations that can be identified: attitudes towards marriage and cohabitation arrangements, unique approach to property ownership,¹¹⁹ and the pluralistic ethnic composite nature of society in general, to name a few.

If 'law is meant to reflect society',¹²⁰ it follows that the laws of the Caribbean Commonwealth should be developed to suit those nations of

115. *ibid* 47

116. Discussions between Senior Caribbean Counsel and Author, July-September 2010

117. Sinanan (n6) 449

118. Belle Antoine (n3)

119. See discussion of 'West Indian chattel houses', *ibid*183

120. *ibid* 5

which it is constituted. Indeed it has been said that:

English judges in the Privy Council may not fully appreciate the nuances of Caribbean culture, modes of thought and social circumstances, in reaching decisions of fundamental importance for the region.¹²¹

This point has also been recognised by English judges. As Denning LJ once observed, in an appeal from the East Africa when dealing with a provision which allowed for adaptation of the law to local circumstances:

Just as with the English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England ... It has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all over the world... The common law cannot fulfil this role except with considerable qualifications. The task of making these qualifications is entrusted to the judges of these lands.¹²²

There is significant evidence to suggest that the JCPC is not sensitive to the needs of Caribbean society. *Pratt* is a case in point. The *Muslimeen*¹²³ case in Trinidad and Tobago is another.

5.1 MUSLIMEEN

Lennox Phillip led a group of insurgents from his Jammal Al Muslimeen, in an attempted Coup d'état against the sitting government in the summer of 1990. The Prime Minister and other parliamentarians were held hostage in parliament.¹²⁴ A Pardon was granted to the insurgents bringing the confrontation to an end. The Government then sought to prosecute the insurgents for treason, murder and other offences alleged to have been committed during the insurrection,¹²⁵ arguing that the pardon was invalid because of the circumstances that led to its issue.¹²⁶

121. S Vasciannie, *The Caribbean Court of Justice: Further reflections on the debate* 23 WILJ 37 (1998) at 53

122. *Nyali Ld v Attorney-General* [1956] 1 QB 1 at 16

123. *Phillip v. DPP* [1992] 1 AC 545

124. *ibid*

125. *ibid*

126. See De La Bastide (n89) 421

The JCPC left little doubt as to their view on the validity of the pardon, despite the fact that this was not the point in contention in that case,¹²⁷ and in the later case in the Court of Appeal of Trinidad and Tobago, by a 2-1 majority, it was held that the pardon was indeed valid.¹²⁸ On appeal to the JCPC by the Government, the pardon was held to have been invalid due to the fact that the insurgents had not promptly surrendered on being granted the pardon,¹²⁹ but nevertheless the state could not prosecute the insurgents as that would amount to an abuse of process.¹³⁰ Although some 20 years has passed, the country is as yet to heal, evident from the fact that the government still seeks retribution against the Muslimeen, albeit with limited success.¹³¹

The CCJ President, writing extra-judicially,¹³² observed that the ‘pro-pardon approach is really a matter of policy’¹³³ and implied a Caribbean final appellate court would have adopted a different approach. Given the fact that ‘114 insurrectionists today walk the streets free from prosecution for their crimes against the society and their assault on the democratic process of the nation’,¹³⁴ the JCPC’s decision may be seen fairly as being neither ‘equitable’ nor ‘just’.¹³⁵

The *Muslimeen* cases highlight similar issues to that elucidated in *Pratt and Morgan*; the inability of the governments of independent states to shape their future.

While this may support the need for a localised final appellate court, it is far from conclusive. After all, when the *Muslimeen* case returned to Trinidad to be decided,¹³⁶ the Court of Appeals awarded damages amounting to millions to the insurgents against the state and it was the JCPC who gave ‘justice’ to the nation through their ruling;¹³⁷ by ruling against the insurgents the award of damages was nullified.

127. *Phillip* (n124) 559

128. C.A.CIV.114/1992

129. *AG of Trinidad and Tobago v Phillip* [1995] 1 ALL ER 93 at 108

130. *ibid*

131. <<http://guardian.co.tt/news/politics/2010/07/23/abu-bakr-wait-and-see-what-happens>>, accessed November 25, 2010

132. De La Bastide (n89) 423

133. *Joseph and Boyce* (n92) para18

134. Bryan (n93) 197

135. *ibid*

136. C.A.CIV.114/1992

137. *Phillip* (n130)

5.2 LOCAL DOCTRINE

Some local legal doctrines have already emerged. However the possibility of review by the JCPC may have the effect of restraining lower courts from attempting to mark out new ground, particularly in controversial matters. Review by the JCPC may even encourage local judges to make decisions for political, not legal reasons, knowing they may later be overruled. It also means that the contribution to the development of the jurisprudence by the appeals courts in the Caribbean may not be identified and instead developments may be attributed to the JCPC:

...Commonwealth Caribbean practitioners and judges have themselves contributed to the collective wisdom of the Privy Council. This is especially so in relation to constitutional matters ...¹³⁸

This has the further effect of making the JCPC appear better able to adapt to local needs than is in fact the case.

There is a distinct call for the development of the law in the Caribbean to go further. Witt J, of the CCJ said of English legal concepts that they are '...unsuitable for Caribbean climate and soil... a new structure should be raised on the terra firma of the Caribbean Constitutions themselves.'¹³⁹ More recently the Chief Justice of Trinidad and Tobago has said:

Judging is not an exercise conducted in the abstract. History, cultural norms, intent and policy all inform the process. Take for example the law of provocation. Should English precedent or understanding of social behaviour dictate, whether, as a matter of policy, bouncing or stepping on someone's foot in a carnival fete could amount to provocation. Or can the use of force to resist a robbery or home intrusion ever amount to provocation, and if so, when? These are real questions that we have to grapple with and surely English judges are challenged in understanding our behaviour (and the threats and fears we face) in their societal context.¹⁴⁰

It is likely the Chief Justice was referring in the first instance to *Burnett v The State of Trinidad and Tobago*,¹⁴¹ a case in which the JCPC overruled the

138. Belle Antoine (n3)323

139. *Joseph and Boyce* (n92)

140. Chief Justice Ivor Archie (Of Trinidad and Tobago), Address to the State Opening of Parliament, September 16, 2010 at pg 17, para 2

141. [2009] UKPC 42

Court of Appeal decision that a provocation defence should not have been open to the jury. Burnett, a plain-clothes police officer shot two revellers at a party, killing one. Prior to the incident, victims and others were engaged in boisterous play characteristic of 'carnival fetes' in Trinidad. Burnett claimed that he was attacked by a mob. He was sentenced to death on conviction for murder. The Trinidad Court of Appeal was evidently unimpressed with his reaction to the jubilant mood at the fete, and upheld his conviction.

The Chief Justice then went on:

There is a view in many circles that the development of the criminal law in areas like provocation and good character may have been unduly influenced by a particular philosophical stance on the death penalty. But it is not only in the criminal arena that context is important. What about land use and occupation? Unlike England, we are not a people of fences and hedges. How do we define adverse possession without an understanding of how our cultural and behavioural norms?

Another reason for the need to develop the law in the Caribbean through an indigenous court is to facilitate the economic and social development of the region. But some thought must be given to allay concerns of judicial activism, that some fear may cause discomfort among investors and potential investors in the region,¹⁴² though similar concerns raised in New Zealand appear to have been unfounded.¹⁴³

The law in the Caribbean region has previously been used as a tool of underdevelopment and dependency.¹⁴⁴ The time has now come for the law to be used by the national governments as a tool of development and independence.¹⁴⁵

Parallels may also be drawn between the role of CCJ and the European Court of Justice and that court's role in the economic development of the European Union,¹⁴⁶ though these will relate mainly to the initial jurisdiction of the CCJ. However, the appellate jurisdiction of the court also has a role to play, not least because the respect and standing of the CCJ will to a large extent depend on its status as a final appellate court.

142. Sinanan (n6) 420

143. See below

144. Belle Antoine (n3) 6

145. Address to Graduates of the Hugh Wooding Law School, 21 Sept 1991, quoted in R Wilson, *A Caribbean Court of Appeal: An Aspect of Regional Integration*

146. See M De La Bastide, *Address to Central American Court of Justice*, Managua, Nicaragua 4-5th October 2007

There are however some distinct difficulties too. Economically, the region is far from homogeneous¹⁴⁷ and there is a definite ideological resistance to any further CARICOM integration.¹⁴⁸ Recent discussions of the EACJ give some guidance on how the CCJ may be fully exploited to further Caribbean integration, but the East African integration movement appears much stronger than that in the Caribbean.¹⁴⁹

6. SUITABILITY OF THE CCJ

Some argue that the Caribbean judges are just not up to the job, and point to short comings of the Court of Appeals judges,¹⁵⁰ saying that one only has to look to the Court of Appeals in the respective jurisdictions to see judges being 'bamboozled' by senior counsel. In Trinidad and Tobago, it has been said that the race of the judge can be determinative of the outcome of a case.¹⁵¹

The question of competence, however, can be rapidly disposed of. The region has produced more than its fair share of exceptional jurists,¹⁵² and there is nothing to suggest this will not always be the case. This was also used as an argument against delinking in New Zealand and to date the Supreme Court's local judges have made some substantial contributions to that jurisdiction's jurisprudence.¹⁵³

Of major concern is that CCJ judges may yield to pressure from governments in the region. But how might such pressure be applied? Concerns of such bias do not appear to have played as significant a role in the discussions prior to the establishing courts in East Africa nor New

147. O'Brian (n49) 348

148. Edward Seaga, Let the People Speak May 13, 2003, in *We Want Justice: Jamaica and the Caribbean Court of Justice* ed. Delano Franklyn, (Ian Randle Publishers: Kingston) 2005 at 13

149. Nsekela (n48) 11

150. Discussions with Senior Attorney's of Trinidad and Tobago, July-September 2010; Bryan (n93) 204; H Rawlins, *The Privy Council or a Caribbean Court of Appeal?* (1996) 6 *Carib Law Review* 235 at 256

151. Discussions between Senior Caribbean Counsel and Author, July-September 2010; see above section Court Politics

152. Justice Robinson, None but ourselves can free our minds, Address to Cornwall Bar Association Annual Banquet and Awards, Montego Bay, Jamaica on December, 4th 2010, text from Jamaica Observer Monday, December 6

153. Rt Hon. Peter Blanchard, *Early Experience of the New Zealand Supreme Court*, <<http://www.victoria.ac.nz/nzcpl/Files/Keith%20Conference/Keith%20Conference%20-%20Blanchard.pdf>> accessed January 11th, 2011

Zealand. In New Zealand, these concerns may have been implicit in issues otherwise raised by the Maori and business communities. However their absence from the East Africa discussions is more difficult to dismiss given the backdrop of widely publicised corruption claims within the judiciary.¹⁵⁴ While this may be because of the confidence that already existed in the East African institution, based on the previous longevity of the EACA, it none the less shows how exceptional the measures taken to ensure the impartiality of the CCJ truly are.

6.1 THE COMMISSION

Appointment, including re-appointment, security of tenure and discipline are some of the ways states may directly manipulate individual judges. In response to this the Regional Judicial and Legal Services Commission (The Commission) was constituted by the Agreement.¹⁵⁵ The agreement also sets out the means for appointment of the President¹⁵⁶ and other judges, and¹⁵⁷ the terms of tenure for the judges.¹⁵⁸ The President is the only judge in whose appointment the CARICOM leaders have any input; they must either accept or reject the commission's recommendation.¹⁵⁹

The commission is itself insulated from external influences as members are explicitly forbidden from acting other than independently.¹⁶⁰ The membership of the Commission is set by the Agreement,¹⁶¹ and the majority of the commission sit ex-officio. None are politicians.¹⁶²

This whole process has been praised internationally, as being a model for the selecting 'independent, high-quality judges'.¹⁶³

154. See for example: <<http://www.nytimes.com/2003/10/04/world/world-briefing-africa-kenya-corrupt-judges-told-to-go.html>> accessed January 11th, 2011

155. Revised Agreement Establishing the Caribbean Court of Justice, Article V

156. *ibid*, Para 6, Article IV

157. *ibid*, Para 7, Article IV

158. *ibid*, Articles IX

159. *ibid*, Para 6, Article V

160. *ibid*, Para 12, Article V

161. *ibid*, Para 1, Article V

162. M de la Bastide, *The Caribbean Court of Justice as a Regional Court*, Presentation to the Central American Court of Justice 4&5 October 2007 at 8

163. P Dayle, *Caribbean court of justice: a model for international courts?* Guardian.co.uk, Friday 10 September 2010, accessed July 2010

6.2 FINANCING OF THE CCJ

The CCJ is funded from a trust fund established specifically for this purpose. With the ambition of 'funding the CCJ in perpetuity',¹⁶⁴ the trust was initially capitalized with US \$100 Million¹⁶⁵ by member state contribution. Provision is also made for the member states to replenish the fund if deemed necessary by the Board of Trustees¹⁶⁶ who manage the fund.¹⁶⁷ The board of Trustees is made up overwhelmingly from persons distinguished in financial and business related fields and again, none are politicians.¹⁶⁸

The board operates in a transparent manner, publishing annual reports on the state of the fund, which are available online.¹⁶⁹ At the end of 2009, the fund still had over US \$94 Million.¹⁷⁰

The fund was set up against a backdrop of the poor record of some of the regional governments with respect to meeting their obligations to CARICOM institutions¹⁷¹ and to further prevent the possibility of political interference in the running of the court.

This arrangement has the effect of removing any impetus for countries to make any decision based on the cost of setting up the regional court; the Caribbean taxpayer has already paid for it. This may mean countries choosing to opt-out at the point when the fund becomes sufficiently depleted to require a further injection from CARICOM member states. Conversely opt-in is the obvious best move should the JCPC be dissolved from Westminster.

6.3 JUSTICES OF THE CCJ

The method of appointing Justices and the financing the CCJ, as set out above, is designed to prevent the governments of the region from being able to influence the CCJ in anyway, and ensure that appointments are on

164. Revised Agreement Establishing the Caribbean Court of Justice (n156) Article II

165. D Leys, *The Administrative and Financial Stability of the Caribbean Court of Justice*, General Counsel, Caribbean Development Bank at 3

166. Revised Agreement Establishing the Caribbean Court of Justice (n156) Article IV

167. *ibid*, Articles V and VI

168. *ibid* Article VI

169. At <http://www.caribbeancourtsofjustice.org/trustees/>

170. US \$94,109,341; 2009 Report of the Board of Trustees of the Caribbean Court of Justice Trust Fund.

171. O'Brian (n49) 356

merit only. However, the JCPC has always been viewed in the region as having a particular legitimacy in terms of judicial integrity.¹⁷² The distance from the region is said to give the JCPC an objective position because it is 'far removed from the reach of regional politics'.¹⁷³

It is still the case that the JCPC is still viewed in the region as intellectually superior, despite the observation that the rate at which the JCPC overturns decisions of the Jamaica Court of Appeal, is similar to that of the Court of Appeal of England and Wales.¹⁷⁴ The fact that the board may consist of judges of the Court of Appeal of England and Wales¹⁷⁵ casts even further doubts on this.

6.4 ACCESS TO JUSTICE

In terms of cost, accessing the JCPC in London is significantly more expensive than accessing the CCJ in Port-of-Spain. Because of this, the majority of appeals will involve firstly the 'wealthy and relatively wealthy, and secondly appellants in capital murder cases, who benefit from the pro bono services of lawyers in the UK'.¹⁷⁶ For other appellants, there effectively exists a one tier appellate structure. '[T]he protection of the law is worthless if you cannot get access to the courts'.¹⁷⁷ One study has looked at the litigants in appeals to the JCPC between 1876 and 1996, which confirms this.

The observation was made that in that period, 47% of the appellants were private individuals. Of these, 25.5% were appellants in capital murder cases, 33.2% were landowners and 6.1% were professionals.¹⁷⁸ The professionals consisted mostly of lawyers, Newspaper editors and 'Senior-employees', commonly in unfair dismissal claims.¹⁷⁹

Should the final appeal court be based in the region, it is likely that an increased scrutiny of the regions Courts of Appeal would result. The figures in New Zealand offer this thesis some support; in 2004, the year New Zealand ceased appeals to the Privy Council, 14 appeals were decided by

172. Bryan (n93) 203

173. *ibid*, at 203

174. Justice Robinson (n153)

175. Statement of Lord Phillips (n57)

176. Justice Robinson (n153)

177. K Anthony, *Will it be a Hanging Court? June 28, 2003* in *We Want Justice: Jamaica and the Caribbean Court of Justice* ed. Delano Franklyn, (Ian Randle Publishers: Kingston) 2005, 281

178. Sinanan (n6) 110

179. *ibid*, 449

the JCPC.¹⁸⁰ In the same year; the New Zealand Supreme Court decided 27 cases. This rose to 75 in 2005 and increased yearly to 115 during 2010.

6.5 CCJ OR LOCAL FINAL COURT

...when Jamaica became independent in 1962 the constitution should have provided for a final appellate body in Jamaica. The failure to do so, and the concomitant retention of the UK Privy Council have only served to nourish the seed of unfitness, incapacity and inferiority...¹⁸¹

For the larger nations, Jamaica and the Republic of Trinidad and Tobago, one might ask why those nations did not establish their own courts, or do as Guyana did and opt for a single tier appellate structure?¹⁸²

While a two tier appellate structure may not always be necessary in general,¹⁸³ it has been said to be necessary in the commonwealth Caribbean.¹⁸⁴ A two-tier system not only gives the opportunity for errors to be corrected, but the law may be better expounded and developed.¹⁸⁵ The jurisprudence of the region cannot hope to develop with sufficient swiftness in the absence of a second-tier final court. Furthermore, in light of known problems with the Caribbean judicature, it seems naïve to suggest a single tier system could be in the interest of justice or the development of the law.¹⁸⁶

A final court based in the country concerned would no doubt be more accessible than the JCPC, and even more so than the CCJ.¹⁸⁷ That said the local judges clearly do not currently enjoy the level of insulation from political manipulation as those of the CCJ. Similar local provisions could be entrenched in the local constitutions as that which applies to the appointment and security of tenure for the CCJ, but are likely to be seen as less effective. The CCJ is the only localised option that can take cases beyond the problems of the local judicature already discussed.

Arguments favouring a local court are also to be found in the

180. This is not an unusual amount, see A Le Sueur, *What is the future for the Judicial Committee of the Privy Council?* At 6

181. Justice Robinson (n153)

182. Commentators do not appear to have address this point rigorously.

183. Sinanan (n6) 432

184. *ibid* 433

185. *ibid*

186. *ibid* 432

187. Except in Trinidad where the CCJ is currently based.

arguments against CARICOM integration already discussed.

One point of difficulty for the CCJ is that a local final appellate court would address the abrogation of sovereignty matter directly. The CCJ as a supra-national court, would require the judicial sovereignty of the nations to be surrendered, albeit voluntarily. This viewpoint was voiced strongly during the initial debates in Jamaica.¹⁸⁸ Should all the Commonwealth Caribbean nations insist on such a provision, the current setup would be unable to accommodate it.¹⁸⁹ This view does seem disingenuous against the backdrop of a judicial sovereignty abrogated to the JCPC, 'traceable to the inordinate degree of arrogance associated with the disposition of royal power in the Middle Ages.'¹⁹⁰

Recently, Bruce Golding, the Jamaican Prime Minister has initiated a debate on establishing a 2nd tier, final appellate court for Jamaica to replace the JCPC.¹⁹¹ As noted above the JLP is historically against accession to the CCJ's appellate jurisdiction. It would appear as if the debate has been initiated in the context of the death penalty prompting concerns that human rights will not be properly be protected by this court,¹⁹² but of course similar concerns were raised regarding the CCJ, and *Boyce* showed them to have been unfounded. None the less, should Jamaica opt to 'go it alone' it may have a considerable impact on the region.¹⁹³

7. CONCLUSION: JCPC OR CCJ?

A lack of confidence in the judiciary and legal system of the Caribbean dogs the development of a distinct Caribbean jurisprudence. For various reasons, some perceived, some real, many in the Caribbean are unwilling to trust in the capabilities of the local judiciary. The JCPC therefore remains the final appellate court for most of the region. On the other hand, the mood for delinking from the JCPC appears to have the prevailing wind behind it. The CCJ is staffed with the Caribbean's best legal minds and funded in a convincingly independent way. Acceding to the CCJ appears, to many, to be

188. See *We Want Justice: Jamaica and the Caribbean Court of Justice* ed. Delano Franklyn, (Ian Randle Publishers: Kingston) 2005

189. Revised Agreement Establishing the Caribbean Court of Justice (n156) Article V: no allowance for national quotas for the judges.

190. Pollard (n50)

191. Editorial: *It's full time now for the Caribbean Court of Justice*, Jamaica Observer, Tuesday December 7th, 2010

192. *Don't Make The Charter Of Rights A Victim*, Jamaica Gleaner, Monday December 27th, 2010

193. *ibid*

the best logical step following delinking.

Without exception in the jurisdictions examined above, the final decision to delink from the JCPC was made almost exclusively on political grounds. Clearly, this is also likely to be the case with respect to delinking from the JCPC and acceding to the CCJ in the various Caribbean states yet to do so. The intrinsic connection between the CCJ and CARICOM may also foster some reluctance both for ideological and practical reasons.

Informed by the difficult politics of the region, the framers of the CCJ have sought to as much as possible insulate it from non-legal influences. Their efforts are noteworthy and the result is a robust court. The CCJ though lacking in the Human Rights pedigree of the JCPC, has demonstrated it is not merely a tool to enable the region's reactionary governments to pursue the death penalty. Should the appellate jurisdiction become enlarged, the CCJ and with it a unique and vibrant body of jurisprudence, would no doubt flourish.

Though the appellate jurisdiction of the CCJ is being incrementally enlarged, the experiences of Canada, East Africa and New Zealand all point to some form of major breaking event precipitating delinking: the mishandling of a national crisis; independence; and fears of being left behind, respectively. In the Caribbean, *Pratt* was thought to be that event, but for all the wrong reasons. Worryingly, nationalists in some jurisdictions may be hijacking this movement to the detriment of the CCJ and the Caribbean. While it is argued that the importance of the death penalty to the region following *Pratt* was exaggerated, the attack on the sovereignty of the independent nation states was not fully appreciated. British judges enjoy the role of final constitutional arbiter in the Caribbean, unlike in the United Kingdom, where the role is played by Parliament. Even if the sovereignty issue is symbolic, it is significant; the issue is heartfelt in the region amongst those who believe it is incumbent on independent states to make their own legal and quasi-legal decisions.

The most commanding argument is one of access to justice. The final appellate court being the preserve of the rich is manifestly unjust. Entrenching the appellate jurisdiction of the CCJ is a sure way to improve access to the region's final court.

A decision to accede to the CCJ and delink from the JCPC is a sound decision. The JCPC has passed its sell by date and is hindering the development of Caribbean jurisprudence. The foundation has been laid for a robust and independent court, which represents the best possible balance between the need to reclaim national sovereignty, ensure fairness and to facilitate access to justice.



KING'S STUDENT LAW REVIEW

BOOK REVIEW:
TOM BINGHAM'S
*"THE LIVES OF THE
LAW"*

STEFAN MANDELBAUM

PhD researcher in International Investment Law, King's College London

The value of listening, learning and understanding from those who the Romans called their "*maiores*," a term which mediates greatness and ancestry, should definitely be remembered with regard to the work and thinking of the late Sir Thomas Bingham. "*The Lives of the Law*", published in 2011 by Oxford University Press, is a prudently selected collection of essays, speeches and lectures from 2000 to 2010, a period during which Sir Bingham, in his role as appointed Senior Law Lord, was at the very centre of changes in and redefinitions of the relationship between the judiciary and Parliament. After the "*Rule of Law*" in 2010, which was received very favourably, this volume of 387 pages is consequently to be seen as a continuation of Sir Bingham's contribution to, analysis and defence of on going critical debates on constitutional and judicial issues. Lord Bingham, whom Sir Jeffrey Jowell in the Introduction (pp v-ix) has not hesitated to proclaim the "greatest [judge] of his generation," still has a strong and convincing authority in both these fields. His elegant and appealing style of expression combined with a deep conceptual understanding as well as his almost essentially practical and naturally pragmatic approach to fundamental questions of law and political order, can be seen as an attempt to not only illuminate past authorities on these subjects, like Jeremy Bentham, Thomas Hobbes or Albert Venn Dicey, but also and most importantly, to mould future discourses.

This twofold perspective on law is well demonstrated by the very first part of the book "The constitution and the Rule of Law" (pp 3-126). Here Bingham first turns "backward" to analyse the Magna Charta (pp 3-12) in order to trace back the underlying but hidden rationale, and with it the contemporary importance of this historical document. After a profound enquiry into surrounding historical and political circumstances, he concludes his "lesson in history" by stating that "kings are subject to the law and not above it at home" (12).

The interesting twist here is that he intuitively takes state sovereignty very seriously, which then sets the stage for the argument that, consequently, "states are subject to the law [too] and not above it in their relations with other states" (ibid). What the Magna Charta truly shows is a universal concept, the Rule of Law, which must have an international effect too. To test this conclusion, the next essay "The Alabama Claims and the International Rule of Law" (pp 13-40) investigates the question of how an international system of arbitration between disputing states, modelled at the Geneva Tribunal of 1871-1872, may serve to enforce a universal Rule of Law, without the impossible attempt of imposing international law or binding rules. Considering today's problems of reaching agreements on an international level or enforcing international law, one has to admit that much would be gained if states just obeyed their own domestic rules, i.e. the Rule of Law, when engaging with foreign state entities. After clarifying

his understanding of the different constituting forces of an "Evolving Constitution" (pp 56-75) by developing constituent principles with regard to subsidiarity (devolutionary principle), legislature (representative principle) and judiciary (the principle of judicial independence), Bingham turns "forward" by considering advantages of a written constitution (pp 93-107) and "The Future of the House of Lords" (pp 108-123), specifically its constitutional and institutional structure.

Yet if the first part stands for an *ex post* and an *ex ante* perspective on the law, the second part ("The Business of Judging," pp 127-176), the third part ("Human Rights and Human Wrongs," pp 177-254), as well as the fourth part ("The Common Law," pp 255-338), can be understood as a view *ex nunc*, a perspective here and now, and from within the judicial system. Here the reader encounters Sir Bingham in his most prominent role: that of a judge. The intriguing and appealing style of his considerations of subjects ranging from judicial power, the Human Rights Act and Liberty within modern society, to the enriching compatibility of the common law system with a civil law tradition, could be said to derive from two sources: Bingham, firstly, elegantly succeeds in avoiding political language or a politicised jargon, although all topics, by the very virtue of their existence, are of high political relevance. Secondly, this well-adjusted style of interpreting concretely and developing conceptually the legal and judicial system from within, without claiming a neutral position outside or above the law, is maintained throughout every single essay and is also impressively demonstrated by the lectures "Governments and Judges – Friends or Enemies?" (pp 144-156) or "The Highest Court in the Land" (pp 157-173). Here, Sir Bingham's fundamental belief in the importance and balancing effects of conflicts within democratic societies shines through every word when he declares that

"there is a natural, inescapable, and *not undesirable* tension ... between those whose mission it is to govern and those whose mission and sworn duty it is to do right by all manner of people ... according to the laws and usages of realms" (p 156, emphasis added)

He is convinced that the constitutional nature of a democracy such as the United Kingdom can never be negated through inner (and sometimes very critical) disputes and that engaging with other legal traditions can never "contaminate the pure stream of common law" (p 333), but will enrich the discourse and deepen its understanding.

Finally, after having covered legal aspects of the lively body politic, the concluding fifth part, "Lives of the Law" (pp 339-371), contains two almost biographical pieces on a possible legal life of Samuel Johnson (pp 339-355) and the ongoing legal presence of Jeremy Bentham (pp 356-371). These two

lives are a consequent round up and conclusion for a book which is never detached from everyday life, but is committed to a sound historical, truly philosophical, as well as highly practical perspective. Sir Thomas Bingham has created this view on legal and judicial issues in his life's work, his writings, lectures and speeches. It was his inherent methodology which he did not need to reflect upon, because it was part of his attitude to life and to work.

"The Lives of the Law" is, on the one hand, a very complex book, because it requires a profound knowledge about the content and the importance of the constitutional debates it touches upon. On the other hand, as a collection of mostly speeches and lectures, thoughts are laid down in a very approachable and educational manner, always including an explanatory introduction to the subject, which makes it readable and even interesting for a first year law student too.

To read and study Lord Thomas Bingham's *"The Lives of the Law"* is truly recommended, because it essentially mediates between judiciary and legislature, private and professional life, and the academic and public sphere. This book being a further incentive to legal and legal-philosophical education as the common ground for political engagement and participation, it may be justifiable to assume that Sir Thomas Bingham could have said and truly meant, and indeed embodied throughout his life, what Pericles has described in his famous funeral oration as steadfast democratic attitude: That "we consider a man who takes no interest in public life not as harmless but as useless". *"The Lives of the Law"* is a book for an audience interested in legal as well as political issues, written by a prudent judge and extraordinary person who seemed to be aware of the inherent interconnectedness of the two.